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COMMENTARIES

ON THE

LAW OF CONTRACTS

BEING A CONSIDERATION
OF THE NATURE AND GENERAL PRINCIPLES OF THE
LAW OF CONTRACTS AND THEIR APPLICATION
IN VARIOUS SPECIAL RELATIONS

BY
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TABLE OF CONTENTS
VOLUME FIVE.

TITLE EIGHT.
GUARANTY AND SURETYSHIP.

CHAPTER CXIV.

DEFINITION AND GENERAL PRINCIPLES.

SECTION.		PAGE.
3930.	Guaranty and suretyship defined	1
3931.	Distinction between guaranty and suretyship	2
3932.	General nature and essentials of contract	4
3933.	Classification of suretyship	5
3934.	Classification of guaranties	6
3935.	Parties to the contract	7
3936.	The consideration	8
3937.	Offer and acceptance	11
3938.	Fraud, duress and undue influence	13
3939.	Incomplete instrument	14
3940.	Agency in establishing relation	16
3941.	Construction of the contract	17
3942.	Forged and unauthorized signatures	18
3943.	Change of relation	19
3944.	Commencement and duration of relation	19

CHAPTER CXV.

REVOCATION AND DISCHARGE.

3950.	Discharge of surety by termination of employment	21
3951.	When surety may require termination of employment	23
3952.	Discharge of surety of a lease	24
3953.	Discharge by destruction of subject-matter	25
3954.	Discharge by change as to principal	26
3955.	Discharge by death of principal	27
3956.	Discharge by death of creditor or obligee	27
3957.	Discharge by death of guarantor or surety	28
3958.	Termination of liability by notice	29

650075

LAW

SECTION. PAGE.
3959. Discharge by new obligation..... 30
3960. Discharge by diversion of instrument..... 31
3961. Discharge by or after judgment..... 31
3962. Discharge by change in obligation of principal..... 32
3963. Discharge by change in duties of office or employment..... 33
3964. Discharge by change in provisions of contract..... 34
3965. Discharge by change in building contracts..... 34
3966. Discharge by alteration of instrument..... 36
3967. Discharge by change in parties to obligation secured..... 37
3968. Discharge by extension of time for payment..... 38
3969. Discharge by extending time of payment or performance..... 39
3970. Discharge by taking additional or substituted security..... 41
3971. Discharge by judgment and execution against principal..... 42
3972. Discharge by payment or satisfaction by principal..... 43
3973. Discharge by payment by surety or third person..... 44
3974. Discharge by relinquishment or loss of funds or securities..... 45
3975. Discharge by misapplication of funds or securities by creditor..... 46
3976. Discharge by non-performance of conditions..... 47
3977. Discharge by neglect to give surety notice of default..... 47
3978. Discharge by release of co-surety..... 48
3979. Discharge by premature payments to contractors..... 48
3980. Rights of surety as to creditor..... 49
3981. Rights of surety as to principal..... 50
3982. Rights of surety as to principal after payment..... 51
3983. Rights of surety as to co-sureties..... 52
3984. Rights of surety as to supplemental surety..... 53
3985. Rights of creditor or obligee..... 55
3986. Rights of creditor or obligee—Effect of delay..... 56
3987. Duty of creditor as to notice..... 57
3988. Surety's liability limited to terms of contract..... 58
3989. Rights and liabilities of sureties on negotiable instruments..... 58
3990. Suretyship by surety companies..... 60

TITLE NINE.

INDEMNITY CONTRACTS.

CHAPTER CXVI.

INDEMNITY CONTRACTS.

3995. Introductory 62
3996. Definition 62
3997. Not within statute of frauds..... 63
3998. Effect of illegality of acts as to which indemnity is given..... 63

SECTION. PAGE.
3999. Consideration 64
4000. Construction and operation..... 65
4001. Joint or several contract and liability..... 67
4002. Time covered—Renewal..... 68
4003. Indemnity by or to trustees..... 68
4004. Indemnity to bail or surety in criminal case..... 69
4005. Indemnity contracts not generally for benefit of third persons..... 69
4006. Indemnity against liens—Labor and materials..... 70
4007. Indemnity against negligence..... 71
4008. Contract to indemnify officer of corporation for indorsing its notes 72
4009. Indemnity mortgages..... 73
4010. Performance or fulfilment of contract..... 74
4011. Breach of contract—Recovery—Measure of damages..... 74
4012. Effect of judgment against indemnities..... 77

TITLE TEN.

INSURANCE.

CHAPTER CXVII.

DEFINITION, NATURE AND MANNER OF MAKING CONTRACT.

4020. Definition 78
4021. Different kinds of insurance—Definitions..... 79
4022. What constitutes insurance..... 80
4023. Reinsurance 84
4024. Parties 85
4025. The insured..... 86
4026. The insurer—Foreign corporations—State control..... 87
4027. Mutual companies and benevolent societies..... 89
4028. The risk..... 92
4029. Contract is personal..... 93
4030. Contract is conditional..... 94
4031. Contract is aleatory..... 94
4032. Indemnity 95
4033. Life insurance not a contract of indemnity..... 95
4034. Indemnity in accident insurance..... 96
4035. Subrogation 97
4036. Loss caused by negligence..... 97
4037. Form of the contract..... 98
4038. Statutory form—Conditions implied in an oral contract..... 99
4039. Statute of frauds..... 100

SECTION. PAGE.
4040. Renewal by parol.... 101
4041. Effect of charter provisions.... 101
4042. Revenue stamps.... 102
4043. Enforcement of oral contract.... 102
4044. Kinds of policies.... 103
4045. Completion of contract—Delivery of the policy.... 104
4046. Countersigning by agent.... 106
4047. Contracts made by correspondence.... 106

CHAPTER CXVIII.

INSURABLE INTEREST IN PROPERTY.

4055. Subject-matter—Insurable interest.... 108
4056. Definition.... 108
4057. Nature of insurable interest.... 109
4058. Different interests.... 109
4059. Time of interest.... 110
4060. Continuity of interest.... 111
4061. Nature of interest.... 112
4062. Illustrations.... 113

CHAPTER CXIX.

INSURABLE INTEREST IN LIVES.

4065. Common-law rule.... 119
4066. English statute—Not in force in this country.... 120
4067. Cases regarding life insurance as indemnity and requiring pecuniary interest.... 121
4068. The modern rule—Pecuniary interest not required.... 122
4069. Creditor's insurable interest.... 123
4070. Mere form disregarded.... 125
4071. Continuance of interest in life.... 126
4072. Interest of beneficiary designated by insured.... 127
4073. Interest of the assignee.... 128
4074. Interest based upon relationship.... 132
4075. Illustrations of insurable interest in life.... 134
4076. Right of assignee without interest to recover premiums paid.... 138
4077. Want of interest as a defense under incontestable clause.... 139
4078. Insurable interest must be pleaded and proved.... 140
4079. Description of interest in application or policy.... 140

CHAPTER CXX.

NONDISCLOSURE OF MATERIAL FACTS.

4085. In general—Application.... 142
4086. Duty of applicant.... 142

SECTION. PAGE.
4087. Concealment—Definition 143
4088. Rule as affected by character of the insurance..... 143
4089. Modern rule in the United States..... 144
4090. What must be communicated..... 145
4091. Where specific inquiries are made..... 146
4092. Where no written application is made..... 147
4093. Incomplete answers to inquiries..... 148
4094. Answers calculated to mislead—Irresponsive answers..... 149
4095. Time of concealment..... 150
4096. Materiality 150
4097. Concealment through inadvertence or negligence..... 151
4098. Concealment or misrepresentation by agent..... 152

CHAPTER CXXI.

REPRESENTATIONS AND WARRANTIES.

4105. Representations—Definition 155
4106. Warranties distinguished from representations..... 155
4107. Affirmative and promissory warranties..... 157
4108. Effect of breach of warranty..... 158
4109. Construction of statements in the application..... 159
4110. Application made part of the policy..... 160
4111. Construction 161
4112. Oral representations..... 162
4113. Mistake—Good-faith answer..... 163
4114. Statement of expectation or belief..... 164
4115. Effect of minor's false answer and warranty..... 165
4116. Affirmative and promissory representations—Continuing warranties 166
4117. Oral promissory representations..... 167
4118. Effect of misrepresentation..... 169
4119. Test of materiality..... 170
4120. Materiality—Opinion of experts..... 171
4121. Burden of proof..... 171
4122. Statutory provisions..... 173
4123. The Massachusetts and Pennsylvania statutes..... 173
4124. Similar provisions in other states..... 175
4125. Controlling force of such statutes..... 176

CHAPTER CXXII.

THE PREMIUM.

4130. Generally 177
4131. Nature of premium..... 178
4132. Obligation to pay premium..... 179
4133. Payment—Condition precedent—Forfeiture..... 180

SECTION. PAGE.
4134. Manner, time and place of payment 181
4135. The giving of a promissory note 184
4136. Payment after loss or death 186
4137. Paid-up policies 187
4138. Premium notes 187
4139. Notice of time when premium is due 188
4140. Right to recover premiums paid 190
4141. Dues and assessments 192
4142. Liability to assessment 193
4143. Effect of nonpayment of assessment 193
4144. Withdrawal of member 194
4145. Insolvency of company 194
4146. Death during period of suspension 195
4147. Reinstatement 195
4148. Waiver—Estoppel 196

CHAPTER CXXIII.

INSURANCE AGENTS AND THE GENERAL RULES OF AGENCY.

4155. In general 198
4156. Statutory provisions relating to insurance agents 199
4157. Construction of such statutes 200
4158. Evidence of agency 200
4159. Character of the agency 201
4160. Various special agents 202
4161. Liability of company for unreasonable delay of soliciting agent in forwarding application 204
4162. Subagents and clerks 204
4163. Insurance brokers 205
4164. Powers of agents 207
4165. Restrictions in application or policy 208
4166. Limitations on authority 209
4167. Limitations contained in application—Preparation of application ... 211
4168. Provisions restricting power of officers and general agent 213
4169. Notice 214
4170. Notice of loss to local agent 216
4171. Rights and liabilities of agent 217
4172. Statutes affecting agents and compensation 218

CHAPTER CXXIV.

WAIVER AND ESTOPPEL IN INSURANCE CASES.

4175. Definition of waiver 220
4176. Knowledge and intent 220
4177. Basis of waiver 221
4178. Effect of mere silence 222

SECTION. PAGE.
4179. What may be waived..... 222
4180. Waiver of certain defenses..... 223
4181. Power of agent to waive..... 224
4182. Waiver by agent..... 224
4183. Prepayment of premium..... 226
4184. Waiver in writing only..... 226
4185. Estoppel by act of agent..... 227
4186. Facts known to company when policy issued..... 229
4187. Oral testimony to show actual statements..... 233
4188. Bad faith—Collusion between applicant and agent..... 234

CHAPTER CXXV.

THE STANDARD POLICY AND ITS PROVISIONS.

4195. In general..... 236
4196. The New York standard..... 237
4197. The binding clause..... 238
4198. Construction of the standard policy..... 238
4199. Effect of a breach of condition..... 241
4200. First clause of standard policy..... 242
4201. First clause—Parties..... 243
4202. The premium..... 244
4203. Term of insurance..... 245
4204. The amount..... 246
4205. Description of the property—In general..... 246
4206. Goods held in trust..... 247
4207. May cover shifting stock..... 248
4208. Ambiguous descriptions—Reformation..... 249
4209. Presumption as to nature of business..... 251
4210. Descriptions—When warranties..... 251
4211. Description of merchandise—What included in the description..... 252
4212. Description of buildings..... 256
4213. Location of property—In general..... 259
4214. Location of material—When change does not prevent recovery..... 260
4215. Location—Materiality—Removal—Illustrations..... 263
4216. Risks insured against..... 266
4217. Proximate cause—Electric wires..... 270
4218. Agency—Authorization..... 272
4219. Application and survey—Application a part of the policy..... 273
4220. Misconduct of insured in procuring policy—Entirety of contract... 274
4221. Concealment and misrepresentation..... 277
4222. Statement of interest..... 277
4223. Fraud and false swearing..... 278
4224. Excluded risks—Invasion, riot, etc..... 280
4225. Excluded risks—Theft..... 283
4226. Excluded risks—Neglect to protect property..... 284

SECTION. PAGE.
4227. Excluded risks—Explosion 284
4228. Lightning 286
4229. Fall of building 287
4230. Earthquake—City ordinance preventing repair 289
4231. Excluded property—Exceptions and limitations 289
4232. Plate glass frescoes and decorations 291

CHAPTER CXXVI.

PROVISIONS OF THE STANDARD POLICY RELATING TO INTEREST AND CARE OF PROPERTY.

4240. Other insurance 292
4241. Definition—Different interests 294
4242. Whether valid or invalid 296
4243. Where the words "valid or invalid" do not appear 297
4244. Consent of the company—Waiver 299
4245. Policy covering part of the property 301
4246. Operation of manufacturing establishment 302
4247. Running over hours 305
4248. Increase of risk 307
4249. Changes in adjoining property 309
4250. Effect of increase of hazard 310
4251. Repairs—Employment of mechanics 312
4252. Ownership 314
4253. Encumbrances 317
4254. Illustrations 319
4255. Illustrations of breach of condition 322
4256. Building on leased ground 324
4257. Encumbrance by chattel mortgage 326
4258. Foreclosure proceedings 328
4259. Generation of illuminating gas 331
4260. Change in interest title or possession—Scope of provision 331
4261. Transfer of part interest 333
4262. Executory contract of sale 334
4263. Mortgages on premises 335
4264. Defeasible conveyances 337
4265. Invalid conveyances or encumbrances 338
4266. Sale with purchase-money mortgage 338
4267. Conveyance to the wife or insured 339
4268. Transfers by and between partners 339
4269. Transfers between joint owners 341
4270. Legal process or judgment 342
4271. By judgment 243
4272. By partition 344
4273. Assignment and bankruptcy proceedings 344
4274. Transfer by death 345

SECTION. PAGE.
4275. Change of possession..... 346
4276. Lease of the property..... 347
4277. Assignment of policy..... 347
4278. Use of property—Prohibited articles..... 351
4279. Prohibited articles..... 355
4280. Vacancy—In general..... 357
4281. Construction 358
4282. "Vacant" and "unoccupied" not synonymous..... 359
4283. Construction when applied to dwelling-house..... 360
4284. Building—Contents—Vacancy 362
4285. Illustrations of construction of this provision..... 362
4286. Building in process of construction..... 364
4287. Authorized change of location..... 365
4288. Renewal of contract—In general..... 366
4289. Illustrations 369
4290. Reformation of the policy..... 370
4291. Cancelation of policy—In general..... 371
4292. Authority of agent to cancel..... 373
4293. Return of premium..... 375
4294. What amounts to a cancelation..... 376
4295. Waiver—Limitations upon power to waive..... 378

CHAPTER CXXVII.

PROVISIONS OF THE STANDARD POLICY RELATING TO MATTERS SUBSEQUENT TO LOSS.

4300. Notice and proof of loss—Generally..... 381
4301. "Immediate" notice..... 384
4302. Separation of goods "forthwith"..... 386
4303. Who may make proof—Excuses for failure to furnish proofs..... 387
4304. When a condition precedent..... 389
4305. What is compliance with this provision..... 390
4306. Certificate of magistrate..... 391
4307. Plans and specifications..... 392
4308. Waiver 393
4309. To whom notice must be given..... 396
4310. Exhibition of property and records—Examination of party..... 397
4311. False swearing..... 399
4312. Failure to produce books..... 399
4313. The iron safe clause..... 400
4314. Arbitration of the amount of loss—Disagreement..... 403
4315. Validity of provision..... 405
4316. Where there is a total loss..... 406
4317. Demand for arbitration..... 407
4318. Condition precedent..... 410
4319. Failure of arbitration through fault of party..... 413

SECTION. PAGE.
4320. Revocation 413
4321. Invalidity of the award 414
4322. Waiver 418
4323. Second arbitration—Resubmission 420
4324. Demand for arbitration as admission of liability 422
4325. Right of mortgagee 423
4326. Right to repair, rebuild or replace 423
4327. Time within which loss is payable 427
4328. Time of bringing suit—Generally 429
4329. Time when limitation begins to run 431

CHAPTER CXXVIII.

OTHER PROVISIONS OF THE STANDARD POLICY.

4335. Measure of damages—Valued policy legislation 433
4336. Meaning of total loss 435
4337. Total loss to frame building within fire limits 438
4338. Amount of recovery—Illustrations 438
4339. Prorating loss with other insurers 439
4340. Subrogation 441
4341. Reinsurance 444
4342. Conditions affecting mortgagees 445
4343. Special provisions 446
4344. Other provisions—Construction of terms—Indorsement 448

CHAPTER CXXIX.

LIFE INSURANCE AND STIPULATIONS IN POLICIES.

4350. General statement 450
4351. Parties 450
4352. The beneficiary—Manner of designation—Right to fund 451
4353. Transmission of interest of beneficiary 455
4354. Rights of beneficiary 457
4355. Reservation of a right to change beneficiary 459
4356. Manner of changing beneficiary 462
4357. Right to proceeds—Bankruptcy 464
4358. Payment of premium a condition precedent 465
4359. Time when premium is due—Construction by agent—Estoppel 469
4360. Powers of agent 471
4361. Statement of age 472
4362. Assignment of policy 472
4363. Notice to company 474
4364. Manner of making assignment 477
4365. Assignment of policy by assignee 479
4366. Incontestable clause 479

SECTION. PAGE.
4367. Special privileges ... 481
4368. Provisions in the application ... 481
4369. Suicide—Sane or insane ... 482
4370. Where there is no provision as to the effect of suicide ... 484
4371. Suicide—Construction ... 485
4372. Presumption—Burden of proof ... 487
4373. Residence and occupation ... 488
4374. Death in violation of law or at the hands of justice ... 489
4375. Habits ... 491
4376. Health and freedom from disease ... 493
4377. Bodily injuries ... 496
4378. Medical attendance ... 497
4379. Family relationship ... 498
4380. Other insurance ... 499
4381. Rejection of former application ... 500
4382. Proof of death ... 502

CHAPTER CXXX.

ACCIDENT INSURANCE.

4385. Definition of accident—Proximate cause ... 503
4386. Construction of policy—External, violent or accidental ... 504
4387. Risks of travel ... 507
4388. Inhaling gas—Poison ... 507
4389. Occupation or employment ... 509
4390. External signs ... 511
4391. Excepted risks—Effect of negligence ... 511
4392. Voluntary exposure to unnecessary dangers ... 512
4393. Knowledge—Distinction between voluntary act and voluntary exposure ... 515
4394. Bodily infirmity or disease ... 516
4395. Injuries intentionally inflicted by others ... 517
4396. Injuries received while engaged in violation of law ... 519
4397. Injuries received while intoxicated ... 522
4398. General provisions—Amount of recovery—Disability ... 522
4399. Sick benefits ... 524
4400. Construction—Effect of existing judicial decisions ... 525

CHAPTER CXXXI.

EMPLOYERS' LIABILITY, CASUALTY, GUARANTY AND TITLE INSURANCE.

4405. Employers' liability insurance—In general ... 526
4406. Legal liability—Costs ... 527
4407. Injuries while engaged in designated business ... 528
4408. Violation of statute by insured ... 530

SECTION. PAGE.
4409. When liability accrues 531
4410. Effect of judgment against insured 532
4411. Notice of injury or claim 533
4412. Fidelity insurance—In general 534
4413. Notice of loss or dishonesty 534
4414. Time and duties or acts covered 536
4415. Manner of proof of default 537
4416. Constructive notice 539
4417. Supervision of employé 539
4418. Warranties and misrepresentations 541
4419. Credit insurance—In general 541
4420. Construction of policy—Amount of recovery 543
4421. Identity of the insured—Partnership 546
4422. Title insurance—Generally—Insurance of titles—Construction 546
4423. Insurance of titles—Construction 547

CHAPTER CXXXII.

MARINE INSURANCE.

4425. Generally 550
4426. Description of insured—Interest covered by policy 551
4427. Insurable interest—Lost or not lost 552
4428. Beginning of the risk—Voyage "from" or "at and from" 553
4429. Termination of the risk 555
4430. Subjects of marine insurance—In general 556
4431. The ship—"The body tackle, apparel, ordnance, munition, artillery, boats and other furniture of and in the good ship" 556
4432. Cargo; goods or merchandise 557
4433. Goods carried on deck 558
4434. Freight 559
4435. Passage money 560
4436. Profits and commission 561
4437. Bottomry and respondentia 562
4438. Seaman's wages 562
4439. Implied warranties—Seaworthiness—Definition 563
4440. What constitutes seaworthiness 563
4441. Implied warranty in a sea voyage policy 565
4442. Time policies—English rule 567
4443. Time policies—Rule in the United States 567
4444. Different stages of the voyage 568
4445. Seaworthiness a relative matter 569
4446. Time of seaworthiness—Continuing warranty 570
4447. Knowledge and intent of insured 571
4448. Exclusion by the terms of the policy 573
4449. Presumption—Burden of proof 574
4450. Implied warranties—Deviation—Definition 575

SECTION. PAGE.
4451. Departure from route ... 575
4452. Order of visiting ports ... 576
4453. As affected by usage ... 578
4454. Delay ... 579
4455. Departure to save property ... 580
4456. Transhipment of cargo ... 580
4457. To avoid danger ... 581
4458. Change of voyage—Intention ... 582
4459. Excusable deviation ... 583
4460. Restraint justifying deviation ... 584
4461. Entering a port to refit ... 585
4462. Entering a port to recruit crew ... 585
4463. Stress of weather ... 585
4464. To escape capture or join convoy ... 586
4465. To save life or succor distress ... 587
4466. Effect of deviation—Increase of risk ... 588
4467. Implied warranties—Illegality—General statement ... 589
4468. Violation of war policy of state ... 589
4469. Neutrality—Contraband—Blockade ... 590
4470. Violation of revenue laws and foreign statutes ... 591
4471. Proper documents ... 592

CHAPTER CXXXIII.

MARINE INSURANCE—PERILS AND RISKS.

4475. Enumeration in the policy ... 594
4476. Perils of the sea ... 594
4477. Foundering at sea ... 595
4478. Stranding ... 596
4479. Collision ... 597
4480. Shipwreck ... 599
4481. Salvage ... 599
4482. Loss by fire ... 600
4483. Loss by thieves ... 601
4484. Capture and seizure—Taking at sea ... 602
4485. Arrest—Restraint—Detention ... 603
4486. Barratry ... 606
4487. "All other perils, losses and misfortunes," etc ... 609
4488. Proximate cause of loss ... 610
4489. Negligence—Misconduct ... 612
4490. The sue and labor clause ... 614
4491. Excluded risks and limitations upon liability ... 616

CHAPTER CXXXIV.

MARINE INSURANCE—LOSS AND ADJUSTMENT.

4495. The loss—Character of the loss ... 620
4496. Actual total loss—The general rule ... 620

SECTION. PAGE
4497. Constructive total loss—In general 621
4498. Insurance against "Actual total loss only"—Memorandum articles "Free from average unless general" 621
4499. Entire or severable contract 625
4500. Division of cargo—Transhipment 625
4501. Abandonment—Definition 626
4502. Right to abandon 627
4503. Test of the right to abandon 628
4504. Apprehension of peril 629
4505. Sale by master 630
4506. Goods separately valued 631
4507. Time of abandonment—Must be complete 631
4508. Notice—Manner and character of 632
4509. Basis of valuation for total loss 633
4510. Acceptance of abandonment 634
4511. Effect of abandonment 636
4512. The master as the agent of the underwriters 638
4513. Time when right determined—Erroneous information 640
4514. General average and adjustment of loss 641
4515. Adjustment of losses 642

TITLE ELEVEN

LEASES.

CHAPTER CXXXV.

THE INSTRUMENT OF DEMISE.

4525. Leases—Defined and distinguished from other contractual relations 644
4526. Distinguished from license 645
4527. Formal parts 647
4528. Date of instrument 647
4529. Reservation and exceptions 648
4530. Consideration 649
4531. Duration of term 650
4532. Description of premises 651
4533. Construction 652
4534. Reformation 654
4535. Execution—Signing 654
4536. Execution—Acknowledging and witnessing 656
4537. Execution—Sealing 656

SECTION. PAGE.
4538. Delivery and acceptance 657
4539. Recording 658
4540. Parties in general 659
4541. Parties—Leases by and to married women 660
4542. Right of husband to lease wife's real estate 661
4543. Parties—Guardians 662
4544. Parties—Power of trustees 663
4545. Parties—Infants as lessors and lessees 664
4546. Parties—Executors and administrators 665
4547. Illegal leases 666
4548. Leases obtained by fraud 667
4549. Collateral parol agreement 668
4550. Agreement to lease 669
4551. Statute of frauds 670

CHAPTER CXXXVI.

COVENANTS IN LEASES.

4555. General observation 672
4556. Construction and effect 673
4557. Covenants for renewal 674
4558. Covenants for renewal—Validity 676
4559. Covenants for quiet enjoyment—When implied 677
4560. Covenants for quiet enjoyment—What amounts to breach 678
4561. Covenants in regard to buildings and improvements 679
4562. Covenants restricting use of premises 680
4563. Covenants as to sale of premises 682
4564. Covenants for insurance 682
4565. Covenants for repairs 683
4566. Covenant to pay taxes 684

CHAPTER CXXXVII.

RENEWALS, ASSIGNMENTS AND SUBLETTING.

4570. Assignment by lessor 686
4571. Assignment by lessee 687
4572. Assignment by lessee—Mode of assignment 688
4573. Assignment—Rights and liabilities of lessor and lessee 690
4574. Assignment—Rights and liabilities of assignee 691
4575. Assignment—Conditions against assignment and subletting 692

CHAPTER CXXXVIII.

KINDS OF TENANCY CREATED.

4580. Estates for years—Nature and extent 694
4581. Tenancy at will 695

SECTION. PAGE.
4582. Tenancy at will—Termination of..... 696
4583. Tenancy from year to year—Generally..... 698
4584. Tenancy from year to year—Created by reservation of rent..... 699
4585. Tenancy from year to year—Created by holding over..... 700
4586. Tenancy from month to month..... 701
4587. Tenancy at sufferance..... 703

TITLE TWELVE

MORTGAGES OF REAL PROPERTY.

CHAPTER CXXXIX.

ORIGIN, NATURE, DEFINITION AND GENERAL CHARACTERISTICS.

4600. Origin and history..... 704
4601. Nature of early English mortgages..... 705
4602. Common-law mortgage—Growth of the equity of redemption..... 705
4603. Mortgages at law and in equity..... 706
4604. Definition—Mortgages distinguished from other transactions..... 707
4605. Mortgages distinguished from deeds of trust..... 708
4606. Mortgages distinguished from conditional sales..... 709
4607. Intention and the existence of a debt—The test..... 709
4608. Evidence and construction..... 713
4609. Rights of the parties under a mortgage and under a conditional sale 715

CHAPTER CXL.

FORM, CONTENTS AND REQUISITES OF MORTGAGES.

A. Form and Contents.

4615. Form of conveyance—In general..... 717
4616. Statutory forms..... 717
4617. Description of parties..... 718
4618. Description of the premises..... 719
4619. Description of debts—In general..... 722
4620. Description of note..... 723
4621. Specification of the amount of the debt..... 725
4622. Determination of amount of debt—Construction..... 727
4623. Increasing amount of debt..... 728
4624. Habendum 730

SECTION. PAGE.
4625. Defeasance 731
4626. Covenants—In general 733
4627. Covenants for payment of debt 734
4628. Interest 735
4629. Taxes 735
4630. Insurance 736
4631. Time of payment of debt 736
4632. Execution 737
4633. Date 739
4634. Filling in blanks 739
4635. Delivery and acceptance 740
4636. Alteration of mortgage 742
4637. Reformation 744
4638. Evidence to vary terms of mortgage 744
4639. Construction 745
4640. Recording 745
4641. Mortgages to secure future advances 746
4642. Mortgages to secure future advances—Effect of record 749
4643. Mortgages to secure future advances—Priority 751
4644. Limitation of amount of future advances 752
4645. Mortgage of indemnity 754
4646. Mortgages for support 756

B. Absolute Deed as Mortgage.

4647. In general 758
4648. Deed and defeasance—Time of execution 762
4649. Cancelation of defeasance 764
4650. Absolute deed as mortgage or conditional sale—Facts considered ... 765
4651. Existence of debt 770
4652. Extinguishment of debt 773
4653. Contract for loan 775
4654. Adequacy or inadequacy of price 776
4655. Evidence 777
4656. Waiver of right of redemption 783

C. Equitable Mortgages.

4657. Definition 786
4658. By agreements 787
4659. Informal mortgages 789
4660. By assignment of contracts of purchase 790
4661. By deposit of title deeds 793

D. Parties.

4662. Parties—In general 794
4663. Executors, administrators and guardians 795
4664. Insane persons 796
4665. Infants 797
4666. Married women—In general 799

SECTION. PAGE.
4667. Married women—Mortgage to secure husband's debts..... 800
4668. Married women—Mortgages under statutes..... 804
4669. Partners 806
4670. Corporations 808
4671. Power to mortgage..... 810
4672. Who may take a mortgage..... 812
4673. Joint mortgagees..... 813

E. Consideration—Void and Usurious Mortgages.

4674. In general..... 814
4675. Failure of consideration..... 816
4676. Illegal consideration..... 817
4677. Mortgage obtained by fraud..... 819
4678. Mortgage obtained by duress..... 820
4679. Mortgage fraudulent as to creditors..... 821
4680. Usury 823
4681. Commissions 824
4682. Proof and defense of usury..... 825
4683. Compound interest..... 827

F. What May Be the Subject of a Mortgage.

4684. In general..... 828
4685. Vested, contingent and future interests..... 829
4686. Interest conveyed..... 830
4687. Buildings 831
4688. Fixtures—In general..... 831
4689. Rule for determining whether fixtures are covered by mortgage.... 833
4690. Effect of chattel mortgage in determining whether fixtures covered 838
4691. Accessions to mortgaged property..... 840
4692. Products of the soil..... 841
4693. After-acquired property..... 842

CHAPTER CXLI.

RESPECTIVE RIGHTS AND LIABILITIES OF PARTIES.

A. Mortgagor's Rights and Liabilities.

4700. In general..... 846
4701. Liability of equity of redemption to attachment and execution.... 848
4702. Right to possession..... 849
4703. Rights to rents and profits..... 851
4704. Remedies against mortgagee..... 853
4705. Right to convey equity of redemption..... 854
4706. Personal liability..... 854
4707. After-acquired title and improvements..... 855
4708. Waste by mortgagor..... 857

SECTION. PAGE.
4709. Right to emblements 859
4710. Right to redeem 860
B. Mortgagee's Rights and Liabilities.
4711. In general 861
4712. Nature of mortgagee's interest 862
4713. Right to possession 863
4714. Accounting 865
4715. Foreclosure 866
C. Rights and Liabilities of Purchaser.
4716. Purchase subject to mortgage 867
4717. Assumption of mortgage by purchaser 869
4718. Personal liability of purchaser 871

CHAPTER CXLII.

ASSIGNMENT OF MORTGAGES.

4725. Form, requisites, method of assignment 874
4726. What constitutes an assignment 875
4727. Delivery 881
4728. Consideration 881
4729. Effect of assignment 882
4730. Who may make an assignment 883
4731. Right to compel assignment by a mortgagee 884
4732. Notice of assignment 885
4733. Mortgage of indemnity 886
4734. Disseizin of mortgagee 886
4735. Equitable assignments 887

TITLE THIRTEEN

CHATTEL MORTGAGES.

CHAPTER CXLIII.

NATURE OF CHATTEL MORTGAGES.

4750. Definition and general nature 892
4751. Distinguished from pledge 893
4752. Distinguished from conditional sale 895
4753. Conditional transfer of title essential 898
4754. Statement of conditions and defeasance 900

SECTION. PAGE.
4755. Bill of sale with separate defeasance..... 901
4756. Absolute bill of sale at law and in equity..... 901
4757. Verbal mortgages—Necessity for writing..... 903

CHAPTER CXLIV.

REQUISITES IN FORM AND EXECUTION OF INSTRUMENT.

4765. The form..... 906
4766. Affidavit..... 907
4767. Alteration and filling in blanks..... 908
4768. Statutory forms..... 909
4769. Mortgage of infant..... 909
4770. Mortgage of insane person..... 910
4771. Married woman as mortgagor..... 911
4772. Husband's mortgage of wife's property..... 912
4773. Husband mortgaging property to wife..... 913
4774. Mortgage of community property..... 914
4775. Mortgage of partnership property..... 914
4776. Mortgage of corporation property..... 916
4777. Mortgage executed by agent..... 918
4778. Mortgage by executors or administrators..... 918
4779. Description of property in general..... 919
4780. Description of live stock..... 921
4781. Stating location and ownership..... 922
4782. Crops to be raised by mortgagor..... 923
4783. Specifying number of articles out of larger number..... 925
4784. Excepting articles included in description..... 926
4785. Defective description cured by subsequent actual delivery..... 927
4786. Effect of false description..... 927
4787. Good will..... 929
4788. Including additions to stock..... 929
4789. Substitution of other property..... 930
4790. Schedule forming part of mortgage..... 930
4791. General clause after particular description..... 931
4792. Construction..... 933

CHAPTER CXLV.

DEBT SECURED AND CONSIDERATION IN GENERAL.

4805. The debt secured—In general..... 934
4806. Legality and validity of consideration..... 935
4807. Pre-existing debt as consideration..... 936
4808. Contingent liability as consideration..... 938
4809. Mortgage to secure debt of third person..... 939

SECTION. PAGE.
4810. Description of debt 940
4811. Description of note secured 941
4812. False description 941
4813. Mortgage to secure future advances 942
4814. Mortgage containing insurance clause 944
4815. Time of payment of consideration 945
4816. Covenant of warranty 945
4817. Seal not necessary 946
4818. Delivery in general 947
4819. Delivery and acceptance necessary 949
4820. Acceptance by agent 950
4821. Delivery to one of several mortgagees 950
4822. Recording and filing in general 951
4823. Effect of recording or filing 952
4824. Requisites of valid filing and recording 955
4825. Place of filing 956
4826. Time of filing or recording 958
4827. Refiling instrument 960
4828. Law of the place of contract 962

CHAPTER CXLVI.

RIGHTS AND LIABILITIES OF MORTGAGOR AND MORTGAGEE.

4835. Rights of possession as between the parties 965
4836. Right of possession under insecurity clause 969
4837. Mortgagor's right to sell the property 971
4838. Mortgagor's power to create liens on the mortgaged property 974
4839. Rights on confusion of mortgaged goods 974
4840. Rights of subsequent purchasers 975
4841. Rights of subsequent mortgages 977
4842. Rights of assignees 979
4843. Rights of mortgagee after forfeiture 981
4844. Right of redemption 983
4845. Liability of mortgagor's interest to attachment and execution 987
4846. Liability of mortgagee's interest to attachment or execution 989

CHAPTER CXLVII.

SUBJECT-MATTER OF CHATTEL MORTGAGES.

4860. In general 991
4861. What present interest subject to mortgage 992
4862. Mortgaging chattels sold conditionally 992
4863. Mortgages by owners of chattels not in possession 994
4864. Statutory limitations of the subject-matter of mortgages 994

SECTION. PAGE.
4865. Mortgages of fixtures—In general..... 995
4866. Mortgages of machinery..... 998
4867. Mortgages of future personal property..... 999
4868. Delivery and possession of mortgaged chattels.....1001

TITLE FOURTEEN

PARTNERSHIP.

CHAPTER CXLVIII

PARTNERSHIP CONTRACTS—FIRM AS DISTINCT ENTITY—FIRM NAME.

4875. Introductory 1004
4876. Firm as distinct entity.....1004
4877. Firm name not essential.....1009
4878. Firm name—Choice, display, failure to choose.....1010
4879. Use of firm name.....1013

CHAPTER CXLIX.

PARTNERSHIP CAPITAL AND PROPERTY.

4890. Definition of "capital" and "property".....1017
4891. Interest of partner in firm property.....1022
4892. Proportionate shares of partners.....1027
4893. Conversion of realty into personalty.....1028

CHAPTER CL.

RIGHTS AND LIABILITIES OF PARTNERS INTER SE.

4905. Good faith.....1032
4906. Acts impinging on requirement of good faith.....1037
4907. Exclusion of partner from management of business.....1044
4908. Interest—In general.....1045
4909. Interest—On capital.....1046
4910. Interest—On advances.....1048
4911. Interest—On balance.....1049
4912. Contribution 1050

SECTION. PAGE.
4913. Contribution—Limit 1053
4914. Contribution—Right of partner to salary 1053
4915. Partner's lien 1059
4916. Rights of action between partners 1063

CHAPTER CLI.

RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

4925. Contracts binding upon partnership 1066
4926. "Apparent" scope of partner's authority 1071
4927. Particular kinds of contracts—Loans 1073
4928. Particular kinds of contracts—Negotiable paper 1074
4929. Particular kinds of contracts—Mortgages 1080
4930. Particular kinds of contracts—Employment 1086
4931. Admissions and representations by partner 1087
4932. Notice to partner 1089
4933. Liability of partner upon firm obligations 1091
4934. Creditors of partnership 1093
4935. Creditors of individual partners 1096
4936. Liability for debt on change of firm 1098
4937. Ratification 1099
4938. Estoppel 1104

CHAPTER CLII.

DISSOLUTION.

4950. In general 1108
4951. By operation of law 1108
4952. By act of the partners 1111
4953. By decree 1116
4954. Post-dissolution transactions 1120
4955. Surviving partner 1124
4956. Liquidating partner 1127

CHAPTER CLIII.

LIMITED PARTNERSHIPS.

4965. In general 1130
4966. Liability of partners on contracts 1131
4967. Dissolution 1134

TITLE FIFTEEN.

SALES.

CHAPTER CLIV.

ELEMENTS AND FORMATION OF THE CONTRACT.

SECTION. PAGE.
4980. Definition 1136
4981. Essential elements 1137
4982. Further definitions and explanation of terms 1137
4983. Sale distinguished from other things 1138
4984. Making the contract—Offer and acceptance 1140
4985. Subject of sale 1142
4986. Subject of sale—Where it has been destroyed or ceased to exist 1146
4987. Subject-matter—Goods "to arrive" 1146
4988. The price 1147

CHAPTER CLV.

ELEMENTS AND FORMATION OF CONTRACTS—CONDITIONS AND WARRANTIES.

4995. Conditions and warranties 1149
4996. When stipulation is of the essence 1150
4997. Severable and entire contracts 1151
4998. Waiver of condition by buyer 1152
4999. Express conditions and warranty 1153
5000. Evidence of oral condition or warranty not admissible when contract is written 1154
5001. Known or obvious defects 1155
5002. When new consideration is essential to warranty 1155
5003. Implied conditions and warranties—Title 1156
5004. When there is no implied warranty as to title 1157
5005. Sale of goods by description—Implied condition or warranty 1158
5006. Implied warranty or condition as to quality or fitness—Caveat emptor 1159
5007. Exceptions—When there is an implied condition or warranty as to fitness 1159
5008. Implied conditions or warranties in sale by sample 1162
5009. When implied warranty is negatived by express warranty 1163

CHAPTER CLVI.

EFFECTS OF THE CONTRACT—TRANSFER OF PROPERTY AS BETWEEN SELLER AND BUYER.

SECTION. PAGE.
5015. Transfer of title—Unascertained goods—Part of uniform bulk....1165
5016. Transfer of title—Specific goods—Intention....1167
5017. Rules to ascertain intention—Goods in a deliverable state....1167
5018. Title does not pass where seller is bound to do something to put in deliverable state....1168
5019. Title does not pass where seller is bound to weigh, measure, count or the like to determine the price....1169
5020. Passing of title where goods are delivered on approval or the like..1170
5021. Transfer of title to unascertained goods—Appropriation—Delivery to carrier....1171
5022. Seller may reserve right of disposal—Title does not pass until condition is performed—Statutes....1173
5023. Right of disposal deemed reserved where goods are shipped with bill of lading making them deliverable to order of seller or his agent....1176
5024. Risk of loss....1177

CHAPTER CLVII.

EFFECTS OF THE CONTRACT—TRANSFER OF TITLE.

5030. Attempted sale by one not the owner....1179
5031. Estoppel of owner....1180
5032. Estoppel of owner—Conditional sales....1182
5033. Factors acts and recording or other statutes—Sales in bulk....1184
5034. Where seller has voidable title....1185
5035. Sale by one having possession of goods or documents of title with consent of owner....1185
5036. Person in possession as ostensible owner—Attaching and execution creditors....1188

CHAPTER CLVIII.

PERFORMANCE OF THE CONTRACT—CONTRACTUAL OBLIGATIONS.

5040. Duty of seller to deliver and buyer to accept and pay....1190
5041. Delivery and payment concurrent conditions....1192
5042. Place of delivery....1192
5043. Time of delivery....1193
5044. Delivery where goods are in possession of bailee....1195
5045. Demand or tender of delivery must be at reasonable hour....1195
5046. Expense of putting goods in deliverable state....1196

SECTION. PAGE.
5047. Incomplete delivery—Smaller quantity than agreed....1196
5048. Incomplete delivery—New York doctrine....1197
5049. Delivery of excessive quantity....1198
5050. Delivery of goods mixed with others....1199
5051. Effect of usage or agreement as controlling preceding rules....1199
5052. Rules of construction when quantity is not definitely stated....1200
5053. Delivery in instalments....1200
5054. Delivery to carrier for buyer—Risk of determination....1202
5055. Acceptance—Buyer not deemed to accept without opportunity to inspect....1202
5056. Place of inspection....1203
5057. Inspection or examination—Reasonable opportunity....1203
5058. Waiver of right of inspection....1204
5059. Acceptance—When buyer is deemed to have accepted....1205

CHAPTER CLIX.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

5065. Rights and remedies of unpaid seller—Generally....1208
5066. Who is an unpaid seller....1209
5067. Lien of unpaid seller....1210
5068. Unpaid seller's lien after part delivery....1211
5069. When lien is lost—Generally....1211
5070. No lien where goods are in public place or already in possession of buyer....1212
5071. Waiver of lien....1213
5072. Right of stoppage in transitu—General rule....1214
5073. When goods are in course of transit—General rule....1215
5074. Transit not ended where goods are rejected or seized by buyer's creditors....1215
5075. When transit is ended....1216
5076. Broken transit....1217
5077. Rule where part delivery has been made....1217
5078. How right of stoppage may be exercised....1218
5079. Resale by seller....1218
5080. Manner of resale....1220
5081. Rescission by unpaid seller....1221
5082. Effect of buyer's sale of goods subject to lien or right of stoppage—Negotiation of document of title....1223

CHAPTER CLX.

ACTIONS FOR BREACH—REMEDIES OF SELLER ON THE CONTRACT.

5090. Generally—Affirming or rescinding—Election of remedies....1225
5091. Seller's action for price where title has passed....1227

SECTION. PAGE.
5092. Recovery of price where title has not passed....1228
5093. Seller's action for price where it is payable on a day certain....1229
5094. Action for nonacceptance....1229
5095. Measure of damage in action for nonacceptance....1230
5096. Rule where buyer repudiates contract and notifies seller to go no further—Anticipatory breach....1231

CHAPTER CLXI.

REMEDIES OF THE BUYER ON THE CONTRACT.

5105. Where property has passed—Action for conversion or nondelivery.1234
5106. Where title has not passed—Action for failing to deliver....1235
5107. Measure of damages....1235
5108. Measure of damages—Difference between contract-price and market-value....1236
5109. Specific performance....1237
5110. Buyer's remedies for breach of warranty....1237
5111. Agreement for specific remedy....1239
5112. Measure of damages for breach of warranty....1240
5113. Measure of damages for breach of warranty of quality....1241
5114. Rescission by buyer—Placing seller in statu quo....1242
5115. Buyer's damages on rescission—Recovery of purchase-price paid...1244
5116. Interest and special damages....1246
5117. Special damages....1247

ELLIOTT ON CONTRACTS

TITLE EIGHT

GUARANTY AND SURETYSHIP

CHAPTER CXIV.

DEFINITION AND GENERAL PRINCIPLES.

§ 3930. Guaranty and suretyship defined.
3931. Distinction between guaranty and suretyship.
3932. General nature and essentials of contract.
3933. Classification of suretyship.
3934. Classification of guaranties.
3935. Parties to the contract.
3936. The consideration.
3937. Offer and acceptance.
§ 3938. Fraud, duress and undue influence.
3939. Incomplete instrument.
3940. Agency in establishing relation.
3941. Construction of the contract.
3942. Forged and unauthorized signatures.
3943. Change of relation.
3944. Commencement and duration of relation.

§ 3930. Guaranty and suretyship defined.—A guaranty is a collateral agreement or undertaking on the part of one person, called the guarantor, to pay a debt or perform an obligation in the event of the failure of another person, called the principal, who is himself liable in the first instance for such payment or performance to a third person, called the guarantee. In legal significance it is an undertaking to be answerable for the payment of some debt, or the due fulfilment of some obligation or duty by another person, who himself remains liable for his own default.[1] Guaranty has also been defined as an agreement not

[1] Miller v. Lewiston Nat. Bank, 18 Idaho 124, 108 Pac. 901; Gridley v. Capen, 72 Ill. 11; La Rose v. Logansport Nat. Bank, 102 Ind. 332, 1 N. E. 805; Merchants Nat. Bank v. Citizens State Bank, 93 Iowa 650, 61 N. W. 1065, 57 Am. St. 284; Maryland Trust Co. v. National Mechanics Bank, 102 Md. 608, 63 Atl. 70; Dole v. Young, 24 Pick. (Mass.) 250; Mc-

under seal "whereby one person engages to be answerable for the debt, default or miscarriage of another."[2] A contract of suretyship is a direct undertaking on the part of one person, called the surety, to pay a debt or perform an obligation of another person, called the principal, by which undertaking the surety becomes bound as the principal debtor.[3] A contract of suretyship is not that the creditor or obligee will see that the principal pays his debt or fulfils his contract, but that the surety will see that the principal pays or performs.[4] It has also been said to be an express contract in writing by which the surety agrees to answer to the creditor for the debt, default or miscarriage of another; but the relationship may often be shown by parol evidence, and as the obligation of the surety is primary, and the liability primary, it would seem that it cannot be true as a general proposition that the relation of suretyship can only be created by an express written contract.[5]

§ 3931. Distinction between guaranty and suretyship.—While a guarantor and a surety are both parties who make an express agreement to bind themselves for the performance of an act or the fulfilment of an obligation or duty of another, yet the distinctions between the contract of each and the obligation assumed thereunder can be sharply made. Ordinarily the agreement of

Laren v. Watson's Exrs., 26 Wend. (N. Y.) 425, 377 Am. Dec. 260.

[2] Hall v. Farmer, 5 Denio (N. Y.) 484, affd. 2 N. Y. 553. And for similar language see Buckingham v. Murray's Exr., 7 Houst. (Del.) 176, 30 Atl. 779. For other definitions of guaranty see Goldring v. Thompson, 58 Fla. 248, 51 So. 46, 25 L. R. A. (N. S.) 418; Bailey v. Miller, 45 Ind. App. 475, 91 N. E. 24; Northern State Bank v. Bellamy, 19 N. Dak. 509, 125 N. W. 888, 31 L. R. A. (N. S.) 149n.

[3] For various definitions see State v. Parker, 72 Ala. 181; Roberts v. Hawkins, 70 Mich. 566, 38 N. W. 575; Russell v. Failor, 1 Ohio St. 327, 59 Am. Dec. 631. See also American Bonding Co. v. Pueblo Invest. Co., 150 Fed. 17, 9 L. R. A. (N. S.) 557n. An authority on the subject has classified the term into suretyship in its broadest sense and suretyship in its narrower sense, including in the former class every relation where there is one person primarily liable, and another person who expects to become liable in the event the one primarily liable makes default; while in the latter class he includes the relation created by an express contract to become liable in a manner similar to that of the principal. Childs' Suretyship and Guaranty, § 8.

[4] American Bonding Co. v. Pueblo Investment Co., 150 Fed. 17, 9 L. R. A. (N. S.) 577n; Nelson v. First Nat. Bank, 69 Fed. 798, 807, 16 C. C. A. 425, 435.

[5] Gay v. Blanchard, 32 La. Ann. 497; Bouine v. Denniston, 41 Mich. 292; Ingersol v. Baker, 41 Mich. 48, 1 N. W. 907. Compare, however, Wayman v. Jones, 58 Mo. App. 313.

a guarantor to answer for the principal's debt or default is not made contemporaneously or in the same instrument with the agreement between the guarantee and principal, but it is usually a subsequent contract based upon a new and different consideration. The guarantor is not bound to inform himself of the principal's default or failure to perform the contract, but the guarantee is under the obligation to inform the guarantor of such default or failure on the part of the principal, otherwise the guarantor can claim a discharge on the obligation to the extent of any injury or loss suffered by a failure to notify him promptly.[6] The contract of guaranty is collateral and secondary; the contract of suretyship is primary and direct.[7] The guarantor agrees to pay a debt or perform an obligation, if by the exercise of due diligence the guarantee cannot obtain payment or performance from the principal; while a surety undertakes directly such payment or performance, and is responsible at once if the principal makes default. A surety is bound to know every default of the principal, while a guarantor is usually not liable unless notified of such default. A guarantor's promise is always to pay the debt of another; but the surety's promise is to pay a debt which becomes his own debt when the principal fails to pay,[8] and while each is, as to the principal, collaterally liable, the surety is, as to the creditor, primarily liable.[9] A surety is an insurer of the principal's debt, while a guarantor is an in-

[6] Gaff v. Sims, 45 Ind. 262; Singer v. Littler, 56 Iowa 601, 9 N. W. 905; Hall v. Weaver, 13 Sawy. (U. S.) 188, 34 Fed. 104; Harris v. Newell, 42 Wis. 687.

[7] Milroy v. Quinn, 69 Ind. 406, 35 Am. Rep. 227; Oxford Bank v. Haynes, 8 Pick. (Mass.) 423, 19 Am. Dec. 334; Kearnes v. Montgomery, 4 W. Va. 29. See also Bedford v. Kelley (Mich.), 139 N. W. 250.

[8] Coleman v. Fuller, 105 N. Car. 328, 11 S. E. 175, 8 L. R. A. 380; Northern State Bank v. Bellamy, 19 N. Dak. 509, 125 N. W. 888, 31 L. R. A. (N. S.) 149n.

[9] Northern State Bank v. Bellamy, 19 N. Dak. 509, 125 N. W. 888, 31 L. R. A. (N. S.) 149n. In Reigart v. White, 52 Pa. St. 38, Agnew, J., distinguishes suretyship from guaranty as follows: "A contract of suretyship being a direct liability to the creditor for the act to be performed by the debtor, and a guaranty being a liability only for his ability to perform this act. In the former the surety assumes to perform the contract of the principal debtor if he should not and in the latter the guarantor undertakes that his principal can perform: that he is able to do so. From the nature of the former the undertaking is immediate and direct that the act shall be done, which if not done, makes the surety responsible at once, but from the nature of the latter, nonability (in other words, insolvency) must be shown."

surer of the solvency of the principal.[10] A surety may be sued as a promisor, but a guarantor cannot.[11]

§ 3932. General nature and essentials of contract.—Having noted the distinctions between guaranty and suretyship we find that, while they are not strictly the same nor governed entirely by the same rules, they are of the same general nature and can conveniently be treated together. Guaranty, indeed, may well be considered as a species of suretyship and included in that term when used in a broad sense. Most of the distinctions pointed out, like many distinctions in law, are more technical than real, and are of little importance except when suit is brought on the contract.[12] It makes little difference whether the promisor calls himself a surety or a guarantor, the terms of the agreement will control in determining whether it is to be considered a contract of suretyship or of guaranty. No particular language or form is necessary to constitute the agreement. Like all other contracts it implies two parties competent to contract, and requires the agreement of both to make it valid. The agreement is completed when an offer or promise is made by the promisor and accepted by the promisee. Also the contract must be based upon a valid consideration. Each of these requirements will be discussed in their proper order. As a general rule a contract of guaranty and suretyship must be in writing, but there is much conflict of authority upon this proposition. The second clause of the fourth section of Stat. 29 Charles II, commonly known as the statute of frauds, provides that, "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing," etc. This branch of the statute has been substantially followed by the statutes in practically all the states. It would

[10] McIntosh-Huntington Co. v. Reed, 89 Fed. 464; Ward v. Wilson, 100 Ind. 52, 50 Am. Rep. 763; Kramph's Exrs. v. Hatz's Exrs., 52 Pa. St. 525. And in Wheeler v. Rohrer, 21 Ind. App. 477, 52 N. E. 780, it is said: "A guarantor undertakes to pay such damages as result from the principal's default." See also, Mading v. McGregor, 121 Ind. 465, 23 N. E. 283, 6 L. R. A. 686.

[11] Oxford Bank v. Haynes, 8 Pick. (Mass.) 423, 19 Am. Dec. 334; Perry v. Barret, 18 Mo. 140.

[12] Jamieson v. Holm, 69 Ill. App. 119, revd. 173 Ill. 295, 50 N. E. 702,

seem, therefore, that the contract of guaranty, or in some instances, at least, of suretyship is clearly within the statute, and in order to be valid, must be in writing.[13] But even if the contract of guaranty and suretyship is within the statute of frauds, and therefore unenforcible when not in writing, the surety may waive his defense on that ground if he choose, and hold his principal for the amount he has been compelled to pay.[14] When the promise is partly within and partly without the statute no part of it can be enforced unless the contract is divisible and the portion not within the statute can be separated from that within, in which case the part not within the statute will be enforced.[15] Generally speaking, it may be said that when the object of the undertaking is to become surety for another, the promise is collateral, and must be in writing,[16] but when the leading object of the promisor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay or discharge the debt of another, his promise is not within the statute.[17]

§ 3933. **Classification of suretyship.**—The relation of suretyship may arise in a great many ways, and for convenience in designating these various ways, two classifications have been made; (1) as to form, and (2) as to nature. As to form the suretyship may be voluntary or involuntary. It is voluntary where the main object of the undertaking is to become a surety;[18] it is involuntary where the main object of the undertaking is the accomplishment of some purpose other than security, but having the effect to make one of the parties liable for the debt or performance of an act by another. A common instance of

45 L. R. A. 846 (where the distinction is said to be formal merely); Langan v. Hewett, 13 Smedes & M. (Miss.) 122.

[13] Tuttle v. Welty, 46 Colo. 25, 102 Pac. 1069; McFarlane v. Wadhams, 165 Fed. 987; Willis v. Fields, 132 Ga. 242, 63 S. E. 828. See ante vol. 2, ch. 30 Statute of Frauds; Watson v. Jones, 125 La. 249, 51 So. 187; Wienman v. Margolish, 120 N. Y. S. 734; Dunlap v. Willett, 153 N. Car. 317, 69 S. E. 222.

[14] Godden v. Pierson, 42 Ala. 370; Lee v. Stowe, 57 Tex. 444.

[15] Rand v. Mather, 11 Cush. (Mass.) 1, 59 Am. Dec. 131.

[16] Mead v. Winslow, 53 Wash. 638, 102 Pac. 753, 23 L. R. A. (N. S.) 1197n, 132 Am. St. 1092.

[17] Nugent v. Wolfe, 111 Pa. St. 471, 4 Atl. 15, 56 Am. Rep. 291; Davis v. Patrick, 141 U. S. 479, 35 L. ed. 826, 12 Sup. Ct. 58; Emerson v. Slater, 22 How. (U. S.) 28, 16 L. ed. 360. See also, Raabe v. Squier, 148 N. Y. 81, 42 N. E. 516.

[18] Duncan v. North & South Wales Bank, L. R. 6 App. Cas. 1, 50 L. J. Ch. 355.

involuntary suretyship is where one party to a contract or deed, as a part of the agreement or consideration, assumes an indebtedness owing by the other, in which case the one assuming the debt becomes the principal, and the former debtor the surety. But this change of relation may not affect the rights of the creditor.[19] As to nature, suretyship is either personal or real. Personal suretyship arises where a surety may be made to pay damages for a breach of his contract, and real suretyship is one which arises where certain designated property can be taken and applied to the payment of the debt of another or the performance of the obligation of another. An instance of real suretyship is a mortgage or pledge of property to secure the debt of a third person.[20] If the surety is subject to an action, and to have a personal judgment for damages rendered against him, the suretyship is designated as personal; but if the debt of the principal is only a lien on the surety's property, with no personal liability on his part, the suretyship is designated as real.

§ 3934. **Classification of guaranties.**—Guaranties have also been classified, and the rights and liabilities of parties to a contract of guaranty differ according to the class to which it belongs. If the undertaking is to enable the principal to have credit over an extended time, or to cover successive transactions, it is a continuing guaranty,[21] but if the terms indicate an intention to cover but one transaction it is designated a limited guaranty.[22] If upon default of the principal the creditor is not required to take some steps in order to hold the guarantor the relation is an absolute guaranty. A common form of absolute guaranty is that of payment and another sometimes so considered is the indorsement of a negotiable instrument.[23] But if the liability of the guarantor upon default of the principal depends upon the creditor taking some steps, such as giving guarantor notice of default of prin-

[19] Goodson v. Cooley, 19 Ga. 599; Gay v. Blanchard, 32 La. Ann. 497.

[20] West Huntsville Cotton Mills Co. v. Alter, 164 Ala. 305, 51 So. 338; Sather Banking Co. v. Arthur R. Briggs Co., 138 Cal. 724, 72 Pac. 352; Price v. Dime Sav. Bank, 124 Ill. 317, 15 N. E. 754, 7 Am. St. 367; Metz v. Todd, 36 Mich. 473; Weil v. Thomas, 114 N. Car. 197, 19 S. E. 103.

[21] Twohy v. McMurran, 37 Minn. 242, 59 N. W. 301.

[22] Liverpool Water-Works Co. v. Atkinson, 6 East 507.

[23] Marx v. Ely, 148 Ala. 659, 41 S. W. 411; J. L. Mott Iron Works v. Clark, 87 S. Car. 199, 69 S. E. 227.

cipal, or diligently prosecuting the claim against the principal, it is a conditional guaranty.[24] If a guaranty is addressed to the public generally, and is broad enough to entitle any one to whom it is presented to act upon it, it is said to be a general guaranty.[25] A letter of credit addressed to the general public is the most common form of general guaranty.[26] A letter of credit, however, may be addressed to a particular person, and he alone has a right to act upon it. Should any one other than the person to whom it is addressed make advances thereon they will not be binding upon the writer of the letter.[27]

§ 3935. **Parties to the contract.**—As has been seen the person who undertakes that another will pay a debt or perform an obligation is called a guarantor or surety. Such person may be an individual, a partnership or a corporation. As regards the contractual capacity of persons acting as guarantors or sureties, the same rules that obtain in other contracts govern. An infant's contract of guaranty or suretyship is voidable at his option. He may disaffirm before he attains his majority, or within a reasonable time thereafter.[28] A contract of suretyship made by an insane person is void, or at least voidable, even though the creditor had no knowledge of the surety's mental condition at the time.[29] It has also been said that a person cannot bind himself by a contract of guaranty or suretyship while in a state of intoxication.[30] The common-law disability of married women to contract generally has been removed by statute in practically all the states, but in some of the states her right to bind herself in a contract of suretyship is expressly denied, the intention being to prevent her from entering into contracts from which she would derive no material benefit;[31] while in other states the restriction is limited to her right

[24] Beardsley v. Hawes, 71 Conn. 39, 40 Atl. 1043. See also, Bull v. Bliss, 30 Vt. 127.

[25] Lonsdale v. Lafayette Bank, 18 Ohio, 126; Lowry v. Adams, 22 Vt. 160.

[26] Evansville Nat. Bank v. Kauffmann, 93 N. Y. 273, 45 Am. Rep. 204; Wheeler v. Mayfield, 31 Tex. 395, 98 Am. Dec. 545.

[27] Penoyer v. Watson, 16 Johns. (N. Y.) 100.

[28] Fetrow v. Wiseman, 40 Ind. 148; Owen v. Long, 112 Mass. 403.

[29] Van Patton v. Beals, 46 Iowa 62.

[30] See Clark, Contracts (2d ed.) §§ 122, 123.

[31] West v. Laraway, 28 Mich. 464; Gwynn v. Gwynn, 31 S. Car. 482, 10 S. E. 221. See generally for full treatment, ante, vol. 1, ch. XIII.

to become a surety for her husband; the reason therefor being that her husband might unduly influence her in the matter. Reference should be made to the statute wherever it is desired to ascertain the power and rights of married women in a particular state. Although the general rule prevails that the liability of a surety is conditioned upon the liability of the principal, yet it is almost universally recognized that an exception exists in case one becomes a surety for a person who himself is relieved from liability because of the wholly personal defense of incapacity to contract. Thus, it is held that a surety is not relieved because the principal is a married woman.[32] A partnership may, with the consent of all the partners, become guarantor or surety for the payment of the debt of another.[33] Where the contract is not within the scope of the firm's business, one partner has no implied power to bind the firm.[34] A corporation, unless authority is expressly or impliedly given in its charter, has no power to enter into contracts of guaranty and suretyship. To make such contract within its implied powers it must be within the scope of its business or corporate authority;[35] but in modern times many corporations have been formed for the very purpose of becoming sureties, and their contracts are clearly within their powers. Under the National Banking Act, there is given the implied power to National Banks to act as a surety wherever it becomes necessary for the bank to so act in negotiating its paper.[36]

§ 3936. **The consideration.**—The contract of guaranty and suretyship, being a distinct contract within itself, and separate and apart from the contract of the principal, must rest upon its own consideration; but this consideration may be, and often is, the same with that on which the original is founded, especially is

[32] Stillwell v. Bertrand, 22 Ark. 375; Jones v. Crosthwaite, 17 Iowa 393; Lobaugh v. Thompson, 74 Mo. 600; Gates v. Tebbetts, 83 Nebr. 573, 119 N. W. 1120, 20 L. R. A. (N. S.) 1000n.

[33] Allen v. Morgan, 5 Hump. (Tenn.) 624.

[34] Osborne v. Stone, 30 Minn. 25, 13 N. W. 922; Avery v. Rowell, 59 Wis. 82.

[35] Best Brewing Co. v. Klassen, 185 Ill. 37, 57 N. E. 20, 50 L. R. A. 765, 76 Am. St. 26; Lucas v. White Line T. Co., 70 Iowa 541, 30 N. W. 771, 59 Am. Rep. 449.

[36] Such companies have been regarded as virtually insurers and held to a stricter liability than individual sureties in ordinary cases. See Philadelphia v. Fidelity &c. Co., 231 Pa. 208, 80 Atl. 62, Ann. Cas. 1912B, 1085 and note. Peoples Bank v. National Bank, 101 U. S. 181, 25 L. ed. 907.

this true where the promise is given at the same time the original debt is incurred.[37] The consideration may be any benefit or advantage to the principal or surety or some detriment, loss, trouble, charge or disadvantage to the creditor;[38] but such disadvantage to the creditor must not, within itself, be illegal or opposed to public policy.[39] It is not necessary that the consideration pass directly from the creditor to the guarantor or surety. If the principal receive a benefit, or the creditor receive some disadvantage, in consequence of the guaranty and as its inducement, this is a sufficient consideration to support the contract.[40] The promise of the surety or guarantor may be made subsequent to the making of the original contract; if so, it requires a new consideration to support it.[41] The consideration for the original contract between the principal and creditor in such a case is what is known as a past consideration and is no consideration at all so far as the contract of suretyship is concerned. The transaction creating the original debt is complete before the surety is signed, and unless there is a new consideration the surety is not bound.[42] But if the surety's contract is to answer for future advancements to be made, as well as for the original debt, and such future advancements are made the surety will be liable for both the past and future indebtedness.[43] If, in accordance with a prior agreement to become surety, the surety sign the contract after it has been

[37] Baily v. Croft, 4 Taunt. 611; Hippach v. MaKeever, 166 Ill. 136, 46 N. E. 790; Hunt v. Adams, 5 Mass. 358, 4 Am. Dec. 68; Wheelwright v. Moore, 2 Hall (N. Y.) 143; In re Hughes' Estate, 13 Pa. Super. Ct. 240.

[38] Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279; Leonard v. Vredenburg, 8 Johns. (N. Y.) 29, 5 Am. Rep. 317; Gregory v. Gleed, 33 Vt. 405.

[39] Thus, where the consideration is that the principal shall not be prosecuted for a crime, the contract is void. Rouse v. Mohr, 29 Ill. App. 321; Board of Education v. Thompson, 33 Ohio St. 321.

[40] See Leonard v. Vredenburg, 8 Johns. (N. Y.) 29, 5 Am. Rep. 317, as a leading case in support of the proposition. See also, Brewster v. Baker, 97 Ind. 260; Rapp v. Linebarger, 149 Iowa 429, 128 N. W. 555; Faust v. Rodelheim, 77 N. J. L. 740, 73 Atl. 491, 27 L. R. A. (N. S.) 189n; Erie County Sav. Bank v. Coit, 104 N. Y. 532, 11 N. E. 54; Churchill v. Bradley, 58 Vt. 403, 5 Atl. 189, 56 Am. Rep 563.

[41] In Hedden v. Schneblin, 126 Mo. App. 478, 104 S. W. 887, it is held that a mere promise to pay an existing debt of another without a new consideration is void.

[42] Anderson v. Bellinger, 87 Ala. 334, 6 So. 82, 4 L. R. A. 680, 13 Am. St. 46; Martin v. Stubbings, 20 Ill. App. 381; Favorite v. Stidham, 84 Ind. 423; Lowenstein v. Sorge, 75 Mo. App. 281; Jones v. Ritter, 32 Tex. 717.

[43] Sherman v. Roberts, 1 Grant Cas. (Pa.) 261.

delivered he will be bound.[44] If the contract of suretyship provides for the payment of services already performed without any agreement, as well as for services to be rendered, the rendition of such subsequent services in reliance upon the surety's promise, is a sufficient consideration for the promise of the surety as to all the services.[45] It is held in many jurisdictions that the written contract of guaranty, unless under seal, must disclose the consideration, as the statute of frauds requires written evidence of every essential element to the validity of the agreement;[46] but where a consideration is named, it does not prevent the real consideration being shown by parol evidence.[47] However, much depends upon the wording of the particular statute, and in many other jurisdictions the contrary is held. In the eyes of the law any benefit or advantage, however small, to the principal or surety, or any detriment or disadvantage, however slight, suffered by the creditor, will support the promise and be deemed adequate as a consideration,[48] but the time must usually be definite in order to be a detriment suffered by the creditor.[49] An agreement of the creditor to extend the time of payment by the principal for a definite time, if such extension is given as a result of the surety's promise to pay, is a sufficient consideration for the contract of suretyship;[50] also forbearance to sue the principal on a debt past due is sufficient consideration to support the promise of the surety to pay the debt.[51] The dismissal of a suit brought against the principal is a sufficient consideration for the promise of the surety

[44] Williams v. Perkins, 21 Ark. 18; Bowen v. Thwing, 56 Minn. 177, 57 N. W. 468; Robertson v. Findley, 31 Mo. 384; Pennsylvania Coal Co. v. Blake, 85 N. Y. 226.

[45] Clune v. Ford, 55 Hun (N. Y.) 479, 8 N. Y. S. 719, 30 N. Y. St. 342; Bagley v. Moulton, 42 Vt. 184.

[46] Aldridge v. Turner, 1 Gill & J. (Md.) 427; Tenney v. Prince, 4 Pick. (Mass.) 385, 16 Am. Dec. 347; Clark v. Small, 6 Yerg. (Tenn.) 418.

[47] Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279; Taylor v. Wightman, 50 Iowa 411, 1 N. W. 607.

[48] Davis v. Wells, 104 U. S. 159, 26 L. ed. 686; Ballard v. Burton, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 664.

[49] Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279 (stating when time must be definite and when not, and suggesting distinction between case where a guarantor is seeking to avoid liability because of insufficiency of consideration and the case of a surety claiming a release because of extension of time to the principal); Ballard v. Burton, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 664.

[50] Coffin v. Trustees of Indiana Asbury University, 92 Ind. 337; Pratt v. Hedden, 121 Mass. 116; Peterson v. Russell, 62 Minn. 220, 64 N. W. 555, 29 L. R. A. 612, 54 Am. St. 634; Lonas v. Wolfe, 67 Tenn. 179.

[51] Ives v. McHard, 103 Ill. 97; Lee

to pay the debt which is the subject of the suit; provided the dismissal was made as the result of the agreement with the surety.[52]

§ 3937. **Offer and acceptance.**—The general rule that an offer must be made by the promisor and accepted by the promisee before it is a binding contract applies to guaranty and suretyship, even in those states which do not require a formal notice of acceptance. There is, however, an apparent lack of harmony in the decisions as to what actually constitutes an acceptance of an offer to guarantee.[53] The common-law rule was that the mere acting on the offer was sufficient acceptance, and that the guarantor was put upon his inquiry if he desired to know if his offer was accepted.[54] This is the rule in New York, Ohio and a few other states.[55] In the United States courts and in most of the states formal notice of acceptance of the offer is generally required.[56] The mere offer to pay the debt of another does not amount to a guaranty, and before the offer is accepted it may be revoked.[57] The reason assigned for formal notice of acceptance as a prerequisite to a binding contract is based upon the proposition that the guarantor is entitled to know whether his offer has been accepted in order that he may arrange his business relations with the person for whose benefit the guaranty is to be given, in order to protect himself against loss.[58] The acceptance may be by word or by some act, and if by the latter, there is usually no occasion to notify the offeree if he has knowledge

v. Wisner, 38 Mich. 82; Hooper v. Pike, 70 Minn. 84, 72 N. W. 829, 68 Am. St. 512.

[52] Castner v. Slater, 50 Maine 212; Worcester Mechanic's Sav. Bank v. Hill, 113 Mass. 25.

[53] Beekman v. Hale, 17 Johns. (N. Y.) 134; William Deering & Co. v. Mortell, 21 S. Dak. 159, 110 N. W. 86, 16 L. R. A. (N. S.) 352n.

[54] Somersall v. Barneby, Cro. Jac. 287.

[55] Fisk v. Stone, 6 Dak. 35, 50 N. W. 125; Platter v. Green, 26 Kans. 252; Boyd v. Snyder, 49 Md. 325; Lininger & Metcalf Co. v. Wheat, 49 Nebr. 567, 68 N. W. 941; Union Bank v. Coster's Exrs., 3 N. Y. 203, 53 Am. Dec. 280; Powers v. Bumcratz, 12 Ohio St. 273; Yancey v. Brown, 3 Sneed (Tenn.) 89; Wells Fargo & Co. v. Davis, 2 Utah 411, affd. 104 U. S. 159, 26 L. ed. 686.

[56] Saint v. Wheeler, 95 Ala. 362, 10 So. 539, 36 Am. St. 210; Farmers Bank v. Tatnall, 7 Houst. (Del.) 287, 31 Atl. 879; Gano v. Farmers' Bank, 103 Ky. 508, 20 Ky. L. 197, 45 S. W. 519, 82 Am. St. 596; Davis Sewing Machine Co. v. Richards, 115 U. S. 524, 29 L. ed. 480, 6 Sup. Ct. 173.

[57] Potter v. Gronbeck, 117 Ill. 404, 7 N. E. 586; Wilkins v. Carter, 84 Tex. 438, 19 S. W. 997.

[58] Bishop v. Eaton, 161 Mass. 496, 37 N. E. 665, 42 Am. St. 437.

that the action has been taken on the faith of his offer, unless the act is of such a kind that knowledge of it will not quickly come to the promisor.[59] If the agreement is to be given to answer for a debt or obligation already made, of which the guarantor has knowledge, or is given at the same time as the contract which is guaranteed, no subsequent formal notice to the guarantor is necessary.[60] Notice of acceptance of an absolute unqualified guaranty is not essential to create a liability on the part of the guarantor, particularly where the guarantor was advised before he signed the guaranty that it would be accepted and credit extended thereon.[61] It sometimes happens that the creditor gives his notice of acceptance in advance, as in case where the principal applies for a loan and is told by the creditor, or person to whom he applies, that the loan will be granted if a certain named person will become surety therefor. If the principal, or borrower, communicates this fact to the person designated, and he signs the note with the principal and the note is afterward delivered to the creditor, the surety is bound.[62] If the guarantor, either directly or indirectly, receive the consideration of the original contract, it is held that no notice of acceptance is necesary.[63] If the guaranty is for continuing transactions and notice of acceptance has once been given it need not be repeated on a subsequent extension of credits;[64] but when the transactions are closed the guarantor is entitled to notice within a reasonable time of the amount of his liability under the contract guaranteed.[65] Where notice of acceptance of offer is required it is not necessary that the notice be given immediately upon receipt of the offer, but it is sufficient if given within a reasonable time thereafter,[66] and

[59] Steadman v. Guthrie, 4 Metc. (Ky.) 147; Lascelles v. Clark, 204 Mass. 362, 90 N. E. 875.

[60] Nading v. McGregor, 121 Ind. 465, 23 N. E. 283, 6 L. R. A. 686; Wright v. Griffith, 121 Ind. 478, 23 N. E. 281, 6 L. R. A. 639; Davis Sewing Machine Co. v. Jones, 61 Mo. 409.

[61] Frost v. Standard Metal Co., 215 Ill. 240, 74 N. E. 139.

[62] Cooke v. Orme, 37 Ill. 186; Davis v. Wells, 104 U. S. 159, 26 L. ed. 686.

[63] Doud v. Nat. Park Bank, 54 Fed. 846, 4 C. C. A. 607; Nading v. McGregor, 121 Ind. 465, 23 N. E. 283, 6 L. R. A. 686.

[64] Cahuzac v. Samini, 29 Ala. 288.

[65] Davis Sewing Machine Co. v. Mills, 55 Iowa 543, 8 N. W. 356; Singer v. Littler, 56 Iowa 601, 9 N. W. 905; Clark v. Remington, 11 Metc. (Mass.) 361; Farmers' and Mechanics' Bank v. Kercheval, 2 Mich. 504.

[66] Furst & Bradley Mfg. Co. v. Black, 111 Ind. 308, 12 N. E. 504; Coe

such notice is not required to be in any precise form of language, nor even in writing.[67] Where the guaranty is joint, notice to one of the guarantors will be sufficient.[68]

§ 3938. **Fraud, duress and undue influence.**—A person cannot be held liable on a contract of guaranty or suretyship when he has been induced to make the agreement through any false statement, or the concealment of any material fact by the creditor or by any other person with the knowledge of such creditor. The utmost good faith is required of the creditor pending negotiations looking to the contract, to make true answer to all questions asked of him, and to fully disclose everything that would naturally influence the decision of the party about to become a surety.[69] When it is apparent to the creditor that the person about to become a surety is ignorant of the true facts in connection with the contract it is the creditor's duty to volunteer such information as will lead the surety to a clear understanding of the obligation he is about to assume.[70] Also any fraud, deceit or concealment amounting to fraud practiced on the surety by the principal with the knowledge of the creditor will likewise avoid the contract;[71] but if the principal practices a fraud on the surety, of which the creditor has no knowledge, even though such fraud results in inducing the surety to make the contract, the surety will not, on that account, be released from his liability to the creditor;[72] nor will the surety be relieved if the fraud be

v. Buehler, 110 Pa. St. 366, 5 Atl. 20; Davis v. Wells, 104 U. S. 159, 26 L. ed. 686.

[67] Hart v. Minchen, 69 Fed. 520; Montgomery v. Kellogg, 43 Miss. 486, 5 Am. Rep. 508; Oaks v. Weller, 16 Vt. 63.

[68] Maynard v. Morse, 36 Vt. 617.

[69] Bank of Monroe v. Anderson Bros. Min. & R. Co., 65 Iowa 692, 22 N. W. 929; Remington Co. v. Kezertee, 49 Wis. 409, 5 N. W. 809. In Ham v. Greve, 34 Ind. 18, a surety was induced to sign a note by the creditor who represented that the note was to be used in payment for goods. The note, however, was really used to pay a pre-existing debt d e by the principal to the creditor. It was held that the surety was not liable. See also, Drabek v. Grand Lodge of Bohemian Slavonian Benev. Soc., 24 Ill. App. 82; Waterbury v. Andrews, 67 Mich. 281, 34 N. W. 575; Mendelson v. Stout, 37 N. Y. Super. Ct. 408; Frisch v. Miller, 5 Pa. 310; Trammell v. Swan, 25 Tex. 473.

[70] Franklin Bank v. Cooper, 39 Maine 542.

[71] Davis Sewing Machine Co. v. Buckles, 89 Ill. 237; State v. Peck, 53 Maine 284; Waterbury v. Andrews, 67 Mich. 281, 34 N. W. 575.

[72] Casoni v. Jerome, 58 N. Y. 315. In Lucas v. Owens, 113 Ind. 521, 16 N. E. 196, it is held that the surety is liable in case he is misled by the principal as to the extent of the obligation if the creditor had no knowl-

practiced by a third person. Following the general rule of the law of contracts, duress avoids the contract of guaranty and suretyship, where the guarantor or surety is compelled to sign the contract under duress.[73] Likewise, duress practiced on the principal alone will relieve both surety and principal, in case the surety is ignorant of the true conditions existing between the principal and creditor.[74] But duress practiced by the principal will not relieve the surety if the creditor accepts the obligation in good faith and without any knowledge of the actions of the principal.[75]

§ 3939. **Incomplete instrument.**—The omission of some word or words necessary to make the instrument complete may render it insensible and void, as where the amount is omitted in a bond.[76] It often happens that the surety signs the contract on condition, and if the contract be delivered without the condition having been complied with the surety will usually be bound if the creditor had no knowledge of the condition, otherwise he will not be bound.[77] This notice or knowledge of the creditor of the conditions upon which the surety signed may be actual or implied. Circumstances connected with the delivery, or the appearance of the instrument may put the creditor on his inquiry, and he will be held to have constructive notice of the conditions.[78] Where a contract is presented to a surety for his signature and is signed by him on the condition that the instrument shall not be delivered unless signed by others mentioned by the principal, and the principal delivers the contract in violation of the condition imposed by the surety, the surety is bound if the creditor act in good

edge of the fraud. Brown v. Davenport, 76 Ga. 799; Sooy v. State, 39 N. J. L. 135, affd. 41 N. J. L. 394; Mason Lumber Co. v. Buchtel, 101 U. S. 633, 25 L. ed. 1072. But see W. T. Rawleigh Medical Co. v. Wilson (Ala.), 60 So. 1001.

[73] Small v. Currie, 2 Drew. 102.

[74] Peacock v. People, 83 Ill. 331.

[75] Fairbanks v. Snow, 145 Mass. 153, 13 N. E. 596, 1 Am. St. 446.

[76] Spring Garden Ins. Co. v. Lemmon, 117 Iowa 691, 86 N. W. 35. See also, Church v. Noble, 24 Ill. 291. But compare Eichelberger v. Old Nat. Bank, 103 Ind. 401, 3 N. E. 127; Evarts v. Steger, 6 Ore. 55.

[77] Evans v. Daugherty, 84 Ala. 68, 4 So. 592; Belleville Sav. Bank v. Bornman, 124 Ill. 200, 16 N. E. 210; Goff v. Bankston, 35 Miss. 518; Hill v. Sweetser, 5 N. H. 168; United States v. Hammond, 4 Biss. (U. S.) 283, Fed. Cas. No. 15292. See also, Richardson v. Bank, 57 Ohio St. 299, 48 N. E. 1100; ante, vol. 2, § 1612.

[78] Sharp v. Allgood, 100 Ala. 183, 14 So. 16; Hessell v. Johnson, 63

faith in accepting the contract.[79] This is upon the principle that where a fraud has been perpetrated, from which one of two innocent parties must suffer, he who put it in the power of a third person to commit the fraud, must bear the loss.[80] If the instrument be a bond, and there are names of persons in the body of the bond who have not signed, the creditor is put upon his inquiry and if he fail to make investigation, the surety who has signed will not be bound.[81] It is only in cases where sureties who have signed have annexed conditions which the creditor would have discovered by inquiry that the surety will be relieved. If the body of the instrument contains names which are not appended to the instrument, no presumption is raised that those who signed imposed any condition that the others should sign,[82] but in some jurisdictions it is held that there is a presumption that there was a condition that the principal would sign.[83] Although the name of the surety does not appear in the body of the bond, but nevertheless he executes and delivers it, he is bound.[84] If the instrument contains blanks and it is intrusted by the surety to the principal, the latter has implied authority to fill up the blanks neces-

Mich. 623, 30 N. W. 209, 6 Am. St. 334; State v. Churchill, 48 Ark. 426, 3 S. W. 352.

[79] Rhode v. McLean, 101 Ill. 467; Mowbray v. State, 88 Ind. 324; Benton County Sav. Bank v. Boddicker, 105 Iowa 548, 75 N. W. 632, 45 L. R. A. 321, 67 Am. St. 310.

[80] Bobbit v. Shryner, 70 Ind. 513; Gage v. Sharp, 24 Iowa 15; Fowler v. Allen, 32 S. Car. 229, 10 S. E. 947, 7 L. R. A. 745; Dair v. United States, 16 Wall. (U. S.) 1, 21 L. ed. 491.

[81] Markland Min. & Mfg. Co. v. Kimmel, 87 Ind. 560; Hessell v. Johnson, 63 Mich. 623, 30 N. W. 209, 6 Am. St. 334; Warfel v. Frantz, 76 Pa. 88.

[82] Los Angeles v. Mellus, 59 Cal. 444; Towns v. Kellett, 11 Ga. 286; Johnson v. Weatherwax, 9 Kans. 75.

[83] Dole Bros. Co. v. Cosmopolitan Preserving Co., 167 Mass. 481, 46 N. E. 105, 57 Am. St. 477; Hall v. Parker, 39 Mich. 287; Safranski v. St. Paul, M. & M. R. Co., 72 Minn. 185, 75 N. W. 17. In Wild Cat Branch v. Ball, 45 Ind. 213, it is held that where the instrument is not signed by the principal, although in its body it purports to be so signed, the surety may show that he signed upon condition that the principal should sign. See, to the same effect, People v. Stacy, 74 Cal. 373, 16 Pac. 192; Oldham v. Broom, 28 Ohio St. 41; Simpson's Exr. v. Bovard, 74 Pa. St. 351; Penn v. Hamlett, 27 Gratt. (Va.) 337.

[84] Murray v. People, 49 Colo. 109, 111 Pac. 711, Ann. Cas. 1912A, 693 and note. In Danker v. Atwood, 119 Mass. 146, a bond purporting in its body to be executed by Samuel Snow, "as principal and sureties," and signed by the principal and James S. Atwood, was held good against Atwood as surety. See also, Neil v. Morgan, 28 Ill. 524; Joyner v. Cooper, 2 Bailey (S. Car.) 199; San Roman v. Watson, 54 Texas 254. But compare, United States v. Pickett, 1 Bond (U. S.) 123, Fed. Cas. No. 16043.

sary to complete the same, and, as between the surety and an innocent creditor, the principal is deemed the agent of the surety in filling up such blanks.[85] A surety who signs a negotiable instrument containing blanks is liable to a purchaser for value without notice of a violation of his instructions as to the manner in which the blanks should be filled.[86] If, at the time of the execution of the contract, there was a mistake as to the facts by all the parties, the surety may not be liable,[87] but he will not be relieved merely because a different contract from the one intended was entered into.[88]

§ 3940. **Agency in establishing relation.**—Like contracts in general, contracts of suretyship may be entered into by a surety through an authorized agent, and the agency may be established in the same manner as any other agency. As a general rule the authority need not be in writing. While it is entirely competent for a person to authorize an agent to bind him as a surety, yet such a contract is extraordinary, and does not come within the implied powers of the most general agent.[89] We have seen that the principal can act as agent for the surety for the purpose of filling blanks and delivering the contract, but in other respects he cannot act as agent for the surety.[90] Where the power exists in a person to bind another on a contract of suretyship, that power must be exercised strictly within the limits prescribed by the person giving the power or he will not be bound at all.[91] Ratification of a contract of suretyship executed by an agent may be inferred from acts. So, where the name of a surety has been forged, and he takes no steps after being informed by the prin-

[85] Robertson v. Smith, 18 Ala. 220; Dolbeer v. Livingston, 100 Colo. 617, 35 Pac. 328; Lowden v. Schoharie County Nat. Bank, 38 Kans. 533, 16 Pac. 748; Abbott v. Rose, 62 Maine 194, 16 Am. Rep. 427.

[86] Roberson v. Blevins, 57 Kans. 50, 45 Pac. 63; Wessell v. Glenn, 108 Pa. St. 104; Frazier v. Gains, 61 Tenn. 92.

[87] Blaney v. Rogers, 174 Mass. 277, 54 N. E. 561.

[88] Brown v. Brown, 17 Ky. L. 1143, 33 S. W. 830.

[89] Wood v. McCain, 7 Ala. 800, 42 Am. Dec. 612. In Gates v. Bell, 3 La. Ann. 62, it is held that an express authority is necessary to bind the principal by a contract of suretyship for a stranger.

[90] Robinson v. Garth, 6 Ala. 204, 41 Am. Dec. 47; Ennis v. Waller, 3 Blackf. (Ind.) 472.

[91] Bryan v. Berry, 6 Cal. 394; Duncan v. Champion Coal &c. Co., 105 Ky. 821, 49 S. W. 958; Farmington Savings Bank v. Buzzell, 61 N. H. 612; Stovall v. Commonwealth, 84 Va. 246, 4 S. E. 379.

cipal, he may become liable.[92] As a general rule, one member of a partnership has no right to lend the credit of the firm to a stranger, unless it is done in the course of the firm's business.[93]

§ 3941. Construction of the contract.—The liability of a surety is measured by his agreement, and is not to be extended by construction. His contract, however, is to be interpreted by the same rules which are applicable to the construction of other contracts. The extent of his obligation must be determined from the language used when read in the light of the circumstances attending the transaction. Hence, where the question is as to the interpretation and meaning of the language by which a party has bound himself, there is no difference between the contract of surety and that of a principal or other party sustaining a different relation. It is when the intention of the parties has been thus ascertained that the principle of strictissimi juris applies, and then it is that the courts guard the rights of the surety and protect him against a liability which is not strictly within the terms of his contract.[94] While a surety is entitled to a strict interpretation of his contract, that interpretation must be a reasonable one.[95] In construing a contract of guaranty doubts are resolved in favor of the guarantor.[96] The doctrine of strict construction of a bond in favor of the surety does not apply in case of corporations organized to make such bonds for profit, but they should generally be construed most strongly in favor of the obligee.[97] The

[92] State v. Pepper, 31 Ind. 76.

[93] Osborne v. Thompson, 35 Minn. 229, 28 N. W. 260; Avery v. Rowell, 59 Wis. 82, 17 N. W. 875.

[94] Corn Exch. Nat. Bank v. Curtiss, 146 Ill. App. 489; The Ulster County Savings Institution v. Young, 161 N. Y. 23, 55 N. E. 483; Bank of California v. Union Packing Co., 60 Wash. 456, 111 Pac. 573. In Hurlburt v. Kephart, 50 Colo. 353, 115 Pac. 521, it is said that the rule that a contract of surety is strictissimi juris is not a rule of construction, but a rule of application of the contract after its meaning has been ascertained, and that in ascertaining its meaning it is subject to the same tests as those applicable to any other written instrument.

[95] Ambrose v. Hayes, 36 App. D. C. 255; McKemy v. Supreme Lodge A. O. U. W., 180 Fed. 961, 104 C. C. A. 117; Rapp v. Linebarger, 149 Iowa 429, 128 N. W. 555.

[96] Hill Merchantile Co. v. Rotan Grocery Co. (Tex. App.), 127 S. W. 1080.

[97] Peabody v. Richard Realty Co., 125 N. Y. S. 349; Young v. American Bonding Co., 228 Pa. St. 373, 77 Atl. 623; Philadelphia v. Fidelity & Deposit Co., 231 Pa. St. 208, 80 Atl. 62, Ann. Cas. 1912B, 1085 and note; American Surety Co. v. San Antonio Trust Co. (Tex. Civ. App.), 98 S. W. 387.

meaning and intent for which the contract was executed must be gathered from the writing itself, and oral evidence will not be allowed to contradict it;[98] but oral proof may be admitted to aid the court in case the language is ambiguous.[99] Where it clearly appears that the contract does not show the intention of both parties, a court of equity may reform the instrument in a proper case to conform to their intention.[1] The construction of the contract is usually a matter of law for the court, but if the parties themselves have placed a construction on the contract by their acts, the court will generally adopt that construction.[2]

§ 3942. **Forged and unauthorized signatures.**—A contract of guaranty and suretyship is void as to a person whose signature thereto has been forged.[3] A surety cannot, however, set up the defense that he was induced to sign the instrument on the supposition that a prior signature thereon was genuine,[4] and this is true even though the signature of the principal is a forgery.[5] Where the contract purports to be signed by the principal through an agent, although the principal denies the authority of the agent to act for him, it has been held that the sureties are liable.[6]

[98] Boston & S. Glass Co. v. Moore, 119 Mass. 435.

[99] Smith v. Van Wyck, 40 Mo. App. 522.

[1] Olmsted v. Olmsted, 38 Conn. 309; Henkleman v. Peterson, 154 Ill. 419, 40 N. E. 359; Prior v. Williams, 3 Abb. Dec. (N. Y.) 624, 41 N. Y. 530, 42 N. Y. 231. A contract cannot be construed in one way as to the principal and in another as to the surety. Pelzer v. Steadman, 22 S. Car. 279.

[2] State v. Loeb, 21 La. Ann. 599; District of Columbia v. Gallaher, 124 U. S. 505, 31 L. ed. 526, 8 Sup. Ct. 585, 23 Ct. Cl. 493 (holding that the construction which the parties have put upon the contract will prevail even over the literal meaning).

[3] Maxwell v. Wright, (Ind. App.) 64 N. E. 893 (holding that a surety is not estopped from asserting the forgery by merely withholding information in regard to it at a time when payment from the principal might have been enforced).

[4] York County Mut. Fire Ins. Co. v. Brooks, 51 Maine 506. In Stoner v. Millikin, 85 Ill. 218, it was held that "apart from the negotiable character of the instrument these holdings have been rested on the ground that where one of two innocent persons must suffer by a third person's fraud, he who reposed confidence in the deceiver should be the loser." See also, Donnell Mfg. Co. v. Jones, 49 Ill. App. 327; Chamberlin v. Brewer, 3 Bush (Ky.) 562. In the latter case it was held that the signature of a surety is an implied assertion of the genuineness of the signatures which preceded it.

[5] Wayne Agriculture Co. v. Cordwell, 73 Ind. 555; Chase v. Hathorn, 61 Maine 505; Arthur v. Sherman, 11 Wash. 254, 39 Pac. 670.

[6] Millius v. Shafer, 3 Denio (N. Y.) 60. But in Russell v. Annable, 109 Mass. 72, 12 Am. Rep. 665, where a firm's name was signed by one of the partners without authority, the bond was held void.

§ 3943. **Change of relation.**—It sometimes happens that the principal and surety to a contract of suretyship, by subsequent dealings, change their respective relations, so that the surety may become the principal and the principal the surety, as where a surety, for a valuable consideration, agrees with his principal to pay the joint indebtedness, he thereby becomes the principal, and the principal becomes his surety;[7] or, where a surety, who has received the amount of the debt in money from his principal, is clearly the principal after he so receives it.[8] But the fact that a principal and surety unite in giving a new obligation for the debt does not of itself convert the surety into a principal.[9] One jointly liable with another might assume the entire indebtedness, and become the principal; the other becoming the surety.[10] Where one member of a partnership retires from the firm and the remaining members agree with him to pay the firm debt, and these facts are known to the creditor, the member so retiring will be considered in law a surety.[11] Where the obligation of a principal is surrendered in consideration of another in which he is merely surety, he is as respects that, entitled to all the rights of a mere surety.[12] It must be borne in mind, however, that the parties, by any arrangement among themselves, cannot affect the existing rights of the creditor; but he is required to exercise care in further dealing with the parties, lest he forfeit some of his rights.

§ 3944. **Commencement and duration of relation.**—The contract of guaranty and suretyship is not retroactive, and the guarantor or surety cannot be held liable for anything occurring prior to the delivery of his contract, unless the contract so stipulates.[13] It has been held, however, that sureties who sign an

[7] Chaplin v. Baker, 124 Ind. 385, 24 N. E. 233.

[8] Smith v. Steele's Estate, 25 Vt. 427, 60 Am. Dec. 376.

[9] Merriken v. Godwin, 2 Del. Ch. 236.

[10] Vary v. Norton, 6 Fed. 808; Crafts v. Mott, 4 N. Y. 604.

[11] Williams v. Boyd, 75 Ind. 286; Wendlandt v. Sohre, 37 Minn. 162, 33 N. W. 700.

[12] Miller v. Stem, 12 Pa. 383.

[13] Mahaffey v. Gray, 85 Ga. 460, 11 S. E. 774; Jones v. Hays, 38 N. Car. 502, 44 Am. Dec. 78; Bell's Admr. v. Jasper, 37 N. Car. 597; Goldberg v. Sisseton Loan & Title Co., 24 S. Dak. 49, 123 N. W. 266, 140 Am. St. 775. In United States v. Anderson, 1 Blatchf. (U. S.) 330, Fed. Cas. No. 14446, it was held that such an intent is indicated where the bond is conditioned that the principal "has truly and faithfully executed and dis-

old bond are liable for breaches thereof occurring before they signed.[14] Where the contract covers a course of dealing for an indefinite time, or contemplates a succession of future credits to be extended to the principal, the surety is not discharged by payments made by the principal; but the amount named in the obligation indicates the balance of the principal's account for which the surety may be held.[15] It is a well recognized principle that a surety cannot be held under obligations more onerous than those of the principal, and if the surety's liability is not continuing, he cannot be held for any credit extended to the principal after the amount designated by him has been reached, although future payments made by the principal have reduced the amount due.[16] Where one becomes surety for the price of goods sold and the creditor terminates the contract with the principal by seizing the goods, the surety is discharged, unless there is a stipulation in his contract to the contrary.[17] Where one of two cosureties remove from the state where the obligation was executed, the one remaining is not relieved from liability.[18] The relation of principal and surety is not destroyed by a judgment against them; but so long as the relation continues the equities which inhere therein obtain and are available for the surety's relief.[19]

charged, and shall continue truly and faithfully to execute and discharge, all the duties of said office."

[14] Commonwealth v. Adams, 3 Bush (Ky.) 41.

[15] Clagett v. Salmon, 5 Gill & J. (Md.) 314; In re Bentz's Estate, 17 Phila. (Pa.) 258.

[16] Stewart v. Levis, 42 La. Ann. 37, 6 So. 898; Thomas v. Stetson, 59 Maine 229. In Bank of St. Albans v. Smith, 30 Vt. 148, it was held that a surety on a note, payable at a fixed time, is not liable for a loan made to the principal after the maturity of the note.

[17] Black v. Stephen, 37 Can. L. J. (N. S.) 206.

[18] Sacramento County v. Bird, 31 Cal. 66.

[19] Stolze v. U. S. Fidelity and Guaranty Co., (Mo.) 131 S. W. 915.

CHAPTER CXV.

REVOCATION AND DISCHARGE.

§ 3950. Discharge of surety by termination of employment.
3951. When surety may require termination of employment.
3952. Discharge of surety of a lease.
3953. Discharge by destruction of subject-matter.
3954. Discharge by change as to principal.
3955. Discharge by death of principal.
3956. Discharge by death of creditor or obligee.
3957. Discharge by death of guarantor or surety.
3958. Termination of liability by notice.
3959. Discharge by new obligation.
3960. Discharge by diversion of instrument.
3961. Discharge by or after judgment.
3962. Discharge by change in obligation of principal.
3963. Discharge by change in duties of office or employment.
3964. Discharge by change in provisions of contract.
3965. Discharge by change in building contracts.
3966. Discharge by alteration of instrument.
3967. Discharge by change in parties to obligation secured.
3968. Discharge by extension of time for payment.
3969. Discharge by extending time of payment or performance.
3970. Discharge by taking additional or substituted security.
§ 3971. Discharge by judgment and execution against principal.
3972. Discharge by payment or satisfaction by principal.
3973. Discharge by payment by surety or third person.
3974. Discharge by relinquishment or loss of funds or securities.
3975. Discharge by misapplication of funds or securities by creditor.
3976. Discharge by nonperformance of conditions.
3977. Discharge by neglect to give surety notice of default.
3978. Discharge by release of cosurety.
3979. Discharge by premature payments to contractors.
3980. Rights of surety as to creditor.
3981. Rights of surety as to principal.
3982. Rights of surety as to principal after payment.
3983. Rights of surety as to cosureties.
3984. Rights of surety as to supplemental surety.
3985. Rights of creditor or obligee.
3986. Rights of creditor or obligee. —Effect of delay.
3987. Duty of creditor as to notice.
3988. Surety's liability limited to terms of contract.
3989. Rights and liabilities of sureties on negotiable instruments.
3990. Suretyship by surety companies.

§ 3950. Discharge of surety by termination of employment. —Where a contract of employment is for an indefinite length of time, or at the pleasure of the employer, the sureties on the employer's bond will be liable indefinitely unless some reservation

is made in the bond.[1] If, however, the employment is for a fixed time, the sureties will not be liable for any default occurring after that time.[2] And if the contract of employment is to do certain work, the sureties are not liable after the particular work has been accomplished.[3] If the employé resign or be removed from his office the liability of his sureties is terminated as to any default that may occur after such resignation or removal.[4] If the principal is to be appointed annually and the bond conditioned for the performance of his duties during his continuance in office, the sureties will not be liable for defaults occurring after the expiration of the year in which the bond was given, although the principal is reappointed.[5] If the language of the contract of suretyship indicates an intention to become liable for subsequent terms the sureties will be bound, but in such cases it requires that the services of the principal be continuous.[6] Where the principal

[1] Mobile &c. R. Co. v. Brewer, 76 Ala. 135; Humbolt Sav. &c. Soc. v. Weunerhold (Cal.), 20 Pac. 553; Sparks v. Farmers' Bank, 3 Del. Ch. 274. In Phillips v. Bossard, 35 Fed. 99, it is held that the sureties on a cashier's bond, reciting the election of the cashier to hold his office during the pleasure of the directors, are liable for any default occurring while he continues to act as cashier. In Mobile & M. R. Co. v. Brewer, 76 Ala. 135, where a bond by a freight agent was conditioned for the discharge of the duties of his office "during the time he holds the said appointment and until he is relieved therefrom," it was held that the sureties were bound for a default at any time before revocation or the acceptance of a new appointment.

[2] In Gundlach v. Fischer, 159 Ill. 172, an agent by a written agreement was authorized to sell as many machines as he could prior to Oct. 1, 1876; it was held that the agency continued only to that date, and the sureties on a bond given to secure the faithful performance of his duties as such agent, and the payment of all moneys received by him, was bound only for a failure by the agent to account for machines received prior to that date.

[3] United States v. West, 8 App. D. C. 59.

[4] Amicable Mut. L. Ins. Co. v. Sedgwick, 110 Mass. 163; City Ins. Co. v. Roberts, 6 Ohio Dec. 1213. In McGill v. United States Bank, 12 Wheat. (U. S.) 511, 6 L. ed. 711, it was held that where a breach of trust by a cashier was discovered, and his discharge sent to the branch where he was employed but was not communicated to the cashier until the afternoon of the day following its receipt by the president of the branch bank, that the sureties on the bond were liable for the frauds committed by the cashier on the day the discharge was communicated to him.

[5] Fresno Enterprise Co. v. Allen, 67 Cal. 505, 8 Pac. 59; Ida County Sav. Bank v. Seidensticker, 128 Iowa 54, 102 N. W. 821, 111 Am. St. 189; North St. Louis Bldg. &c. Assn. v. Obert, 169 Mo. 507, 69 S. W. 1044; Harris v. Babbitt, 4 Dill. (U. S.) 185, Fed. Cas. No. 6114. If the office is an annual one, but the time is one or more years, the principle is the same; the term is fixed, and the sureties are not liable after that period has expired. In Richardson School Fund v. Dean, 130 Mass. 242, the period was three years.

[6] In Shackamaxon Bank v. Yard, 143 Pa. St. 129, 22 Atl. 908, 24 Am. St. 521, under a bond "for and during the time of his employment by the said bank, whether under his present

is appointed or elected annually the liability of the sureties is held not to terminate at the very instant the year expires, but to continue for a reasonable time for the election and qualification of a successor; but if the principal continues in office without any reappointment the sureties cannot be held for any default occurring after the expiration of his term.[7] In a continuing contract of suretyship for the faithful performance of the duties of an agent or servant, the sureties will not be liable for any defalcation by such agent or servant occurring after the employer discovers such default and continues such agent or servant in his employ;[8] but a surety on the bond of an agent is not discharged from liability by the mere fact that the agent is continued in the employment of the obligee after he has failed to make payments promptly, of which fact the surety has not been advised.[9]

§ 3951. **When surety may require termination of employment.**—It may be stated as a general rule that when a person employed is unfaithful to his trust the employer may terminate the contract for his own protection, and his duty in this matter the surety may require to be done for his individual protection; and if, after the surety has notice or knowledge of the default of the principal, he consents to the latter's continuance in the employment, his liability will remain as before.[10] But immoral

election or under any subsequent election to the said position," etc., it was held that the sureties were bound for the whole period of the principal's service, although he was not formally re-elected from year to year. See also, to same effect, Coombs v. Hartford, 99 Maine 426, 59 Atl. 529; Mutual Bldg. &c. Assn. v. Hammell, 43 N. J. L. 78.

[7] In Black v. Oblender, 135 Pa. St. 526, 19 Atl. 945, sureties were held liable although the principal held over from March 26th to May 1st. In Lexington &c. R. Co. v. Elwell, 8 Allen (Mass.) 371, five weeks was considered not an unreasonable delay in selection of a successor to the principal. See also, Chelmsford Co. v. Demarest, 7 Gray (Mass.) 1.

[8] Rapp's Estate v. Phœnix Ins. Co., 113 Ill. 390, 55 Am. Rep. 427. The fact that an employer retains an employé in his service after he has discovered that the latter has failed to pay over money due to the employer does not release his surety upon the bond given by the employé from liability for money which the employé had embezzled before the master's discovery. See Donnell Mfg. Co. v. Jones, 49 Ill. App. 327.

[9] Home Ins. Co. v. Holoway, 55 Iowa 571, 8 N. W. 457, 39 Am. Rep. 179.

[10] Connecticut Mut. L. Ins. Co. v. Scott, 81 Ky. 540, 5 Ky. L. 639; Emery v. Baltz, 94 N. Y. 408. There is a lack of harmony in the authorities upon the application of this rule as between a private corporation, being a creditor, and the surety of one of its officers and employés, where there is a failure on the part of one such officer to give notice to the sureties of another of his dishonesty, and the

conduct which does not relate to some act or acts of dishonesty or incapacity in the business to which the employment pertains will not authorize the surety on the bond to demand the discharge of the principal.[11] Nor will a mere breach of duty or contract obligations by the principal, not amounting to dishonesty or want of integrity on his part, or fraud and concealment on the part of the employer, authorize the surety to demand a discharge of such principal.[12] On the other hand, some authorities hold that mere incompetency of negligence on the part of the servant may be so gross or habitual that good faith to the sureties would require the master to discharge the servant or at least give notice of such facts to the sureties.[13] As a rule the employer is not bound to examine the accounts of the principal, and this has been held even though a statute or a by-law required such examination to be made, and the surety signed the bond with knowledge of such statute or by-laws and with the belief that they would be enforced.[14]

§ 3952. **Discharge of surety of a lease.**—It is always the privilege of the surety of a lease, by a stipulation in his contract, to fix the time when his liability shall terminate, and he is not

continuance of the culprit in the corporate service. Some authorities hold that the rule applies. Saint v. Wheeler &c. Mfg. Co., 95 Ala. 362, 10 So. 539, 36 Am. St. 210; Ætna Ins. Co. v. Fowler, 108 Mich. 557, 66 N. W. 470. Others take a different view, Taylor v. Bank of Ky., 2 J. J. Marsh. (Ky.) 564; Pittsburg, Ft. W. & C. R. Co. v. Shaeffer, 59 Pa. St. 350.

[11] La Rose v. Logansport Nat. Bank, 102 Ind. 332, 1 N. E. 805.

[12] Lancashire Ins. Co. v. Callahan, 68 Minn. 277, 71 N. W. 261, 64 Am. St. 475; Bostwich v. Van Voorhis, 91 N. Y. 353. In Enright v. Falvey, L. R. 4 Ir. 397, it was held that where the employer has actual knowledge of defaults on the part of the person for whom the sureties are responsible justifying immediate dismissal, in order to hold the sureties as for a continuing liability or subsequent defaults they should be informed of all such circumstances as are material to enable them to decide whether they will require the employment to be terminated or will consent to its continuance, and that for this purpose a notice in general terms of a default on the part of the agent, consistent with his being merely a debtor on foot of his accounts is not enough, but distinct information of any acts of dishonesty or acts of misconduct should be given to the sureties.

[13] In Manchester F. Assur. Co. v. Redfield, 69 Minn. 10, 71 N. W. 709, it was held that the acts of the agent need not necessarily amount to positive dishonesty in order that the master's continuing him in service without notice to the sureties would amount to fraud or bad faith to the latter.

[14] Sparks v. Farmers' Bank, 3 Del. Ch. 274; Chew v. Ellingwood, 86 Mo. 260, 56 Am. Rep. 429; State v. Atherton, 40 Mo. 209; Morris Canal & Banking Co. v. Van Vorst's Admx., 21 N. J. L. 100; Pittsburg, Ft. W. & C. R. Co. v. Shaeffer, 59 Pa. St. 350.

liable after its expiration, although the lessee holds over.[15] But one who guarantees the covenants of a lease is not discharged by an assignment of the lease without his knowledge, but with the landlord's consent, such assignment not being in violation of the terms of the lease.[16] If the lease carry an option for renewal, and the lessee holds over, the surety's liability will terminate at the expiration of the time fixed, unless the language indicates a contrary intention.[17] A surety is discharged by a surrender of the premises, accepted by the landlord, but he remains liable for rent accrued to date of surrender and acceptance.[18] But the surety is not discharged from liability if the lessee abandon the premises without cause, even though others occupy the premises, or the landlord failed to relet the premises when he had an opportunity.[19]

§ 3953. **Discharge by destruction of subject-matter.**—As a general rule, if the subject-matter of the contract is destroyed and the principal is discharged thereby the surety will also be discharged, unless he has undertaken absolutely that the property shall be returned.[20] But it has been held that where the surety has undertaken that the property be returned, he is discharged if the property be destroyed without negligence on the part of the principal or himself, so that performance of his contract has become impossible. Thus where an aeronaut borrowed a balloon, which was destroyed by fire without fault or negligence on the

[15] Brewer v. Knapp, 1 Pick. (Mass.) 332.

[16] Flank v. Kuhlmann, 63 Misc. (N. Y.) 334, 117 N. Y. S. 110.

[17] It was held in Coe v. Vogdes, 71 Pa. St. 383, that where a lease to the principal and surety for three years with the privilege of five, in consideration of the payment of rent by them, provided that if the lessee continued to occupy the premises after the term "such tenancy shall be in accordance with the terms of this lease," the surety was liable for the rent accruing after the expiration of three years. See also, Webb v. Bailey, 17 Ky. L. 1117, 33 S. W. 935. Where a lease for one year, with "privilege to the lessee to retain the house at the same rent as long as she might wish;" held, that the lessee's surety was not bound beyond the year without a new agreement by him. See also, Brewer v. Thorp, 35 Ala. 9.

[18] White River, L. & W. R. Co. v. Star Ranch &c. Co., 77 Ark. 128, 91 S. W. 14.

[19] Ledoux v. Jones, 20 La. Ann. 539.

[20] In Carney v. Walden, 16 B. Mon. (Ky.) 388, it was held that a surety, upon an obligation containing a covenant for the return of a slave, was liable for the value of the slave, whose death had been caused by the inhuman treatment of the principal.

part of any one, the surety was not held liable.[21] If a building, which is the subject of a lease, is destroyed, the surety is liable for rent, unless the contract provides that the lease shall terminate in such event,[22] and if the tenant is not released from his liability to pay rent on account of the destruction of the property, a surety for the rent remains liable, even though the landlord was fully insured.[23]

§ 3954. Discharge by change as to principal.—In general, the assignment of a contract by the principal will discharge the surety from liability for its performance, unless the authority to assign was contemplated by the contract.[24] A surety for one person as principal is not liable for the acts of a partnership subsequently formed by that person with another,[25] but the mere fact of the principal's associating himself with another person will not release the surety if the principal continue to act individually in the same capacity as he did before.[26] A surety for joint principals is not liable for the independent acts of any one of them even though the bond is conditioned for performance by three named persons as principals "and the survivors and survivor of them, and such other person as should or might act at any time or times thereafter, in partnership with them, or any or either of them."[27] A surety upon a partnership bond is liable only for a breach of the obligation occurring before the dissolution of the firm, but if the surety has become liable for the performance of a particular contract by a partnership, its subsequent dissolution before the completion of the contract will not release him from liability for each of the former partners so far as that particular contract is concerned.[28] If a

[21] Meridian Fair Assn. v. North Birmingham R. Co., 70 Miss. 808, 12 So. 555.

[22] Taylor v. Hortop, 22 U. C. C. P. 542.

[23] Kingsbury v. Westfall, 61 N. Y. 356.

[24] Sachs v. American Surety Co., 72 App. Div. (N. Y.) 60, 76 N. Y. S. 335; Bedford v. Jones, 5 Leg. Gaz. (Pa.) 230.

[25] Connecticut Mut. L. Ins. Co. v. Scott, 81 Ky. 540, 5 Ky. L. 639; Parham Sewing Mach. Co. v. Brock, 113 Mass. 194.

[26] Dupee v. Blake, 148 Ill. 453, 35 N. E. 867; Gilbert v. State Ins. Co., 3 Kans. App. 1, 44 Pac. 442.

[27] Cambridge University v. Baldwin, 5 M. & W. 580; State v. Boon, 44 Mo. 254; Mathews v. Garman, 110 Mich. 559, 68 N. W. 243.

[28] Freeman v. Berkey, 45 Minn. 438, 48 N. W. 194; Kauffmann v. Cooper, 46 Nebr. 644, 65 N. W. 796.

surety has become liable for a principal in a gas contract and the building is afterward occupied by another person, the surety is not liable for that other person,[29] and where, with the consent of all parties in interest, a new tenant is substituted in the place of one already in possession, the transaction amounts to the surrender of the lease by the latter, and his surety is thereby discharged.[30]

§ 3955. **Discharge by death of principal.**—A surety is not discharged by the death of the principal where the liability survives.[31] If the contract of suretyship is irrevocable, the death of the principal has no effect upon the liability of the surety,[32] but if the liability of the principal terminates with his death, his surety cannot be held for anything which arises thereafter.[33] As to any default which occurred prior to the death of the principal the surety will be bound.[34] A surety for a partnership is not liable for the acts of a surviving member of the firm after the death of one, unless a contrary intention appears on the face of the contract.[35] But generally in case there were two or more principals, upon the death of one or more the surety remains liable for the survivor or survivors.[36].

§ 3956. **Discharge by death of creditor or obligee.**—The death of the obligee or creditor is held to terminate the suretyship, although the principal is continued in the same capacity by the obligee's executor.[37] Where a bond is given by one partner to the others, and one of the others dies, the surety on the bond

[29] Manhattan Gas Light Co. v. Ely, 39 Barb. (N. Y.) 174, 25 How. Pr. (N. Y.) 237.

[30] Koenig v. Miller Bros. Brewing Co., 38 Mo. App. 182.

[31] American Surety Co. v. State, 46 Ind. App. 126, 90 N. E. 99; Macdonald v. O'Shea, 58 Wash. 169, 108 Pac. 436.

[32] Camp v. Watt, 14 Ala. 616; State v. Soale, 36 Ind. App. 73, 74 N. E. 1111; Baker v. Elliott, 73 Maine 392.

[33] In Stinson v. Prescott, 15 Gray (Mass.) 335, it was held that sureties on a bond given by a husband for the expenses of his wife at a hospital are not liable for expenses incurred subsequent to the husband's death.

[34] McCloskey v. Wingfield, 32 La. Ann. 38; Elmendorf v. Whitney, 153 Pa. St. 460, 25 Atl. 607; Scantlin v. Kemp, 34 Tex. 388.

[35] Simson v. Cooke, 1 Bing. 452, 8 E. C. L. 590; Connecticut Mut. L. Ins. Co. v. Bowler, Holmes (U. S.) 263, Fed. Cas. No. 3106.

[36] Brooks v. Hope, 139 Mass. 351, 31 N. E. 728; Dobyns v. McGovern, 15 Mo. 662.

[37] Barker v. Parker, 1 Durn. & E. 287.

is not liable for any acts of the principal thereafter.[38] But where the intention, appearing from the instrument, is to be bound to the obligees as a class or changing body, a change in the personnel of the body or in the number thereof will not operate as a discharge of the surety.[39] Where a corporation is the creditor or obligee, its dissolution releases sureties on a bond executed to it, and a revival of the charter will not renew their liability for defaults subsequent to the dissolution.[40]

§ 3957. **Discharge by death of guarantor or surety.**—As to whether the death of the guarantor will terminate the guaranty may depend upon whether the contract is an absolute or continuing contract of guaranty. It has been held that a continuing guaranty or one which could be ended at the will of the guarantor while living will be terminated by his death and notice thereof,[41] but there is a lack of harmony in the decisions whether death alone will terminate the liability, or whether the creditor must have knowledge of the death.[42] But the death of one jointly liable on a revocable guaranty does not relieve the other. He should give notice if he does not wish to remain individually liable.[43] But the death of a surety on a bond does not end the suretyship, and his estate is liable not only for defaults which

[38] Chapman v. Beckington, 3 Q. B. 703, 3 G. & D. 33; Bodenham v. Purchas, 2 B. & Ald. 39, 20 Rev. Rep. 342; Bowers v. Cobb, 31 Fed. 678, held that where, by an arrangement between two sureties on a bond, one of them is released from liability as between themselves, sureties on an indemnifying bond given to them are discharged.

[39] Metcalf v. Bruin, 2 Campb. 422, 12 East 400; Gargan v. School Dist. No. 15, 4 Colo. 53.

[40] Bank of Washington v. Barrington, 2 Pen. & W. (Pa.) 27.

[41] Harris v. Fawcett, L. R. 8 Ch. App. 866; Aitkin v. Lang's Admr., 106 Ky. 652, 51 S. W. 154, 90 Am. St. 263; Hyland v. Habich, 150 Mass. 112, 22 N. E. 765, 6 L. R. A. 383, 15 Am. St. 174; Jordan v. Dobbins, 122 Mass. 168, 23 Am. Rep. 305.

[42] In Gay v. Ward, 67 Conn. 147, 34 Atl. 1025, 32 L. R. A. 818, the estate of the deceased guarantor was held liable for advances made after the death of the guarantor, the creditor being in ignorance thereof. See to the same effect, Bradbury v. Morgan, 1 Hurl. & Colt. 249; Rapp's Estate v. Phœnix Co., 113 Ill. 390, 55 Am. Rep. 427; Menard v. Scudder, 7 La. Ann. 385, 56 Am. Dec. 610. In Aitken v. Lang's Admr., 106 Ky. 652, 21 Ky. L. 247, 51 S. W. 154, 90 Am. St. 263, a different view is taken, and it is held that the guaranty is revoked at once by the death of the guarantor, although the creditor has no notice thereof. See to same effect, Hyland v. Habich, 150 Mass. 112, 22 N. E. 765, 6 L. R. A. 383, 15 Am. St. 174; Illinois Roofing & Supply Co. v. Gorton, 19 Pa. Co. Ct. 124, 6 Pa. Dist. Ct. 407; Michigan State Bank v. Leavenworth's Estate, 28 Vt. 209.

[43] Fennell v. McGuire, 21 U. C. C. P. 134; Richardson v. Draper, 23 Hun (N. Y.) 188, affd. 87 N. Y. 337.

occurred prior to his death, but also for those which occurred thereafter.[44]

§ 3958. Termination of liability by notice.—In most states, under the common law, if the consideration for the surety's contract is entire, and has been executed fully, he cannot terminate his liability by notice, but he remains liable indefinitely,[45] but if the consideration for the surety's contract is executory—if his liability depends upon some future act of the creditor or obligee, and no time has been fixed in the contract, the surety can terminate his liability by notifying the creditor or obligee that he withdraws, remaining liable, however, for any rights previously acquired by such creditor or obligee.[46] The surety may expressly provide in his contract for the right to terminate his liability by notice, and where he has reserved that right, such notice must be clear and explicit, and the right exercised in a reasonable manner.[47] The right to terminate his contract is sometimes given a surety by statute.[48] In most states at common law

[44] Mowbray v. State, 88 Ind. 324; Moore v. Carpenter, 10 Ky. L. (abstract) 814; Forbes v. Harrington, 171 Mass. 386, 50 N. E. 641; White's Exrs. v. Commonwealth, 39 Pa. St. 167; Coleman v. Stone's Exr., 85 Va. 386, 7 S. E. 241; Donnerberg v. Oppenheimer, 15 Wash. 290, 46 Pac. 254. See also, Rapp's Estate v. Phœnix Ins. Co., 113 Ill. 390, 55 Am. Rep. 427; Palmer v. Pollock, 26 Minn. 433, 4 N. W. 1113; Hecht v. Weaver, 13 Sawy. (U. S.) 199, 34 Fed. 111. Under the common-law rule of survivorship where the liability of the surety was joint, his estate was not liable after his death (2 Brandt on Suretyship (3d ed.) § 157), but under various statutory enactments the death of a surety does not affect the liability of his estate, so the statute must be examined in each instance where it is desired to ascertain the rule. And see as to right to contribution by cosurety, Sanders v. Weelburg, 107 Ind. 266, 7 N. E. 573; Johnson v. Harvey, 84 N. Y. 363, 38 Am. Rep. 515.

[45] Calvert v. Gordon, 7 B. & C. 809, 6 L. J. K. B. (O. S.) 187, 14 E. C. L. 361; Ripley Bldg. Co. v. Coors, 37 Colo. 78, 84 Pac. 817; Lewiston v. Gagne, 89 Maine 395, 36 Atl. 629, 56 Am. St. 432; Crane v. Newell, 2 Pick. (Mass.) 612, 13 Am. Dec. 461; Greenawalt v. Kreider, 3 Pa. St. 264, 45 Am. Dec. 639. In Miller v. Speed, 9 Heisk. (Tenn.) 196, it was held that a surety, on the death of the principal on a private bond to secure the repayment of money, could file a bill, if he was in danger of loss, to compel a new bond, or the payment of the fund into court.

[46] White Sewing Machine Co. v. Courtney, 141 Cal. 674, 75 Pac. 296; Jeudevine v. Rose, 36 Mich. 54; Emery v. Baltz, 94 N. Y. 408.

[47] La Rose v. Logansport Nat. Bank, 102 Ind. 332, 1 N. E. 805; Reilly v. Dodge, 131 N. Y. 153, 29 N. E. 1011; Bostwick v. Van Voorhis, 91 N. Y. 353; Gass v. Stinson, 2 Sumn. (U. S.) 453, Fed Cas. No. 5260.

[48] White Sewing Machine Co. v. Courtney, 141 Cal. 674, 75 Pac. 296; McKim v. Demmon, 130 Mass. 404; In re Thurber's Estate, 162 N. Y. 244, 56 N. E. 631; Bank of Tarboro v. Fidelity & Deposit Co., 128 N. Car. 366, 38 S. E. 908, 83 Am. St. 682;

a surety cannot require the creditor to proceed against the principal.[49] Where statutes have been enacted, giving the surety the right to terminate his liability by notice, only those sureties who are sureties in the strict and narrow sense of the term can avail themselves of the right; and it does not extend to indorsers, guarantors and sureties by operation of law, nor does the statute apply to unliquidated amounts.[50] The creditor may waive a written notice by a promise to sue upon receipt of an oral notice,[51] and the surety may withdraw his notice, in which case his liability continues.[52]

§ 3959. **Discharge by new obligation.**—It has been said that where an officer, after having given one bond, gives a second bond covering the same duties, the second one will be cumulative, and the sureties upon the first one will remain liable, unless it is apparent that the second bond is intended to be substituted for the first.[53] If the new bond is made to take the place of the old one, the sureties on the prior one are not discharged as to defaults which already have occurred.[54] In any event the

Kincaid v. Sharp, 3 Head (Tenn.) 151.

[49] Hefferlin v. Krieger, 19 Mont. 123, 47 Pac. 638; White v. Savage, 48 Ore. 604, 87 Pac. 1040. In some states, at common law, a request by the surety to the creditor to sue the principal will discharge the surety if the request be not complied with and the principal afterwards becomes insolvent. See Thompson v. Robinson, 34 Ark. 44; Colgrove v. Tallman, 67 N. Y. 95, 23 Am. Rep. 90. In Campbell v. Sherman, 151 Pa. St. 70, 25 Atl. 35, 31 Am. St. 735, it was held that the notice to the creditor must be accompanied by a statement that the surety will not continue liable unless there be compliance therewith. Fidler v. Hershey, 90 Pa. St. 363, held that the notice must be given after maturity of the debt. In some states there must be an offer to indemnify against expenses. Huey v. Pinney, 5 Gil. (Minn.) 246. The common-law notice must be explicit and clear but need not be in writing. Darby v. Berney Nat. Bank, 97 Ala. 643, 11 So. 881; Klingensmith v. Klingensmith's Exr., 31 Pa. St. 460. A discharge of one cosurety by notice will not discharge another. Gordon v. Moore, 44 Ark. 349, 51 Am. Rep. 606. But see, contra, Towns v. Riddle, 2 Ala. 694. Also at common law an indorser cannot terminate his liability by notice. Stephens v. Monongahela Nat. Bank, 88 Pa. St. 157, 32 Am. Rep. 438. See also, Trimble v. Thorne, 16 Johns. (N. Y.) 152, 8 Am. Dec. 302.

[50] It has been held that such statutes apply to sureties proper, though not shown on the instrument to be such. Ward v. Stout, 32 Ill. 399; Hamrick v. Barnett, 1 Ind. App. 1, 27 N. E. 106; Boatmen's Sav. Bank v. Johnson, 24 Mo. App. 316.

[51] Taylor v. Davis, 38 Miss. 493; Clark v. Osborn, 41 Ohio St. 28.

[52] Gillilan v. Ludington, 6 W. Va. 128.

[53] Childs' Suretyship and Guaranty, § 113.

[54] Grand Junction R. Co. v. Pope, 30 U. C. C. P. 633; Sharpe v. Connelly, 105 N. Car. 87, 11 S. E. 177; Hawley v. United States Fidelity &c.

surety on the old bond is not released by the making of the new bond until the new one is executed and accepted.[55]

§ 3960. Discharge by diversion of instrument.—If one becomes a surety on a note or other obligation purporting to be executed for a specified purpose, he is not liable if it is used for a different purpose without his consent, to any one having notice or knowledge of such purpose and the diversion therefrom,[56] but if the person who takes the instrument has no notice or knowledge of the diversion from the use for which the surety executed it he may hold the surety.[57] The rule in some cases is that where there is a general intention to become surety to raise money without regard to whom the note should be passed, it is immaterial by whom the money is advanced, provided the purpose has been accomplished,[58] while in other cases it is held that if the note is not delivered to the payee but is sold to a third person without the surety's consent it cannot be enforced against him.[59]

§ 3961. Discharge by or after judgment.—While the authorities are not uniform on the subject, it may be stated as a general proposition that whatever acts will discharge a surety before judgment will have a like effect thereafter, and the relation of principal and surety will not be terminated by reason of a judg-

Co., 100 App. Div. (N. Y.) 12, 90 N. Y. S. 893, affd. 184 N. Y. 549, 76 N. E. 1096.

[55] Reilly v. Dodge, 59 N. Y. Super. Ct. 199, 38 N. Y. St. 352, 14 N. Y. S. 129, affd. 131 N. Y. 153, 29 N. E. 1011. Under a statute requiring a new bond "instead of the bond required by" a former act, sureties on the former bonds were discharged upon such new bonds being given. United States v. Wardwell, 5 Mason (U. S.) 82, Fed. Cas. No.16640.

[56] Ham v. Greve, 34 Ind. 18; Crossley v. Stanley, 112 Iowa 24, 83 N. W. 806, 84 Am. St. 321; Gano v. Farmers' Bank, 103 Ky. 508, 45 S. W. 519; Chaffe v. Taliaferro, 58 Miss. 544; St. Louis Nat. Bank v. Flanagan, 129 Mo. 178, 31 S. W. 773; Benjamin v. Rogers, 126 N. Y. 60, 26 N. E. 970.

[57] Davis v. Atlanta Nat. Bank, 66 Ga. 651; Lovelace v. Lovelace, 136 Ky. 452, 124 S. W. 400, 136 Am. St. 271; Chalaron v. McFarlane, 9 La. 227; Citizens Nat. Bank v. Durrill, 61 Mo. App. 643; Farmers Bank v. Burchard, 3 Vt. 346.

[58] Thompson v. Armstrong, 5 Ala. 383; Meeker v. Shanks, 112 Ind. 207, 13 N. E. 712; Dunn v. Weston, 71 Maine 270, 36 Am. Rep. 310; Greene County Bank v. Chapman, 134 Mo. 427, 35 S. W. 1150.

[59] Howe v. Selby, 53 Iowa 670, 6 N. W. 39; Chase v. Hathorn, 61 Maine 505 (holding that the surety's consent may be implied from the conduct of the parties, or that he may ratify the act of the principal); Prescott v. Brinsley, 6 Cush. (Mass.) 233; Dewey v. Cochran, 49 N. Car. 184; Janes v. Benson, 155 Pa. St. 489, 26 Atl. 752, 35 Am. St. 899; Eck v. Schuermeyer (Tex.), 29 S. W. 241.

ment against them having been obtained.[60] The rule is the same whether the judgment be obtained against the principal and surety jointly or against the principal alone.[61] While the surety has the same liability after judgment as he had before, he also has the same rights, which the creditor must respect; and any acts of the creditor which would have discharged the surety before judgment will discharge him if committed afterward.[62] It is held that an extension of time given to the principal after the recovery of a judgment against the surety will discharge the latter,[63] but in some jurisdictions a different view is taken.[64]

§ 3962. Discharge by change in obligation of principal.—In general, any agreement between the creditor and the principal in the obligation or debt which essentially varies the terms of the contract, without the consent of the surety, will release the surety from liability,[65] and this is true, although the surety may

[60] New York Bank Note Co. v. Kerr, 77 Ill. App. 53; West v. Brison, 99 Mo. 684, 13 S. W. 95; First Nat. Bank v. Eureka Lumber Co., 123 N. Car. 24, 31 S. E. 348 (holding that the confession of a judgment by the maker of a note in favor of the holder thereof does not discharge sureties or indorsers who are not parties thereto). See also, Carpenter v. Devon, 6 Ala. 718; Crawford v. Gaulden, 33 Ga. 173; Gipson v. Ogden, 100 Ind. 20; Allison v. Thomas, 29 La. Ann. 732; Anthony v. Capel, 53 Miss. 350; Bangs v. Strong, 4 N. Y. 315. But in Bay v. Tallmadge, 5 Johns. Ch. (N. Y.) 305, it was held that after judgment and execution against bail and sureties there was an end to the relation of principal and surety and that the bail could not claim any advantage against the creditor on the ground of want of due diligence in prosecuting the principal debtor. In Ware v. Millican, (Tex.) 30 S. W. 728, it was held that the release of some of the sureties on an injunction bond after judgment did not release the others.

[61] Manufacturers' & Mechanics' Bank v. Bank of Pennsylvania, 7 Watts & S. (Pa.) 335, 42 Am. Dec. 240.

[62] Brown v. Ayer, 24 Ga. 288; Green v. Raftes, 67 Ind. 49; Ames v. Maclay, 14 Iowa 281; West v. Brison, 99 Mo. 684, 13 S. W. 95.

[63] Blazer v. Bundy, 15 Ohio St. 57; Pilgrim v. Dykes, 24 Tex. 383. See also, Ide v. Churchill, 14 Ohio St. 372 (holding that an extension of time given to one surety will discharge another); Gipson v. Ogden, 100 Ind. 20; Wingate v. Wilson, 53 Ind. 78; Hancock v. Wilson, 46 Iowa 352; Manufacturers' & Mechanics' Bank v. Bank of Pennsylvania, 7 Watts & S. (Pa.) 335, 42 Am. Dec. 240.

[64] Duff v. Barrett, 15 Grant Ch. (U. C.) 632; The Colonel Howard v. Hayden, Fed. Cas. No. 3026; Bryant v. Rudisell, 4 Heisk. (Tenn.) 656, but see Williams v. Wright, 9 Humph. (Tenn.) 493.

[65] United States v. McIntire, 111 Fed. 590; Burt v. McFadden, 58 Ill. 479; Orleans & J. R. Co. v. International Const. Co., 113 La. 409, 37 So. 10; Bullock v. Taylor, 39 Mich. 137, 33 Am. Rep. 356; Schuster v. Weiss, 114 Mo. 158, 21 S. W. 438, 19 L. R. A. 182; Mallory v. Brent, 75 Mo. App. 473; Rothnell v. Paine, 3 How. Pr. (N. S.) (N. Y.) 187, affd. 9 Civ. Proc. (N. Y.) 128.

sustain no injury by the change, or it may even be for his benefit.[66] In determining whether a surety is discharged by an alteration of the principal's contract without his consent, the question is not whether the change was or could be prejudicial to him, but whether it effected a material alteration of the agreement to which his undertaking of suretyship related; and if it did, he is discharged.[67] While a surety may be discharged by subsequent transactions between the principal and creditor, to which he has not given his consent, yet he may remain liable by giving his consent in advance, at the time of negotiations between principal and creditor or at any subsequent time.[68]

§ 3963. **Discharge by change in duties of office or employment.**—A change in the duties of the principal will usually discharge the surety on his bond, the surety being ignorant of the change.[69] Where, however, no particular time of settlement is provided for in a bond securing the faithful performance of the duties of an agent in paying over money, but it is left to the discretion of the obligee, the surety cannot claim a discharge on the plea that the obligee changed the time and manner of settlement,[70] but if the contract of employment require remittances at stated periods, and the obligee give the principal authority to retain money for a longer period, the surety will be discharged.[71] If the principal's duty to account is fixed at stated periods by statute it is held that an extension of time will not operate to

[66] Judah v. Zimmerman, 22 Ind. 388; Cartmel v. Newton, 79 Ind. 1; Bauschard Co. v. Fidelity & Casualty Co. of New York, 25 Pa. Super. Ct. 370; Dey v. Martin, 78 Va. 1; Leonard v. County Court of Jackson County, 25 W. Va. 45.

[67] Zeigler v. Hallahan, 131 Fed. 205, 66 C. C. A. 1; Calloway v. Snapp, 78 Ky. 561, 1 Ky. L. 229; Hyde v. Miller, 168 N. Y. 590, 60 N. E. 1113; Cudahy Packing Co. v. Shepard, 37 Tex. Civ. App. 1, 82 S. W. 786.

[68] Pelton v. Prescott, 13 Iowa 567; Smith v. Molleson, 148 N. Y. 241, 42 N. E. 669; Sage v. Strong, 40 Wis. 575.

[69] Roberts v. Donovan, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599; Stevens v. Partridge, 109 Ill. App. 486; Burley v. Hitt, 54 Mo. App. 272; Bagley v. Clarke, 20 N. Y. Super. Ct. 94. In Lionberger v. Krieger, 88 Mo. 160, it was held that the increase of the capital stock of a bank does not discharge the sureties on the cashier's bond. In Singer v. Reynolds, 168 Mass. 588, 47 N. E. 438, 60 Am. St. 417, it is held that a change in a contract of employment, unknown to the surety, and increasing the risk, works no discharge from liability on a bond given the employer, stating that it "is expressly intended as a continuing guaranty," and conditioned, after reciting entry of the employé into the service of the employers, "for the transaction of such business as they might intrust to him."

[70] Lake v. Thomas, 84 Md. 608, 36 Atl. 437.

[71] Burley v. Hitt, 54 Mo. App. 272.

discharge the surety,[72] and in a number of decisions a statute extending the time of settlement of an officer, although enacted subsequent to the execution of the bond, is not permitted to discharge the sureties who are held to have bound themselves subject to the right of the state to make such provisions.[73]

§ 3964. Discharge by change in provisions of contract.—A surety cannot, at law or in equity, be bound further than by the very terms of his contract; and, if the principal and the obligee change the terms of it materially without his consent, the surety is discharged,[74] and it is stated broadly that any dealings with the principal debtor by the creditor, amounting to a departure from the contract by which a surety is to be bound, and which by possibility might materially vary or enlarge the latter's liability, without his assent, discharges the surety.[75]

§ 3965. Discharge by change in building contracts.—The general rule of law as to the effect of a failure to perform conditions in a contract of suretyship applies to sureties for building contracts, and to hold the surety the conditions imposed by him must be complied with. Thus, his contract may expressly stipulate for notice to be given him of the commencement of the work,[76] the amounts to be paid during the progress of the work,[77] that payments are to be made on estimates only,[78] that liens must be released,[79] that certain insurance shall be procured,[80] the man-

[72] Whitby v. Flint, 9 U. C. C. P. 449; Olean v. King, 42 Hun (N. Y.) 651, 5 N. Y. St. 169, affd. 116 N. Y. 355, 22 N. E. 559; Locke v. Postmaster-General, 3 Mason (U. S.) 446, Fed. Cas. No. 8441.

[73] State v. Swinney, 60 Misc. 39, 45 Am. Rep. 405; Worth v. Cox, 89 N. Car. 44; Smith v. Commonwealth, 25 Grat. (Va.) 780. For decisions holding to the contrary see People v. McHatton, 7 Ill. 638; Davis v. People, 1 Gilm. (Ill.) 409; State v. Roberts, 68 Mo. 234, 30 Am. Rep. 788; Johnson v. Hacker, 8 Heisk. (Tenn.) 388.

[74] Bethune v. Dozier, 10 Ga. 235; Miller v. Stewart, 4 Wash. C. C. (U. S.) 26, Fed. Cas. No. 9591.

[75] Mayhew v. Boyd, 5 Md. 102, 59 Am. Dec. 101.

[76] Orleans &c. R. Co. v. International Constr. Co., 113 La. 409, 37 So. 10.

[77] Chester v. Leonard, 68 Conn. 495, 37 Atl. 397.

[78] First Nat. Bank v. Fidelity & Deposit Co., 145 Ala. 335, 40 So. 415, 5 L. R. A. (N. S.) 418, 117 Am. St. 45; Chester v. Leonard, 68 Conn. 495, 37 Atl. 397; Getchell &c. Mfg. Co. v. National Surety Co., 124 Iowa 617, 100 N. W. 556; Brennan v. Clark, 29 Nebr. 385, 45 N. W. 472.

[79] Shelton v. American Surety Co., 131 Fed. 210, 66 C. C. A. 94.

[80] Watts v. Shuttleworth, 5 H. & N. 235, 29 L. J. Exch. 229; Gallagher v. St. Patrick's Church, 45 Nebr. 535, 63 N. W. 864. But see Hohn v. Shideler, 164 Ind. 242, 72 N. E. 575, holding that sureties are not dis-

ner of making changes,[81] and for the giving of additional surety.[82] It is universally held that, in the absence of stipulations in a working contract or in the bond of the contractor accompanying the contract, permitting the parties to the contract to make alterations in the work to be done, a material alteration made without the consent of the surety on the contractor's bond will discharge such surety.[83] But where the contract for the construction of a building provides that changes in the plans and specifications may be made, and a bond is given to secure the performance of the contract, the contract becomes a part of the bond, and the surety is deemed to consent in advance to a change from the original plans.[84] A change in the kind or quantity of materials from those provided in the contract of construction, without the consent of the surety on the contractor's bond, will be deemed a material change in the contract, and will operate to discharge the surety on such bond, though it did not increase the cost of the building;[85] likewise any change not provided for in the original contract whereby additional work is done will usually relieve the surety on the contractor's bond from liability.[86] But an immate-

charged by a failure of the owner to insure as agreed, if there is no loss which such insurance would have covered.

[81] Truckee Lodge No. 14 I. O. O. F. v. Wood, 14 Nev. 293. See also, McConnell v. Poor, 113 Iowa 133, 84 N. W. 968, 52 L. R. A. 312; Cowles v. United States Fidelity &c. Co., 32 Wash. 120, 72 Pac. 1032.

[82] Chester v. Leonard, 68 Conn. 495, 37 Atl. 397.

[83] Forst v. Leonard, 116 Ala. 82, 22 So. 481; O'Neal v. Kelley, 65 Ark. 550, 47 S. W. 409; Barrett-Hicks Co. v. Glas, 9 Cal. App. 491, 99 Pac. 856; Haigler v. Adams, 5 Ga. App. 637, 63 S. E. 715; Stillman v. Wickham, 106 Iowa 597, 76 N. W. 1008; Morgan County v. McRae, 53 Kans. 358, 36 Pac. 717; Livingston v. Albany, 161 N. Y. 602, 56 N. E. 148; Reissaus v. Whites, 128 Mo. App. 135, 106 S. W. 603; United States v. Freel, 186 U. S. 309, 46 L. ed. 1177, 22 Sup. Ct. 875; Guthrie v. Carpenter, 162 Ind. 417, 70 N. E. 486; Fransioli v. Thompson, 55 Wash. 259, 104 Pac. 278.

[84] Higgins v. Quigley, 23 Ind. App. 348, 54 N. E. 136; Young v. Young, 21 Ind. App. 509, 52 N. E. 776; Getchell &c. Mfg. Co. v. National Surety Co., 124 Iowa 617, 100 N. W. 556; Smith v. Molleson, 148 N. Y. 241, 42 N. E. 669. See also, Roennigke v. Errig (Mo. App.), 151 S. W. 765.

[85] Burnes' Estate v. Fidelity & Deposit Co., 96 Mo. App. 467, 70 S. W. 518.

[86] United States v. Freel, 186 U. S. 309, 46 L. ed. 1177, 22 Sup. Ct. 875; House v. American Surety Co., 21 Tex. Civ. App. 590, 54 S. W. 303. In Fullerton Lumber Co. v. Gates, 89 Mo. App. 201, it was held that a subsequent independent agreement of the parties to do other and different work for the owner will not discharge the sureties on the contractor's bond, though done on the same building. Compare also, Moore v. Fountain, (Miss.), 8 So. 509.

rial alteration in the work to be done does not discharge the sureties on the contractor's bond.[87]

§ 3966. **Discharge by alteration of instrument.**—It may be stated as a general rule, that any material alteration either in the contract of suretyship or in the contract the performance of which is secured, without the consent of the surety, will release such surety from liability.[88] There are many transactions that may be had between the principal and creditor which would have no effect so far as their respective rights and liabilities are concerned, but will terminate the liability of the surety in the absence of consent on his part.[89] It has often been held that sureties are favorites of the law and as such are entitled to stand strictly upon the terms of their contract, and if such contract is changed or altered in a material matter for a consideration without their knowledge or consent such alteration will discharge them from liability thereon,[90] nor does the fact that the altered contract is not carried out affect the operation of the rule.[91] A mere spoliation of the instrument or change made by a third party without the knowledge of the creditor will not ordinarily affect the liability of a surety thereon,[92] and so if the change has been made by the creditor himself by accident, his right to enforcement will not be necessarily affected.[93] It has been held that a change in a building contract, to which the owner of the building consents will take away the right of such owner to hold the

[87] Prescott Nat. Bank v. Head, 11 Ariz. 213, 90 Pac. 328; Eureka Stone Co. v. First Christian Church, 86 Ark. 212, 110 S. W. 1042, 126 Am. St. 1088; Hohn v. Shideler, 164 Ind. 242, 72 N. E. 575; Grafton v. Hinkley, 111 Wis. 46, 86 N. W. 859. It is presumed that slight immaterial alterations were contemplated by the parties at the time of the original contract and, therefore, such changes do not release the surety. Hohn v. Shideler, 164 Ind. 242, 72 N. E. 575.

[88] Chester v. Leonard, 68 Conn. 495, 37 Atl. 397; Worthan v. Brewster, 30 Ga. 112; McCartney v. Ridgway, 160 Ill. 129, 43 N. E. 826, 32 L. R. A. 555; Hall v. Smith, 14 Bush (Ky.) 604; Orleans &c. R. Co. v. International Constr. Co., 113 La. 409, 37 So. 10; Sasscer v. Young, 6 Gill & J. (Md.) 243; Brigham v. Wentworth, 11 Cush. (Mass.) 123.

[89] Rockville Nat. Bank v. Holt, 58 Conn. 526, 20 Atl. 669, 18 Am. St. 293; Corlies v. Estes, 31 Vt. 653.

[90] Parker Land & Imp. Co. v. Ayers, 43 Ind. App. 513, 87 N. E. 1062.

[91] O'Neal v. Kelley, 65 Ark. 550, 47 S. W. 409. And the rule is applied even though the alteration may be for the benefit of the surety. Stillman v. Wickham, 106 Iowa 597, 76 N. W. 1008.

[92] Force v. Elizabeth, 28 N. J. Eq. 403, reversed 29 N. J. Eq. 587; State v. Berg, 50 Ind. 496.

[93] Nevins v. De Grand, 15 Mass. 436.

surety liable for a breach of the contract, but would not affect the rights of employés, who were not parties to the change,[94] and a surety may remain liable on an altered instrument if he has been negligent and it gets into the hands of a purchaser for value without notice.[95] Alterations such as a change as to the place of performance,[96] a change in the time of payment, if the time of performance is calculated from the date,[97] a change in the amount whether greater or smaller,[98] a change in the rate, time of payment or beginning, or the erasing of a provision for the payment of interest,[99] and the addition or erasure of signatures are each and all material alterations, and the surety on an instrument so altered without his consent would not be liable.[1]

§ 3967. Discharge by change in parties to obligation secured.—Following the settled rule that a surety is not to be held beyond the terms of his contract, any change in the parties to the obligation secured will discharge him from liability. Thus it is held that the erasure of the name of the principal, or of a cosurety will release the surety;[2] also by substituting principals or

[94] United States v. National Surety Co., 92 Fed. 549, 34 C. C. A. 526; Doll v. Crume, 41 Nebr. 655, 59 N. W. 806.

[95] Blakey v. Johnson, 13 Bush (Ky.) 197, 26 Am. Rep. 254; Hackett v. First Nat. Bank, 114 Ky. 193, 24 Ky. L. 1002, 70 S. W. 664.

[96] Pelton v. San Jacinto Lumber Co., 113 Cal. 21, 45 Pac. 12; Southwark Bank v. Gross, 35 Pa. St. 80.

[97] Brannum Lumber Co. v. Pickard, 33 Ind. App. 484, 71 N. E. 676.

[98] Sans v. People, 3 Gilm. (Ill.) 327; Sage v. Strong, 40 Wis. 575.

[99] Coburn v. Webb, 56 Ind. 96, 26 Am. Rep. 15; Marsh v. Griffin, 42 Iowa 403; Waterman v. Vose, 43 Maine 504; Thompson v. Massie, 41 Ohio St. 307.

[1] Crandall v. First Nat. Bank, 61 Ind. 349; Bell v. Mahin, 69 Iowa 408, 29 N. W. 331; Ward v. Hackett, 30 Minn. 150, 14 N. W. 578, 44 Am. Rep. 187; Robinson v. Berryman, 22 Mo. App. 509; Mitchell v. Burton, 2 Head (Tenn.) 613.

[2] Martin v. Thomas, 24 How. (U. S.) 315, 16 L. ed. 689; State v. Craig, 58 Iowa 238, 12 N. W. 301; Bracken County Comrs. of Sinking Fund v. Daum, 80 Ky. 388, 4 Ky. L. 204; Bradley v. Trousdale, 15 La. Ann. 206; State v. Allen, 69 Miss. 508, 10 So. 473, 30 Am. St. 563; Briggs v. Glenn, 7 Mo. 572; Hagler v. State, 31 Nebr. 144, 47 N. W. 692; Cass v. American Exch. State Bank, 11 N. Dak. 238, 91 N. W. 59; Mitchell v. Burton, 2 Head (Tenn.) 613; Smith v. United States, 2 Wall. (U. S.) 219, 17 L. ed. 788. But in Landis v. Keller, 13 Phila. (Pa.) 501, it was held that a surety on a note cannot depend on the ground that the name of a cosurety was cut off, such cosurety having paid his share, and there not being any improper intent in the mutilation.

cosureties,[3] or by a change in the name of the payee of a note, or the capacity in which he acts.[4]

§ 3968. Discharge by extension of time for payment.—The extension of the time of payment given by the creditor to the principal is an alteration of a very material part of the contract, and, unless consented to by the surety, such extension or valid agreement for extension for a definite time will operate to discharge him from liability for such payment.[5] Contracts of guaranty and contracts of suretyship are governed by the same rule in respect to the release of the guarantor or surety by an extension of time of payment,[6] and it has been held that the acceptance by the creditor of the promissory note of the debtor for a debt secured by an undertaking of guaranty, by which the time

[3] Vincent v. People, 25 Ill. 500; State v. Polke, 7 Blackf. (Ind.) 27; First Nat. Bank v. Gatewood, 19 Ky. L. 225, 39 S. W. 509; Dupee v. Blake, 148 Ill. 453, 35 N. E. 867 (holding that a surety who guarantees the performance of certain conditions by a firm is not liable for the default of the firm after it has been changed by the addition of a new member). See also, Friendly v. National Surety Co., 46 Wash. 71, 89 Pac. 177, 10 L. R. A. (N. S.) 1160, and note. Novation of the contract discharges a surety thereon. Gower v. Halloway, 13 Iowa 154.

[4] Hodge v. Farmers' Bank, 7 Ind. App. 94, 34 N. E. 123 (holding that writing "cashier" after the name of the payee is a material alteration); Jackson v. Cooper, 19 Ky. L. 9, 39 S. W. 39 (holding that the word "guardian" inserted after the name of the payee discharges the surety); Robinson v. Berryman, 22 Mo. App. 509. In Anderson v. Hall, 4 Nebr. (Unof.) 494, 94 N. W. 981, it was held that the addition of a guaranty to a note does not release the surety. Also it is held that the addition of supplemental sureties will not release the surety. Bowser v. Rendell, 31 Ind. 128. But see Anderson v. Bellenger, 87 Ala. 334, 6 So. 82, 4 L. R. A. 680, 13 Am. St. 46; Owens v. Tague, 3 Ind. App. 245; Nicholson v. Combs, 90 Ind. 515; Crandall v. First Nat. Bank, 61 Ind. 349; Holthouse v. State (Ind. App.), 97 N. E. 130; Houck v. Graham, 106 Ind. 195, 6 N. E. 594, 55 Am. Rep. 727. Compare Commercial Bank v. Layne, 101 Tenn. 45, 46 S. W. 762.

[5] Moses v. Home Bldg. &c. Assn., 100 Ala. 465, 14 So. 412; Daneri v. Gazzola, 139 Cal. 416, 73 Pac. 179; McCrary v. Coley, Ga. Dec. 104 pt. 1; Skinner v. Sullivan, 227 Ill. 93, 81 N. E. 11; Stayner v. Joice, 82 Ind. 35; Spurgeon v. Smitha, 114 Ind. 453, 17 N. E. 105; Cambria Sav. Bank v. Orley La Nier, 135 Iowa 280; Diehl v. Davis, 75 Kans. 38, 88 Pac. 532; Dohn v. Bronger, 20 Ky. L. 823, 47 S. W. 619; Alter v. Zunts, 27 La. Ann. 317; Dunn v. Spalding, 43 Maine 336; Walter A. Wood Mowing &c. Co. v. Oliver, 103 Mich. 326, 61 N. W. 507; Ducker v. Rapp, 67 N. Y. 464; Fawcett v. Freshwater, 31 Ohio St. 637; Henderson v. Ardery's Admrs., 36 Pa. St. 449; Foy v. Sinclair, 93 Tenn. 296, 30 S. W. 28; Fanning v. Murphy, 126 Wis. 538, 105 N. W. 1056, 4 L. R. A. (N. S.) 666, 110 Am. St. 946. The general rule is that in order to release the surety on a note the agreement of extension should be for a definite period, for a valuable consideration, without consent of the surety, and that the holder of the note should have knowledge of the suretyship. Voris v. Shotts, 20 Ind. App. 220, 50 N. E. 484; Olson v. Chism, 21 Ind. App. 40, 51 N. E. 373.

[6] Chicago Trust &c. Bank v. Black, 72 Ill. App. 147; Hart v. Hudson, 6 Duer (N. Y.) 294.

of payment of the debt and the right of action thereon is suspended until the maturity of the note, discharges the guarantor from liability,[7] but there is authority to the effect that the note so accepted does not raise any implication that the creditor agreed to extend the time of payment, and that such an agreement must be proved as a fact dependent on the understanding of the parties at the time the surety was given.[8] It may be stated as a general rule that where a person enters into an express contract of suretyship and as a collateral security gives a mortgage on his real estate, any change in the suretyship contract that will discharge him will likewise discharge the security.[9] Where payments are to be made in instalments an extension of time as to one or more will not, ordinarily, affect the liability of the surety for the others;[10] nor will an extension of time of payment of a portion of the principal's debt discharge the surety for the balance.[11] There must be a binding agreement between the creditor and principal to extend the time, as a mere delay which will not prevent the surety from making payment at any time will not be sufficient to discharge the surety.[12]

§ 3969. Discharge by extending time of payment or performance.—The contract to extend the time must be complete, a mere unaccepted offer or conditional agreement to be consummated in the future not being sufficient to discharge the surety.[13] The test whether the agreement to extend the time is

[7] American Iron &c. Mfg. Co. v. Beall, 101 Md. 423, 61 Atl. 629.

[8] Roberson v. Blevins, 57 Kans. 50, 45 Pac. 63; Shaw v. First Associated Reformed Presb. Church, 39 Pa. St. 226.

[9] Bolton v. Salmon, L. R. (1891) 2 Ch. 48; Christner v. Brown, 16 Iowa 130; Campion v. Whitney, 30 Minn. 177, 14 N. W. 806 (holding that the extension of time operated to release the surety and likewise the security). It is held in Bank of Albion v. Burns, 46 N. Y. 170, that whatever will operate to discharge a surety and the security which he pledges as collateral will inure to the benefit of the heirs and representatives of the surety.

[10] Coe v. Cassidy, 72 N. Y. 133.

[11] Commercial Bank v. Muirhead, 12 U. C. Q. B. 39; Klein v. Long, 27 App. Div. (N. Y.) 158, 50 N. Y. S. 419.

[12] Woodburn v. Friend, 19 La. 496; Brink v. Stratton, 64 App. Div. (N. Y.) 331, 72 N. Y. S. 87.

[13] Vaughan v. Vernon, 82 Ark. 28, 100 S. W. 92; English v. Landon, 181 Ill. 614, 54 N. E. 911; Fanning v. Murphy, 126 Wis. 538, 105 N. W. 1056, 4 L. R. A. (N. S.) 666, 110 Am. St. 946; Merriman v. Barker, 121 Ind. 74, 22 N. E. 992; Miller v. Hatch, 72 Maine 481, 39 Am. Rep. 346. See also, Uniontown Bank v. Mackey, 140 U. S. 220, 35 L. ed. 485, 11 Sup. Ct. 844. For cases holding that void or voidable agreements to extend time do not discharge sureties see Carter v.

sufficient to discharge the surety has been said to be whether the principal can maintain an action on such agreement if it be violated.[14] If the contract is binding its form is not material, nor need it always be express.[15] The extension must be given by the creditor or obligee or by some one acting in his behalf with authority to grant the extension.[16] The extension must be given to the principal, and where there are several joint principals an extension to one releases the surety.[17] An agreement for an extension, in order to release the surety, must be supported by a consideration.[18] An actual money consideration is not required to effect an extension of time, for one promise may be sufficient consideration for another.[19] It is held that if the principal actually pays interest in advance or gives a note in advance for the interest it is a sufficient consideration to support the agreement of extension,[20] but it has been held, on the other hand, that the mere acceptance of interest in advance, in the absence of an agreement to extend, would not discharge a surety.[21] An agreement to pay an increased rate of interest would be a sufficient consideration,[22] but the authorities differ as to whether an agreement to pay at the same or a lower rate would be sufficient.[23]

Bank of Columbia, 12 Ky. L. 968, 16 S. W. 79; Frederick-Town Sav. Inst. v. Michael, 81 Md. 487, 32 Atl. 189, 33 L. R. A. 628.

[14] Austin v. Darwin, 21 Vt. 38.

[15] Jones v. Fleming, 15 La. Ann. 522; Revell v. Thrash, 132 N. Car. 803, 44 S. E. 596.

[16] Farwell v. Meyer, 35 Ill. 40; Gray v. Farmers' Nat. Bank, 81 Md. 631, 32 Atl. 518. See also, Jones v. Goodin, 20 Ky. L. 659, 46 S. W. 690; Jackson v. Michie, 33 La. Ann. 723.

[17] Warburton v. Ralph, 9 Wash. 537, 38 Pac. 140.

[18] Saint v. Wheeler & Wilson Mfg. Co., 95 Ala. 362, 10 So. 539, 36 Am. St. 210; Hazard v. White, 26 Ark. 155; Regan v. Williams, 185 Mo. 620, 84 S. W. 959, 105 Am. St. 600; Smith v. Mason, 44 Nebr. 610, 63 N. W. 41; Olmstead v. Latimer, 158 N. Y. 313, 53 N. E. 5, 43 L. R. A. 685. See also, Bedford v. Kelly (Mich.), 139 N. W. 250.

[19] English v. Landon, 181 Ill. 614, 54 N. E. 911. In Blackwell v. Bainbridge, 47 N. Y. St. 130, revd. 1 Misc. (N. Y.) 499, 20 N. Y. S. 950, 49 N. Y. St. 707, 19 N. Y. S. 681, it is held that an agreement between the creditor and principal to exchange releases of mutual claims is a sufficient consideration for an extension of time to the principal.

[20] Scott v. Saffold, 37 Ga. 384; Maher v. Lanfrom, 86 Ill. 513; Robinson v. Miller, 2 Bush (Ky.) 179; Kaler v. Hise, 79 Ind. 301; Dubuisson v. Folkes, 30 Miss. 432; Binnian v. Jennings, 14 Wash. 677, 45 Pac. 302.

[21] McGlassen v. Tyrrell, 5 Ariz. 51, 44 Pac. 1088; Morse v. Blanchard, 117 Mich. 37, 75 N. W. 93; Coster v. Mesner, 58 Mo. 549; Bank of Uniontown v. Mackey, 140 U. S. 220, 35 L. ed. 485, 11 Sup. Ct. 844. See also, Turner v. Williams, 73 Maine 466.

[22] Dodgson v. Henderson, 113 Ill. 360; Fawcett v. Freshwater, 31 Ohio St. 637.

[23] In Dare v. Hall et al., 70 Ind. 545, it is held that neither an agreement to continue the payment of in-

Owing to the effect of usury on the contract under the statutes of the various states, there is a lack of harmony in the decisions whether the payment of, or an agreement to pay, usurious interest is a sufficient consideration for a contract of extension, but most courts hold that if the usury be paid in advance, a surety for the debt is discharged.[24] Some courts have held that the payment of usury being illegal, the agreement for an extension is not binding, and a surety for the debt remains liable.[25] Part payment on the debt before maturity is held to be a sufficient consideration to support the agreement of extension, but part payment at or after maturity is not sufficient for such purpose.[26]

§ 3970. Discharge by taking additional or substituted security.—The consideration for extension may consist in taking from the principal new or additional obligations, such as notes, bonds or other security,[27] but if the new obligation is taken merely as collateral security for the original debt and does not

terest at the same rate as specified in the note, nor an agreement to thereafter pay interest at a reduced rate, creates any new consideration for the extension of time on a note overdue. See also, to same effect, Chute v. Pattee, 37 Maine 102; Wilson v. Powers, 130 Mass. 127; Fowler v. Brooks, 13 N. H. 240. For rule to contrary see Dodgson v. Henderson, 113 Ill. 360; Field v. Brockaw, 148 Ill. 654, 37 N. E. 80; Keirn v. Andrews, 59 Miss. 39; Benson v. Phipps, 87 Tex. 578, 29 S. W. 1061, 47 Am. St. 128. Payment of interest in advance is held a valid consideration in the recent case of Bedford v. Kelly (Mich.), 139 N. W. 250.

[24] Camp v. Howell, 37 Ga. 312; Osborn v. Low, 40 Ohio St. 347; Farmers & Merchants' Bank v. Bayless (Tex.), 1 White & W. Civ. Cas. Ct. App. § 1245; Turrill v. Boynton, 23 Vt. 142; Glenn v. Morgan, 23 W. Va. 467. See also, Lemmon v. Whitman, 75 Ind. 318, 39 Am. Rep. 150; Wild v. Howe, 74 Mo. 551; Niblack v. Champeny, 10 S. Dak. 165, 72 N. W. 402.

[25] Howell v. Sevier, 1 Lea (Tenn.) 360, 27 Am. Rep. 771; McKamy v. McNabb, 97 Tenn. 236; Meiswinkle v. Jung, 30 Wis. 361, 11 Am. Rep. 572. See also, Prather v. Gammon, 25 Kans. 379.

[26] Vestal v. Knight, 54 Ark. 97, 15 S. W. 17; Greely v. Dow, 2 Metc. (Mass.) 176; Newsam v. Finch, 25 Barb. (N. Y.) 175; Smith v. Tunnis, 1 McCord Eq. (S. Car.) 443, 16 Am. Dec. 617, all holding payment before maturity sufficient. But most of them also state or concede that payment after due is not sufficient, and so among others do the following: Stroud v. Thomas, 139 Cal. 274, 72 Pac. 1008, 96 Am. St. 111 and note; Davis v. Stout, 126 Ind. 12, 25 N. E. 862, 22 Am. St. 565; Wilson v. Powers, 130 Mass. 127; Sherman County v. Nichols, 65 Nebr. 250, 91 N. W. 198. In Evans v. Partin, 56 S. W. 648, 22 Ky. Law 20, it is held that the promise of forbearance as to the balance due on a note in consideration of a payment made after maturity was without consideration, and did not release the surety.

[27] Canada Permanent Loan &c. Co. v. Ball, 30 Ont. 557; United States v. American Bonding &c. Co., 89 Fed. 921; Semple v. Atkinson, 64 Mo. 504; Brown v. Mason, 170 N. Y. 584, 63 N. E. 1115; Gardner v. Watson, 76 Tex. 25, 13 S. W. 39.

amount to an extension of time, the surety is not discharged.[28] If the creditor take such new obligation as collateral security for the original debt, and afterward release it, or any part of it, the surety is discharged to the extent of the value of the security released.[29] Taking a note for an indebtedness for which the surety is not liable does not discharge the surety on the original debt, or if the original note is retained as collateral security for the new note.[30] Stay or extension by authority of law or order of court is held not to affect the liability of sureties.[31]

§ 3971. Discharge by judgment and execution against principal.—The general rule is that the liability of a surety ends with the extinguishment of the obligation of the principal. If a judgment has been rendered in favor of the principal for an alleged default, even though the surety was not a party to the action in which the judgment was rendered, the surety is released.[32] If the principal succeeds only in reducing the amount of the claim against him, the surety will be released to the same extent.[33] If after the creditor has obtained a judgment against the principal, and such judgment has become a lien upon the property of the principal, or if he has attached or levied upon the principal's property, he takes some action which has the effect of releasing the lien of such judgment, levy or attachment, the

[28] Parham Sewing Mach. Co. v. Brock, 113 Mass. 194; Kingman St. Louis Implement Co. v. McMaster, 118 Mo. App. 209, 94 S. W. 819; Hutchison v. Woodwell, 107 Pa. St. 509. See also, Sigourney v. Wetherell, 6 Metc. (Mass.) 553; Globe Mut. Ins. Co. v. Carson, 31 Mo. 218; Remsen v. Graves, 41 N. Y. 471.

[29] Winston v. Yeargin, 50 Ala. 340; Brown v. First Nat. Bank, 112 Fed. 901, 50 C. C. A. 602, 56 L. R. A. 870; Weik v. Pugh, 92 Ind. 382; Guild v. Butler, 127 Mass. 386.

[30] Bordelon v. Weymouth, 14 La. Ann. 93; Fitts v. A. F. Messick Grocery Co., 144 N. Car. 463, 57 S. E. 164.

[31] Houston v. Hurley, 2 Del. Ch. 247 (holding that stay of execution on a judgment, if required by statute, does not release the surety on the debt for which the judgment is given, although entered as by consent of plaintiffs); Helm v. Commonwealth, 79 Ky. 67, 1 Ky. L. (abstract) 355.

[32] Bank of Commerce v. Porter, 1 Baxt. (Tenn.) 447; Sonnentheil v. Texas Guarantee &c. Co., 23 Tex. Civ. App. 436, 56 S. W. 143. See also, Michener v. Springfield Engine Co., 142 Ind. 130, 40 N. E. 679, 31 L. R. A. 59; Stevens v. Carrol, 131 Iowa 170, 105 N. W. 653. In Hardin v. Johnston, 58 Ga. 522, where the creditor relied on the surety to prosecute the action against the principal, and it appeared that the judgment for the principal was only a dismissal of the action for want of prosecution, it was held that the judgment did not release the surety.

[33] Jones v. Kilgore, 2 Rich. Eq. (S. Car.) 63.

surety will be released to the same extent.[34] It has also been held that if the creditor obtains judgment against the principal for less than the amount due, he cannot maintain a suit against the surety for the remainder of the debt.[35]

§ 3972. Discharge by payment or satisfaction by principal. —The extinguishment of the debt or obligation of the principal, however accomplished, releases the surety from liability,[36] and the most common method is by payment of the debt by the principal.[37] If the contract of suretyship provides for the payment of money, payment in money or in property is performance of the contract and discharges the surety.[38] If the principal give a valid new note as payment, this will discharge the surety on the old debt,[39] and it has been held that the indebtedness cannot be

[34] In Houston v. Hurley, 2 Del. Ch. 247, it was held that the release by an execution creditor of goods levied on, without the consent of the debtor's surety, released the surety pro tanto. See also to same effect, Finnegan v. Janeway, 85 Minn. 384, 89 N. W. 4; Bangs v. Strong, 7 Hill (N. Y.) 250, 42 Am. Dec. 64; Stephens v. Monongahela Nat. Bank, 88 Pa. 157, 32 Am. Rep. 438; Shelton v. Hurd, 7 R. I. 403, 84 Am. Dec. 564; Watson v. Read, 1 Tenn. Ch. 196. But compare Maury v. Shepperd, 57 Ga. 68; Griffith v. Moss, 94 Ga. 199, 21 S. E. 463; Moss v. Pettingill, 3 Gil. (Minn.) 145; Findlay v. United States Bank, 2 McLean (U. S.) 44, Fed. Cas. No. 4791. In National Surety Co. v. Walker, 127 Iowa 518, 101 N. W. 780 it was held that a release of an attachment will release a surety on a bond given in consideration that there were to be no more attachments. But see Caller v. Vivian, 8 Ala. 903; Hurd v. Little, 12 Mass. 502; Morrison v. Citizens' Nat. Bank, 65 N. H. 253, 20 Atl. 300, 9 L. R. A. 282, 23 Am. St. 39.

[35] Couch v. Waring, 9 Conn. 261.

[36] Bridges v. Blake, 106 Ind. 332, 6 N. E. 833; Dibble v. Richardson, 171 N. Y. 131, 63 N. E. 829 (by will); Wolf v. Fink, 1 Pa. St. 435, 44 Am. Dec. 141; Omaha Nat. Bank v. Johnson, 111 Wis. 372, 87 N. W. 237.

[37] Fireman's Ins. Co. v. McMillan, 29 Ala. 147; Rockford Ins. Co. v. Rogers, 15 Colo. App. 23, 60 Pac. 956; Charles v. Hoskins, 14 Iowa 471, 83 Am. Dec. 378; Thomas v. Stetson, 59 Maine 229; Chapman v. Collins, 12 Cush. (Mass.) 163; Marquardt Sav. Bank v. Freund, 80 Mo. App. 657; Barnes v. Cushing, 43 App. Div. (N. Y.) 158; 59 N. Y. S. 345, revd. 168 N. Y. 542, 61 N. E. 902; Berger v. Williams, 4 McLean (U. S.) 577, Fed. Cas. No. 1341. Tender of payment is generally held sufficient, White's Admr. v. Life Assn. of America, 63 Ala. 419, 35 Am. Rep. 45; Spurgeon v. Smitha, 114 Ind. 453, 17 N. E. 105; Johnson v. Mills, 10 Cush. (Mass.) 503; Smith v. Old Dominion Bldg. &c. Assn., 119 N. Car. 257, 26 S. E. 40. But see Clark v. Sickler, 64 N. Y. 231, 21 Am. Rep. 606; Cunningham v. Morrow, 24 Pa. Co. Ct., 348. Compare Wilson v. McVey, 83 Ind. 108, with Taylor v. Lohman, 74 Ind. 418. In Furbush v. Lee, 37 Ark. 87, it was held that the surety was not discharged where the principal repudiated a payment made by his agent, and received back the means of payment.

[38] Neylan v. Green, 82 Cal. 128, 23 Pac. 42; Petefish v. Watkins, 124 Ill. 384, 16 N. E. 248; Ruble v. Norman, 7 Bush (Ky.) 582; Greening v. Patten, 51 Wis. 146, 8 N. W. 107.

[39] Morris Canal & Banking Co. v. Van Vorst's Admx., 21 N. J. L. 100. In Mitchell v. Cotten, 2 Fla. 136, it was held that the sureties are not dis-

kept alive against the surety, even though payment was made with money borrowed by the principal for that purpose, with an understanding with the lender that the debt should be kept alive against the surety.[40] It has also been held that if the creditor take judgment against the principal for less than the amount due he cannot hold the surety for the remainder of the debt,[41] and if the creditor accept less than the amount due by way of settlement with the principal, the surety cannot be held for the balance.[42] Payment may be made by the principal in property, personal or real, and if accepted by the creditor in full satisfaction of the debt, the surety will be discharged.[43] If, however, the payment by the principal is illegal, and the creditor is obliged to pay the money over to others, the surety will not be discharged.[44]

§ 3973. Discharge by payment by surety or third person. —Payment or other satisfaction by the surety completely extinguishes his obligation to the creditor,[45] but payment by a cosurety of his proportionate share does not release him as to the remainder.[46] Inasmuch as the surety is discharged by payment or

charged if the principal's note be void on account of usury. See also, to same effect, Williams v. Gilchrist, 11 N. H. 535. See also, Kirby v. Landis, 54 Iowa 150, 6 N. W. 173. But it is held that the surety is discharged even where the note or other security turns out to be of no value. Frederick Town Sav. Inst. v. Michael, 81 Md. 487, 32 Atl. 189, 33 L. R. A. 628.

[40] Buffington v. Bernard, 90 Pa. St. 63; Greening v. Patten, 51 Wis. 146, 8 N. W. 107. It is held in Rolfe v. Lamb, 16 Vt. 514, that the law will not imply authority from sureties to the principal to borrow money on the joint credit of the principal and sureties, to be applied in payment of the debt, nor a promise from the sureties to the lender to repay the money so borrowed.

[41] Couch v. Waring, 9 Conn. 261.

[42] Heitz v. Atlee, 67 Iowa 483, 25 N. W. 742; Daniel's Exr. v. Wharton, 90 Va. 584, 19 S. E. 170; Renick v. Ludington, 14 W. Va. 367.

[43] Woodman v. Mooring, 14 N. Car. 237; United States v. Cushman, 2 Sumn. (U. S.) 426, Fed Cas. No. 14908; Ellis v. Allen, 48 Vt. 545; Daniel's Exr. v. Wharton, 90 Va. 584, 19 S. E. 170. In Wilson v. McVey, 83 Ind. 108, it is held that a tender of property in payment of an ordinary note does not release the surety. That tender must be made in lawful money.

[44] Harner v. Batdorf, 35 Ohio St. 113; Hooker v. Blount, 44 Tex. Civ. App. 162, 97 S. W. 1083. See also, Petty v. Cooke, L. R. 6 Q. B. 790, 40 L. J. Q. B. 281; Northern Bank v. Farmers' Nat. Bank, 111 Ky. 350, 23 Ky. L. 696, 63 S. W. 604.

[45] Mann v. Stennett, 8 Beav. 189; Bothwell v. Sheffield, 8 Ga 569. But see as to payment of only part, Vaughn v. Haden, 37 Mo. 178; Martin v. Frantz, 127 Pa. St. 389, 18 Atl. 20, 14 Am. St. 859. It is held in Chamberlain v. Fox (Tex.), 54 S. W. 297, that payment in a particular place is not required of a surety, if his contract does not call for it, although the principal by a separate contract has bound himself to do so.

[46] Schooley v. Fletcher, 45 Ind. 86; Vaughn v. Haden, 37 Mo. 178; Martin v. Frantz, 127 Pa. St. 389, 18 Atl. 20, 14 Am. St. 859.

other performance it is not material by whom such performance is made; and payment by a third person at the request of the principal has the same effect as if made by the principal;[47] but if such third person make payment for the purpose of having the instrument assigned to him, such transaction does not amount to payment, and the instrument is not extinguished.[48]

§ 3974. **Discharge by relinquishment or loss of funds or securities.**—It is quite common for the principal or a third person to give the creditor collateral security for the debt or obligation, such as a mortgage or pledge of property. If, after the receipt of such security, the creditor relinquishes it, or any part of it without the consent of the surety, the surety is discharged to the extent of the value of the security released.[49] This rule of law arises from the equities existing between the surety and the principal; that is to say, when the creditor has the means in his hands belonging to the principal which is pledged for the payment of the debt, either by agreement between the principal and creditor, or by operation of law, the surety is entitled to be subrogated to the rights of the creditor upon paying the debt, and therefore any affirmative act of the creditor which prevents such subrogation releases the surety to the extent he is thereby deprived of property which could be applied to the payment of a debt for which he is secondarily liable.[50] The security may consist of funds or property belonging to the principal which may rightfully be retained, a claim of the principal against third per-

[47] Dreher v. Sick, 7 Ohio Dec. (Reprint) 579. See also, Riddle v. Russell, 108 Iowa 591, 79 N. W. 363.

[48] Wright v. Yell, 13 Ark 503, 58 Am. Dec. 336; Chappel v. McKeough, 21 Colo. 275, 40 Pac. 769.

[49] Crosby v. Woodbury, 37 Colo. 1, 89 Pac. 34; Rogers v. Schools of Township 23, 46 Ill. 428; Brown Carriage Co. v. Dowd, 155 N. Car. 307, 71 S. E. 721; Clow v. Derby Coal Co., 98 Pa. St. 432; Parsons v. Harrold, 46 W. Va. 122, 32 S. E. 1002. In Hill v. Horskins, 150 Fed. 236, it was held that where both the principal and surety gave security the creditor cannot retain that of the latter after having relinquished that of the former. The rule stated in the text applies to securities lost by the wilful acts of the creditor. See Griffith v. Moss, 94 Ga. 199, 21 S. E. 463; Murrell v. Scott, 51 Tex. 520. See also, Allen v. O'Donald, 23 Fed. 573.

[50] Brandt on Suretyship (3rd ed.), § 480; Crosby v. Woodbury, 37 Colo. 1, 89 Pac. 34; Phares v. Barbour, 49 Ill. 370; Kirkpatrick v. Howk, 80 Ill. 122; Maquoketa v. Willey, 35 Iowa 323; Springer v. Toothaker, 43 Maine 381, 69 Am. Dec. 66; Mayhew v. Boyd, 5 Md. 102, 59 Am. Dec. 101; Guild v. Butler, 127 Mass. 386; Priest v. Watson, 75 Mo. 310, 42 Am. Rep. 409; Nelson v. Wiliams, 22 N. Car. 118.

sons, a mortgage, judgment or execution lien, and a loss or relinquishment thereof will generally release the surety to the extent of the value of such security.[51]

§ 3975. Discharge by misapplication of funds or securities by creditor.—When the creditor has money or other property of the principal, which he has a right to retain and appropriate to the payment of the debt, it generally becomes his duty to account for it and appropriate it to the payment of the debt for which the security was given;[52] and if he fraudulently encumbers or conceals the property, or applies it to a purpose other than the satisfaction of that debt the surety is discharged to the extent of the value of the security misapplied.[53] Likewise, if the property taken as collateral security is sold irregularly, or negligently, by the creditor so that it brings less than its value the surety is discharged pro tanto.[54] But the mere fact that the proceeds of property of the principal were improperly distributed by an erroneous order of court does not discharge the surety,[55] and if the creditor applies security given by one cosurety to the share of

[51] See First Nat. Bank v. Kittle, 69 W. Va. 171, 71 S. E. 109, 37 L. R. A. (N. S.) 699, and elaborate note. The creditor must have the right to apply the money to the secured debt before he can be charged with releasing the surety by not applying such funds. Ewen v. Wilbor, 208 Ill. 492, 70 N. E. 575. The more recent decisions hold that a failure of the creditor to register or record instruments, in consequence of which the security is lost, will discharge the surety. See Sullivan v. State, 59 Ark. 47, 26 S. W. 194; Evans v. Kister, 92 Fed. 828, 35 C. C. A. 28; Tramwell v. Swift Fertilizer Works, 121 Ga. 778, 49 S. E. 739. In Crim v. Fleming, 101 Ind. 154, it was held that where the creditor, having received an assignment of fees due the principal as clerk of court, allows the principal to collect and appropriate the proceeds, the surety is released. The surety on a note, given in renewal of a prior note secured by mortgage, is discharged by the subsequent surrender of the mortgage. Port v. Robbins, 35 Iowa 208. In Findlay's Exrs. v. United States Bank, 10 Ohio 59, it was held that a creditor, by losing priority of a judgment possessed by him over other creditors, discharges the surety.

[52] Brown v. First Nat. Bank, 112 Fed. 901, 50 C. C. A. 602, 56 L. R. A. 870; Iowa Nat. Bank v. Cooper, 131 Iowa 556, 107 N. W. 625; Packard v. Herrington, 41 Kans. 469, 21 Pac. 621; Spalding v. Susquehanna Bank, 9 Pa. St. 28.

[53] Eppinger v. Kendrick, 114 Cal. 620, 46 Pac. 613; Barrett v. Bass, 105 Ga. 421, 31 S. E. 435; Robeson v. Roberts, 20 Ind. 155, 83 Am. Dec. 308; Greenwood First Nat. Bank v. Wilbern, 65 Nebr. 242, 90 N. W. 1126, 93 N. W. 1002, 95 N. W. 12. See also, Law v. East India Co., 4 Ves. Jr. 824; De Goey v. Van Wyk, 97 Iowa 491.

[54] Montgomery v. Sayre, 100 Cal. 182, 34 Pac. 646, 38 Am. St. 271; Ward v. McLamb, 118 Ga. 811, 45 S. E. 688; Nichols v. Burch, 128 Ind. 324, 27 N. E. 737.

[55] McCalla v. Knox, 84 Ga. 291, 10 S. E. 624. See also, Gaar v. Taylor, 128 Iowa 636, 105 N. W. 125.

that cosurety it has been held that the liability of the other cosurety is not affected as to his share.[56]

§ 3976. Discharge by nonperformance of conditions.—If the contract of suretyship impose conditions upon the creditor or obligee, a failure to perform them releases the surety from liability, and the principal cannot waive performance.[57] In order to relieve the surety, however, the creditor or obligee must have notice of the conditions,[58] as the creditor is not bound by a secret agreement between the principal and surety with which he has no connection.[59] Where the liability of the surety is made conditional upon the creditor abstaining from certain acts, the surety is not discharged if these acts are done by a third person on his own account.[60]

§ 3977. Discharge by neglect to give surety notice of default.—As a general rule, a surety is not entitled to any notice of the principal's default,[61] for a default by the principal is a default by the surety, but if the surety expressly stipulate that the creditor shall notify him of the principal's default he cannot be held liable unless the condition has been complied with.[62] There is a class of contracts of suretyship in which the law implies certain conditions without their being stipulated

[56] Margarett v. Gregory, 6 L. T. (N. S.) 543.

[57] Lombard Inv. Co. v. American Surety Co., 65 Fed. 476; Fay v. Jenks, 93 Mich. 130, 53 N. W. 163 (where the condition was that the principal should have the exclusive sale of certain goods); Eldridge v. Fuhr 59 Mo. App. 44; United States v. Corwine, 1 Bond (U. S.) 339, Fed. Cas. No. 14871.

[58] Joyce v. Cockrill, 92 Fed. 838, 35 C. C. A. 38, affd. 179 U. S. 591, 45 L. ed. 332, 21 Sup. Ct. 227; Haines v. Gibson, 115 Mich. 131, 73 N. W. 126.

[59] Mathews v. Meek, 23 Ohio St. 272. In Ellis v. McCormick, 1 Hilt. (N. Y.) 313, it was held that a breach of an agreement by the landlord to make certain improvements indorsed on the lease does not discharge a surety for the rent.

[60] Musket v. Rogers, 5 Bing. N. Cas. 728, 8 L. J. C. P. (N. S.) 354.

[61] Bacigalupi v. Phoenix Bldg. & Const. Co., 14 Cal. App. 632, 112 Pac. 892; First Nat. Bank v. Babcock, 94 Cal. 96, 29 Pac. 415, 28 Am. St. 94; Gage v. Lewis, 68 Ill. 604; Wakefield v. American Surety Co., 209 Mass. 173, 95 N. E. 350; Watertown Fire Ins. Co. v. Simmons, 131 Mass. 85, 41 Am. Rep. 196. See also, Lake v. Thomas, 84 Md. 608, 36 Atl. 437; Cumberland Bldg. &c. Assn. v. Gibbs, 119 Mich. 318, 78 N. W. 138.

[62] National Surety Co. v. Long, 125 Fed. 887, 60 C. C. A. 623; Scarratt v. F. W. Cook Brewing Co., 117 Ga. 181, 43 S. E. 413; Heffernan v. United States Fidelity & Guaranty Co., 37 Wash. 477, 79 Pac. 1095. But see Pacific F. Ins. Co. v. Pacific Surety Co., 93 Cal. 7, 28 Pac. 842; Bank of Tarboro v. Fidelity & Deposit Co., 128 N. Car. 366, 38 S. E. 908, 83 Am. St. 682.

expressly. For example, a conditional guaranty of collection, wherein the creditor is required to notify the guarantor of the principal's inability to pay.[63] Also, in the contract of a regular indorser of a negotiable instrument the law requires the creditor to make demand of the principal and to give notice of default to the indorser; otherwise he is discharged from liability.[64]

§ 3978. Discharge by release of cosurety.—The general rule is that a release of one cosurety discharges the other to the extent that the remaining surety is thereby deprived of his right to contribution.[65] But a discharge of a cosurety by operation of law, without the fault or procurement of the creditor, such as a discharge in bankruptcy, leaves the remaining surety liable for the full amount.[66] One of two sureties is not released because the creditor allows the action to become barred by the statute of limitations as to the other;[67] nor is the fact that one of the sureties in a common-law bond has been released on her plea of coverture a defense to the other sureties.[68]

§ 3979. Discharge by premature payments to contractors.—Sureties on a contractor's bond conditioned for the principal's faithful performance of a building contract, which provides that the consideration is to be paid to the principal at times therein specified as the work progresses, are generally released from all liability on the bond, if the payments are made before they are due by the terms of the contract,[69] but it has been held that if a

[63] Brackett v. Rich, 23 Minn. 485, 23 Am. Rep. 703; Janes v. Scott, 59 Pa. St. 178, 98 Am. Dec. 328; Sylvester v. Downer, 18 Vt. 32.

[64] See Norton, Bills and Notes (3rd ed.), p. 367; Neg. Inst. L., § 160.

[65] Wilkinson v. Conley, 133 Ga. 518, 66 S. E. 372; Hunter v. First Nat. Bank, 172 Ind. 62, 87 N. E. 734; Dodd v. Winn, 27 Mo. 501; Morgan v. Smith, 70 N. Y. 537; Hilleboe v. Warner, 17 N. Dak. 594, 118 N. W. 1047. See also, In re Wolmershausen, 62 L. T. (N. S.) 541; Gordon v. Moore, 44 Ark. 349, 51 Am. Rep. 606; Ide v. Churchill, 14 Ohio St. 372.

[66] Sacramento v. Bird, 31 Cal. 66.

[67] Davis' Admr. v. Auxier, 19 Ky. L. 719, 41 S. W. 767; Clark v. Douglas, 58 Nebr. 571, 79 N. W. 158; Camp v. Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669.

[68] Warren v. Louisville Leaf Tobacco Exch. (Ky.), 55 S. W. 912.

[69] National Surety Co. v. Long, 79 Ark. 523, 96 S. W. 745; Kiessig v. Allspaugh, 91 Cal. 231, 27 Pac. 655, 13 L. R. A. 418; Chester v. Leonard, 68 Conn. 495, 37 Atl. 397; Fidelity & Deposit Co. v. Agnew, 152 Fed. 955; Lucas v. Roberts, 49 Iowa 159; St. Mary's College v. Meagher, 11 Ky. L. 112, 11 S. W. 608; Backus v. Archer, 109 Mich. 666, 67 N. W. 913; Simonson v. Grant, 36 Minn. 439, 31 N. W. 861, holding also that where sureties are discharged by premature payments, they are not estopped from en-

payment by the owner does not impair any security to the benefit of which the surety is entitled the latter is not discharged.[70]

§ 3980. Rights of surety as to creditor.—Generally a surety for a contractor has no right to require payment to himself, but where the agreement of the parties provides for such payment to the surety, or where he has completed the work himself on default of the principal, he can recover the contract-price less any amount paid to the principal before his default, and less deductions for defects in work or material furnished by the principal.[71] For good cause shown the surety may, for his own protection, invoke the aid of a court of equity to require the creditor or obligee to proceed against the principal, or against his estate, if he is deceased, bankrupt or insolvent.[72] And so in equity the creditor may be required to resort to the property of the principal, or any security in the creditor's hands, before resorting to the surety or any security furnished by him.[73] It is also held that if the surety has paid the debt, and subsequently the creditor recovers from the principal, a recovery may be had by the surety against the creditor for the amount obtained from the principal.[74]

forcing their claims for liens for material furnished by them to the contractor and used in the building; Picard v. Shantz, 70 Miss. 381, 12 So. 544; Kane v. Thuenor, 62 Mo. App. 69; Evans v. Graden, 125 Mo. 72, 28 S. W. 439; Gray v. Norfolk School Dist., 35 Nebr. 438, 53 N. W. 377; Welch v. Hubschmitt Bldg. &c. Co., 61 N. J. L. 57, 38 Atl. 824; Henricus v. Englert, 63 Hun (N. Y.) 625, 43 N. Y. St. 595, 17 N. Y. S. 235, revd. 137 N. Y. 488, 33 N. E. 550; Enterprise Hotel Co. v. Book, 48 Ore. 58, 85 Pac. 333; McNally v. Mercantile Trust Co., 204 Pa. 596, 54 Atl. 360; Greenville v. Ormand, 51 S. Car. 121, 28 S. E. 147; Bell v. Trimby (Tenn.), 38 S. W. 100; Ryan v. Morton, 65 Tex. 258; Peters v. Mackay, 20 Wash. 172, 54 Pac. 1122.

[70] Hand Mfg. Co. v. Marks, 36 Ore. 523, 52 Pac. 512, 53 Pac. 1072, 59 Pac. 549.

[71] American Bonding Co. v. Regents of University, 11 Idaho 163, 81 Pac. 604; Howard v. Public Schools, 50 Mich. 94, 14 N. W. 712; Board of Education v. First Nat. Bank, 70 Hun (N. Y.) 520, 54 N. Y. St. 46, affd. 146 N. Y. 384, 24 N. Y. S. 392.

[72] Street v. Chicago Wharfing &c. Co., 157 Ill. 605, 41 N. E. 1108; Hoppes v. Hoppes, 123 Ind. 397, 24 N. E. 139; Meader v. Meader, 88 Ky. 217, 10 Ky. L. 783, 10 S. W. 651; Pride v. Boyce, Rice Eq. (S. Car.) 275, 33 Am. Dec. 78; McCollum v. Hinckley, 9 Vt. 143; Paxton v. Rich, 85 Va. 378, 7 S. E. 531, 1 L. R. A. 639.

[73] Moffitt v. Roche, 77 Ind. 48; Richards v. Osceola Bank, 79 Iowa 707, 45 N. W. 294; Neal v. Buffington, 42 W. Va. 327, 26 S. E. 172; United States v. Cushman, 2 Sumn. (U. S.) 426, Fed. Cas. No. 14908.

[74] Gray v. Seckham, L. R. 7 Ch. 680, 42 L. J. Ch. 127, 27 L. T. (N. S.) 290. But it was held in Wilson v. Whitmore, 140 Mass. 469, 5 N. E. 304, that the surety cannot recover an amount paid by him to the creditor for his release, although the principal afterward pays the debt in full.

If the security furnished by the surety, after being converted into money, brings more than the amount for which he is liable, he can recover the excess.[75] So, payments made by the surety for defaults accruing before his liability had attached, or any money paid by him through mistake or ignorance of facts, he may recover;[76] also, in a proper case, payments made after he has been discharged by acts of the creditor,[77] or payments made under duress, through fraud, or on failure of consideration.[78]

§ 3981. Rights of surety as to principal.—If a surety has been paid something as a consideration for his undertaking he has a right to retain it; and if he has become liable as a surety on the promise of a consideration he can maintain an action to recover it.[79] The principal may place money, notes, mortgages, choses in action or other property in the hands of the surety for his protection, and an agreement in regard to such securities is valid, although the liability of the surety is contingent and remote,[80] and the principal cannot ordinarily recover such securities from the surety until the liability of the latter ceases.[81] The right of the surety to securities transferred to him for his protection is paramount to the rights of subsequent lien holders, purchasers, mortgagees, assignees in insolvency, receivers and other creditors.[82]

[75] Manning v. Sweeting, 42 Hun (N. Y.) 655, 4 N. Y. St. 842.

[76] Anderson v. Western Union Tel. Co., 77 Miss. 851, 27 So. 838; Cox v. Hill, 5 Lea (Tenn.) 146.

[77] Riggins' Exrs. v. Brown, 12 Ga. 271.

[78] Gerard v. Knapp, 26 Ill. App. 307, holding that where the payee of a note, given as the consideration for a sale which never was consummated, wrongfully negotiated it, a surety thereon, being compelled to pay it to the holder, can recover the amount so paid from the payee.

[79] Blount v. Bowne, 82 Ga. 346, 9 S. E. 164; Nashville Bank v. Grundy, Meigs (Tenn.) 256; Culbertson v. Stillinger, Taney (U. S.) 75, Fed. Cas. No. 3463.

[80] Dumbell v. Isle of Man R. Co., 42 L. T. (N. S.) 745 (where a chose in action was assigned); Murry v. Strother, 158 Ala. 204, 48 So. 72 (where it was held that a surety may assign a mortgage so given to him, to a stranger who pays the obligation); Fidelity & Deposit Co. v. Johnston, 117 La. 880, 42 So. 357 (where it appears that the giving of a pledge for holding a surety harmless is expressly authorized by the code); Fling v. Goodall, 40 N. H. 208.

[81] Mandigo v. Mandigo, 26 Mich. 349; Smith v. Wigler (N. J.), 65 Atl. 900; Cook v. Casler, 76 App. Div. (N. Y.) 279, 78 N. Y. S. 661; Shea v. Fidelity Co., 39 Misc. (N. Y.) 107, 78 N. Y. S. 892.

[82] Bates v. Wiggin, 37 Kans. 44, 14 Pac. 442, 1 Am. St. 234; State v. Hemmingway, 699 Miss. 491, 10 So. 575; Haven v. Foley, 18 Mo. 136; Knaggs v. Green, 48 Wis. 601, 4 N. W. 760, 33 Am. Rep. 838.

A well recognized distinction exists as to the time when a surety may maintain an action against his principal, depending upon the terms of the contract. Thus, an agreement of indemnity given generally to save harmless from all loss or damage will usually affect a right of action only where the surety has been actually damnified by being compelled by legal process to pay the debt of his principal. Where, however, the contract is special, as that the principal shall pay a certain debt at a specified time, the surety can maintain an action when the principal makes default, even before he is called upon to pay as surety.[83] So, if the contract of suretyship is against liability the surety can apply the securities in his hands in a proper case before he has sustained any actual damage,[84] but if the surety is indemnified against loss or damage, ordinarily he must suffer such loss before he can recover on the indemnity.[85]

§ 3982. Rights of surety as to principal—After payment.—After the surety has paid the debt he becomes a creditor of the principal and is entitled to recover from the latter the amount so paid, even though the creditor was not bound to respect the suretyship.[86] The surety can enforce his claim against the estate of his deceased principal.[87] After payment by the surety, he may retain any security held by him without any previous suit against the principal to determine his liability, but if he holds no securities he does not acquire a lien on the property of the principal by the mere fact of having made payment.[88] As has been said,

[83] Brentnal v. Holmes, 1 Root (Conn.) 291, 1 Am. Dec. 44; Wright v. Whiting, 40 Barb. (N. Y.) 235; Guernsey v. Marks, 55 Ore. 323, 106 Pac. 334.

[84] Wooldridge v. Norris, L. R. 6 Eq. 410, 37 L. J. Ch. 640; Jarvis v Sewall, 40 Barb. (N. Y.) 449.

[85] Marshall v. Cobleigh, 18 N. H. 485; Crippen v. Thompson, 6 Barb. (N. Y.) 532; Carman v. Noble, 9 Pa. St. 366; Pond's Admrs. v. Warner, 2 Vt. 532.

[86] Martin v. McMullen, 20 Ont. 257; Smith v. Pitts, 167 Ala. 461, 52 So. 402; Griffin v. Long, 96 Ark. 268, 131 S. W. 672, 35 L. R. A. (N. S.) 855n; Fitch v. Hammer, 17 Colo. 591, 31 Pac. 336; Flemming v. Shockley, 8 Ga. App. 229, 68 S. E. 1013; Bonny v. Brashear, 19 La. 383; Vermeule v. York Cliffs Imp. Co., 105 Maine 350, 134 Am. St. 553n; Keys v. Keys' Estate, 217 Mo. 48, 116 S. W. 537; Sullivan v. Bankers' Surety Co., 59 Misc. (N. Y.) 54, 112 N. Y. S. 173.

[87] Walker v. Drew, 20 Fla. 908; Eckert v. Myers, 45 Ohio St. 525, 15 N. E. 862; Webster v. Lawson's Estate, 73 Wis. 561, 41 N. W. 710. Where he pays the debt after the death of his principal, Matter of Hill, 67 Cal. 238; Burckhartt v. Helfrich's Admr., 77 Mo. 376.

[88] Foster v. Athenaeum, 3 Ala. 302; Wood v. Wood, 124 Ind. 545, 24 N. E. 751, 9 L. R. A. 173.

payment must usually be made by the surety before he can maintain an action for reimbursement, but it is immaterial to this right how he extinguished the secured debt.[89] If a present liability exists or has become fixed by judicial determination the surety may pay voluntarily without waiting to be compelled by process,[90] and his right to reimbursement for such payment is not affected by the fact that the bond on which payment was made could not have been exacted of the principal by the creditor,[91] but the surety cannot recover from the principal, if the surety was under no legal obligation to make the payment,[92] or if he or the principal had been discharged or released from liability, and the payment was made with knowledge of the facts.[93] The surety may make payment by note, draft, or other obligation to the creditor, and such payment has been held sufficient unless something remains to be done to carry his engagement into effect.[94]

§ 3983. Rights of surety as to cosureties.—If two or more persons are bound similarly for the same principal, to the same creditor, and for the same debt or obligation, although they are bound by separate instruments, executed at different times and without knowledge of each other, the law implies a promise by each surety to contribute proportionately to a surety who has paid more than his share of the indebtedness.[95] This equitable obli-

[89] Burns v. Parish, 3 B. Mon. (Ky.) 8; Hazelton v. Valentine, 113 Mass. 472; Presly v. Donaldson, 33 Miss. 92; Harper's Admr. v. McVeigh's Admr., 82 Va. 751, 1 S. E. 193. See also, Ainslie v. Wilson, 7 Cow. (N. Y.) 662, 17 Am. Dec. 532; Miller v. Howry, 3 Pen. & W. (Pa.) 374, 24 Am. Dec. 320. And compare State Bank v. Davis, 4 Ind. 653.

[90] Halsey v. Murray, 112 Ala. 185, 20 So. 575; Smith v. Harry, 91 Pa. St. 119; Macdonald v. O'Shea, 58 Wash. 169, 108 Pac. 436.

[91] Halsey v. Murray, 112 Ala. 185, 20 So. 575; United States Fidelity &c. Co. v. More, 155 Cal. 415, 101 Pac. 302; Frith v. Sprague, 14 Mass. 455.

[92] Smith v. Staples, 49 Conn. 87; Hollensbee v. Ritchey, 49 Ind. 261; Farrelly v. Schaettler, 143 App. Div. (N. Y.) 273, 128 N. Y. S. 157. See also, Lane v. Westmoreland, 79 Ala. 372.

[93] Windle v. Williams, 18 Ind. App. 158, 47 N. E. 680; Spilman v. Smith, 15 B. Mon. (Ky.) 123.

[94] Flannagan v. Forest, 94 Ga, 685, 21 S. E. 712; Maysville Tel. Co. v. First Nat. Bank, 142 Ky. 578, 134 S. W. 886; Lucas v. Chamberlain, 8 B. Mon. (Ky.) 276; Auerbach v. Rogin, 40 Misc. (N. Y.) 695, 83 N. Y. S. 154; Sapp v. Aiken, 68 Iowa 699, 28 N. W. 24; Coburn v. Parker, 11 Gray (Mass.) 335. See also, Dodd v. Wilson, 4 Del. Ch. 108. But compare Pitzer v. Harmon, 8 Blackf. (Ind.) 112, 44 Am. Dec. 738; Boulware v. Robinson, 8 Tex. 327, 58 Am. Dec. 117. And see Hearne v. Keath, 63 Mo. 84, where by agreement between the creditor and surety the latter is to pay accrued interest, holding payment not sufficient.

[95] Crawford v. Kirksey, 50 Ala. 590; McLin v. Harvey, 8 Ga. App. 360, 69 S. E. 123; Paul v. Berry, 78 Ill.

gation arises at the time the relation is entered into, and the surety is an existing creditor of a cosurety from the date of the execution of his contract, although the right to contribution is not consummated until payment of the debt.[96] All sureties liable for the same debt or obligation are in general entitled and subject to contribution among themselves.[97]

§ 3984. Rights of surety as to supplemental surety.—It does not follow that all persons who become secondarily liable on the same instrument, and would be liable for the same default of the principal, are cosureties and entitled and subject to contribution among themselves; for on the same debt some of the parties may be sureties, some supplemental sureties, some guarantors and some indorsers. So, a surety is not entitled to contribution from a supplemental or successive surety.[98] Some authorities have held that if a surety request another person to become a surety with him he is not entitled to contribution from such person,[99] but in other jurisdictions the right is held to exist in the absence of a contract of indemnity.[1] To entitle a surety to contribution from a cosurety he must pay the debt and thereby discharge the liability of the cosurety. Payment may be made in any form, and it has been held that the surety may individually assume the

158; State v. Mitchell, 132 Ind. 461, 32 N. E. 86; Weston v. Elliott, 72 N. H. 433, 57 Atl. 336. See also, Matthews v. Millsap, 58 Miss. 564; Daniel v. McRae, 2 Hawks (N. Car.) 590, 11 Am. Dec. 787.

[96] Anthony v. Percifull, 8 Ark. 494; Williams v. Riehl, 127 Cal. 365, 59 Pac. 762, 78 Am. St. 60; Manning v. Weyman, 99 Ga. 57, 26 S. E. 58; Mentzer v. Burlingame, 78 Kans. 219, 97 Pac. 371, 18 L. R. A. (N. S.) 585n; Bachelder v. Fiske, 17 Mass. 464; Roeder v. Niedermeier, 112 Mich. 608, 71 N. W. 154; Mosely v. Fullerton, 59 Mo. App. 143; Glasscock v. Hamilton, 62 Tex. 143.

[97] Dussol v. Bruquiere, 50 Cal. 456; Waldrop v. Wolff, 114 Ga. 610, 40 S. E. 830; Burgett v. Stream, 85 Ill. App. 72; Houck v. Graham, 106 Ind. 105, 6 N. E. 594, 55 Am. Rep. 727; Davezac v. Seiler, 93 Ky. 418, 14 Ky. L. 497, 20 S. W. 375; Nally v. Long, 56 Md. 567; Wilson v. Kieffer, 141 Mo. App. 137, 122 S. W. 1149; Decker v. Judson, 16 N. Y. 439; Atwater v. Farthing, 118 N. Car. 388, 24 S. E. 736; Robinson v. Boyd, 60 Ohio St. 57, 53 N. E. 494; Moore v. Hanscom (Tex. Civ. App), 103 S. W. 665; Fanning v. Murphy, 126 Wis. 538, 105 N. W. 1056, 4 L. R. A. (N. S.) 666, 110 Am. St. 946.

[98] Bulkeley v. House, 62 Conn. 459, 26 Atl. 352, 21 L. R. A. 247; Chapeze v. Young, 87 Ky. 476, 10 Ky. L. 465, 9 S. W. 399; Leeper v. Paschal, 70 Mo. App. 117; Mulkey v. Templeton (Tex.), 60 S. W. 439.

[99] Daniel v. Ballard, 2 Dana (Ky.) 296; Byers v. McClanahan, 6 Gill & J. (Md.) 250; Taylor v. Savage, 12 Mass. 98; Cutler v. Emery, 37 N. H. 567. See also, Hayden v. Thrasher, 18 Fla. 795.

[1] Bagott v. Mullen, 32 Ind. 332, 2 Am. Rep. 351; Burnett v. Millsaps, 59

debt,[2] or give security for its payment.[3] If the payment made was outside the scope of the surety's undertaking,[4] or if a surety voluntarily pays the debt when he is not under legal liability to do so he is not entitled to contribution.[5] So, payment by one of the cosureties after the claim against them has been barred by the statute of limitations has been held voluntary and does not entitle him to contribution.[6] The law will permit cosureties to regulate the order of their liability and rights of contribution among themselves by contract, and such contract takes the place of the contract implied by law.[7] Also a surety may release a cosurety and thereby terminate the liability of the latter for contribution.[8] Likewise a release of the principal by a surety will prevent such surety from obtaining contribution from his cosureties,[9] and also a discharge of the principal by the creditor releases all the sureties from liability for contribution.[10] A surety is deprived of the right to contribution if the default of the principal resulted from the wrongful act of such surety or if he participated in the wrongful act of the principal, unless all the sureties were at fault.[11]

Miss. 333; Bishop v. Smith (N. J.), 57 Atl. 874. See also, McKee v. Campbell, 27 Mich. 497.

[2] Lucas v. Chamberlain, 8 B. Mon. (Ky.) 276; Flickinger v. Hull, 5 Gill (Md.) 60.

[3] Lytle's Exr. v. Pope's Admr., 11 B. Mon. (Ky.) 297.

[4] Halsey v. Murray, 112 Ala. 185, 20 So. 575; McLin v. Harvey, 8 Ga. App. 360, 69 S. E. 123.

[5] Halsey v. Murray, 112 Ala. 185, 20 So. 575; Curtis v. Parks, 55 Cal. 106. But it was held in Hotham v. Berry, 82 Kans. 412, 108 Pac. 801, that payment of a note a few days before maturity, where the principal was insolvent, was not within the rule. In Briggs v. Hinton, 14 Lea (Tenn.) 233, it was held that where the amount against the principal was swelled owing to an appeal by him alone, a surety paying the excess over the amount of the original judgment could not have contribution.

[6] Hatchett v. Pegram, 21 La. Ann. 722; Hooper v. Hooper, 81 Md. 155, 31 Atl. 508, 48 Am. St. 496; Wheatfield v. Brush Valley Tp., 25 Pa. St. 112. But see Bright v. Lennon, 83 N. Car. 183, holding that a surety on a guardian's bond cannot have contribution, although he waives the statute of limitations in an action against him by the ward.

[7] Barton v. Haltom, 93 Ark. 631, 125 S. W. 418; Kellogg v. Lopez, 145 Cal. 497, 78 Pac. 1056; Robertson v. Deatherage, 82 Ill. 511; Lusby v. Carr, 60 Md. 192; Rose v. Wollenberg, 36 Ore. 154, 59 Pac. 190; Hall v. Taylor (Tex.), 95 S. W. 755.

[8] Warren v. Whitesides, 34 Miss. 171; Peyton v. Stuart, 88 Va. 50, 13 S. E. 408, 16 S. E. 160.

[9] John v. Jones, 16 Ala. 454; Pickering v. Marsh, 7 N. H. 192. See also, Hamilton v. Glasscock (Tex.), 9 S. W. 207.

[10] Fox v. Litwiler, 12 Pa. Dist. 337; Hamilton v. Glasscock (Tex.), 9 S. W. 207.

[11] Healey v. Scofield, 60 Ga. 450; Block v. Estes, 92 Mo. 318, 4 S. W. 731; Pomeroy v. Sterrett, 183 Pa. St. 17, 38 Atl. 476.

§ 3985. Rights of creditor or obligee.—The general rule is that the liability of a surety, or of a supplemental surety, to the creditor or obligee is measured by that of the principal, even though the relationship be known;[12] although a surety, when entering into the contract, may assume expressly a less or even a greater liability.[13] This liability of principal and surety may be joint or joint and several.[14] If the liability be joint, but not several, the creditor should join them in one action; but if the liability is joint and several, each signer can be held for the entire indebtedness,[15] and the surety held may afterward adjust his rights by contribution from his cosureties.[16] It has also been held that if the liability be joint and several the fact that the creditor has recovered a judgment against one is no defense to the other if that judgment remains unsatisfied,[17] but that a judgment recovered against them jointly bars a separate action against either.[18] The mere fact that the creditor receives possession of property of the principal or otherwise takes additional security for the debt or obligation does not release the surety from liability;[19] nor, in general, does a mere delay, not amounting to laches, after default in proceeding against a surety or against cosureties, discharge a surety.[20] As a general rule, in the absence of a statute, the creditor is not required to proceed against the

[12] Gage v. Lewis, 68 Ill. 604; People v. Morrison, 75 Mich. 30, 42 N. W. 531; Higerty v. Higerty, 1 Phila. (Pa.) 232, 4 Am. Law J. (N. S.) (Pa.) 102; St. Albans Bank v. Dillon, 30 Vt. 122, 73 Am. Dec. 295. See also, Stewart v. Lewis, 42 La. Ann. 37, 6 So. 898; Kendrick v. Moss, 104 Tenn. 376, 58 S. W. 127; Gill v. Morris, 11 Heisk. (Tenn.) 614, 27 Am. Rep. 744.

[13] Smith v. Rogers, 14 Ind. 224.

[14] Mariposa v. Knowles, 146 Cal. 1, 79 Pac. 525; East Bridgewater Sav. Bank v. Bates, 191 Mass. 110, 77 N. E. 711; Renkert v. Elliott, 11 Lea (Tenn.) 235. See also, United States v. Cushman, 2 Sumn. (U. S.) 426.

[15] McCormick v. Mitchell, 57 Ind. 248; Keller's Admr. v. McHuffman, 15 W. Va. 64.

[16] Prescott v. Newell, 39 Vt. 82.

[17] Burwell v. Edison, 3 Ont. Case Law Dig. 5733 (where separate actions are brought against two sureties it was held that the discharge of one does not operate as a discharge of the other); Fireman's Ins. Co. v. McMillan, 29 Ala. 147; State v. Roberts, 40 Ind. 451.

[18] United States v. Archer, 1 Wall. Jr. (U. S.) 173, Fed. Cas. No. 14464, affd. 9 How. (U. S.) 83, 13 L ed. 56.

[19] Oxley v. Storer, 54 Ill. 159; Citizens' Bank v. Whinery, 110 Iowa 390, 81 N. W. 694; Johnson v. Howe, 14 Ky. L. 897, 21 S. W. 239; First Nat. Bank v. Wilbern, 65 Nebr. 242, 90 N. W. 1126, 93 N. W. 1002, 95 N. W. 12; Cruger v. Burke, 11 Tex. 694.

[20] Newman v. Kaufman, 28 La. Ann. 865, 26 Am. Rep. 114; Clark v. Douglas, 58 Nebr. 571, 79 N. W. 158; People v. Donohue, 70 Hun (N. Y.) 317, 24 N. Y. S. 437; First Nat. Bank v. Rusk Pure Ice Co. (Tex. Civ. App.), 136 S. W. 89.

principal before resorting to the surety,[21] nor can he ordinarily be compelled to resort to other remedies before coming on the surety.[22]

§ 3986. Rights of creditor or obligee—Effect of delay.—So, in the absence of a statute, mere forbearance to proceed against the principal will not affect the creditor's right to resort to the surety, even though the principal may become insolvent during the delay or the remedy against him be lost by lapse of time.[23] Delay in enforcing the claim after suit has been instituted, or in issuing execution after judgment does not discharge the surety, even if the property of the principal is sold by him meanwhile, or is destroyed.[24] If securities are placed with the creditor as collateral security for the debt or obligation, the surety is not usually discharged by mere delay on the part of the creditor in enforcing such security for the debt; and the creditor is not

[21] London &c. Bank v. Smith, 101 Cal. 415, 35 Pac. 1027; Levy v. Cohen, 103 App. Div. (N. Y.) 195, 92 N. Y. S. 1074; Campbell v. Sherman, 151 Pa. St. 70, 25 Atl. 35, 31 Am. St. 735; Manson v. Rawling's Exrs., 112 (Va.) 384, 71 S. E. 564; Post v. Bailey, 68 W. Va. 434, 69 S. E. 910; Stein v. Benedict, 83 Wis. 603, 53 N. W. 891.

[22] Brooks v. Carter, 36 Ala. 682; First Nat. Bank v. McKenney, 67 Maine 272; First Nat. Bank v. Fowler, 54 Wash. 65, 102 Pac. 1038.

[23] Dampskibsaktieselskabet Habil v. United States Fidelity &c. Co., 142 Ala. 363, 39 So. 54; Dawson v. Real Estate Bank, 5 Ark. 283; Humphreys v. Crane, 5 Cal. 173; Byers v. Hussey, 4 Colo. 515; Clark v. Gerstley, 26 App. Cas. D. C. 205; American Surety Co. v. Lawrenceville Cement Co., 96 Fed. 25; Pfeiffer v. Knapp, 17 Fla. 144; Harvey v. Atkinson, 100 Ga. 178, 28 S. E. 31; Williams v. Kennedy, 134 Ga. 339, 67 S. E. 821; Pearl v. Wellman, 11 Ill. 352; Barnes v. Mowry, 129 Ind. 568, 28 N. E. 535; Hall v. First Nat. Bank, 5 Kans. App. 493, 47 Pac. 566; Nichols v. McDowell, 14 B. Mon. (Ky.) 6; Forstall v. Fussell, 50 La. Ann. 249, 23 So. 273; Livermore Falls Trust &c. Co. v. Richmond Mfg. Co., 108 Maine 206, 79 Atl. 844; Freeman's Bank v. Rollins, 13 Maine 202; Taylor v. State, 73 Md. 208, 20 Atl. 914, 11 L. R. A. 852; Allen v. Brown, 124 Mass. 77; People v. Butler, 74 Mich. 643, 42 N. W. 273; Berryhill v. Peabody, 77 Minn. 59, 79 N. W. 651; Wright v. Watt, 52 Miss. 634; McCune v. Belt, 38 Mo. 281; Kroncke v. Madsen, 56 Nebr. 609, 77 N. W. 202; Quillen v. Quigley, 14 Nev. 215; Morris Canal &c. Co. v. Van Vorst's Admx., 21 N. J. L. 100; Douglass v. Ferris, 138 N. Y. 192, 33 N. E. 1041, 34 Am. St. 435; Neal v. Freeman, 85 N. Car. 441; Ashton v. Bayard, 71 Pa. St. 139; Watson v. Barr, 37 S. Car. 463, 16 S. E. 188; Bennett v. Ellis, 13 S. Dak. 401, 83 N. W. 429; Burke v. Cruger, 8 Tex. 66, 58 Am. Dec. 102; Fanning v. Murphy, 126 Wis. 538, 105 N. W. 1056, 4 L. R. A. (N. S.) 666.

[24] Williams v. Kennedy, 134 Ga. 339, 67 S. E. 821. In Bellows v. Lovell, 5 Pick. (Mass.) 307, it was held that refusal of the creditor to proceed with an attachment against the principal after a request by the surety, is not a defense to the surety, although the principal afterward became insolvent. Duer v. Morrill, 20 Ill. App. 355. In Alcock v. Hill, 4 Leigh (Va.) 622, it was held that a mere suspension of execution for several years

required, nor can he be compelled to resort to such securities to obtain payment of the debt.[25]

§ 3987. Duty of creditor as to notice.—In most states, under the common law, the surety cannot, by notice, compel the creditor to proceed against the principal, but statutes have been enacted in most of the states giving the surety the right to require the creditor to institute suit against the principal and releasing the surety upon failure of the creditor to comply with the notice. The extent of such right must be ascertained by reference to the statute of the particular state, as it varies in different states. These statutes are somewhat similar with respect to form of notice, sufficiency, time for giving, to whom and by whom given. The statutory notice, or the notice allowed in some common-law states, must be given by the surety himself,[26] an authorized agent,[27] or an administrator or executor of a deceased surety.[28] If there are two creditors, notice must be given to both.[29] Notice is prematurely given if the cause of action has not accrued to the creditor.[30] If the statute prescribes the manner of giving the notice, it must be followed to effect the surety's release,[31] and if required to be in writing, an oral notice will not suffice.[32] It is ordinarily the duty of a person who has entered into an absolute undertaking of suretyship to make inquiry and ascertain whether the principal is discharging the obligation, and he is not entitled to notice of default from the creditor,[33] nor is the creditor

without any binding agreement to do so, and until the principal and all the sureties but one became insolvent, does not discharge the solvent surety in equity.

[25] Maledon v. Leflore, 62 Ark. 387, 35 S. W. 1102; Presbyterian Bd. of Publication &c. v. Gilliford, 139 Ind. 524, 38 N. E. 404; Cromwell v. Rankin, 30 Ky. L. 123, 97 S. W. 415; Thorn v. Pinkham, 84 Maine 101, 24 Atl. 718, 30 Am. St. 335; Warner v. Williams, 93 Md. 517, 49 Atl. 559; Webber v. Webber, 109 Mich. 147, 66 N. W. 960; Roberts v. Jeffries, 80 Mo. 115; Coe v. Cassidy, 72 N. Y. 133; Stone v. Rockefeller, 29 Ohio St. 625; First Nat. Bank v. Wood, 71 N. Y. 405, 27 Am. Rep. 66. See also, note in 37 L. R. A. (N. S.) 699. A surety who undertakes to pay rent unqualifiedly upon the tenant's default, cannot require the landlord to distrain. Brooks v. Carter, 36 Ala. 682.

[26] Geddis v. Hawk, 10 Serg. & R. (Pa.) 33.

[27] Medley v. Tandy, 85 Ky. 566, 9 Ky. L. 168, 4 S. W. 308; Wetzel v. Sponsler's Exrs., 18 Pa. St. 460.

[28] O'Howell v. Kirk, 41 Mo. App. 523.

[29] Meridian Silver Plate Co. v. Flory, 44 Ohio St. 430, 7 N. E. 753.

[30] Scales v. Cox, 106 Ind. 261, 6 N. E. 622; Conard v. Foy, 68 Pa. St. 381.

[31] Simpson v. State, 6 Baxt. (Tenn.) 440.

[32] Darby v. Berney Nat. Bank, 97 Ala. 643, 11 So. 881.

[33] Jones v. Gaines, 92 Ark. 519, 123

required, before proceeding against the surety, to make a demand on the principal for payment or performance of the contract.[34] However, a different rule prevails if the obligation of the surety is a continuing one, and the extent of the principal's liability is entirely within the knowledge of the creditor. In such case, notice of the principal's default must be given to the surety within a reasonable time, or he will be discharged.[35]

§ 3988. Surety's liability limited to terms of contract.—As we have stated the general rule that the liability of the surety is measured by that of the principal, we will now consider the qualifying rule, namely, that the extent of the surety's liability is strictly limited to that assumed by the terms of his contract.[36] Thus a surety on a bond is not liable beyond the penalty named therein.[37] While the law restricts the surety's liability to that which he agreed to undertake, it does not fail to hold him to that liability which, by the plain terms of his agreement, he promised to assume.[38]

§ 3989. Rights and liabilities of sureties on negotiable instruments.—Having considered the principles which apply to

S. W. 667; Connor v. Hodges, 7 Ga. App. 153, 66 S. E. 546; Many v. Jacobson, 149 Ill. App. 240; Wakefield v. American Surety Co., 209 Mass. 173, 95 N. E. 350; Wright v. Deaver, 52 Tex. Civ. App. 130, 114 S. W. 165. Where bond expressly requires notice of default see Lazelle v. Empire State Surety Co., 58 Wash. 589, 109 Pac. 195. See also, Bacigalupi v. Pheonix Bldg. &c. Co., 14 Cal. App. 632, 112 Pac. 892; Fidelity &c. Co. v. Courtney, 186 U. S 342, 46 L. ed. 1193, 22 Sup. Ct. 833.

[34] Treweek v. Howard, 105 Cal. 434, 39 Pac. 20; First Nat. Bank v. Story, 131 App. Div. (N. Y.) 472, 115 N. Y. S. 421; Wallace v. Richards, 16 Utah 52, 50 Pac. 804. In Fitch v. Citizens' Nat. Bank, 97 Ind. 211, it is held that one who endorses a note as surety for the maker is not entitled to notice of nonpayment.

[35] Ætna Indemnity Co. v. Comer, 136 Ga. 24, 70 S. E. 676. Thus, where goods are sold from time to time, it is the duty of the seller to give notice to the buyer's surety of the amount, and of default in payment, within a reasonable time.

[36] Brandt on Suretyship and Guaranty, (3rd ed.), § 106; Bergevin v. Wood, 11 Cal. App. 643, 105 Pac. 935; People v. Tompkins, 74 Ill. 482; Kuhl v. Chamberlain, 140 Iowa 546, 118 N. W. 776, 21 L. R. A. (N. S.) 766n; Heaton v. Ainley (Iowa), 74 N. W. 766; Cromwell v. Rankin, 30 Ky. L. 123, 97 S. W. 415. The liability of the surety is to be determined by the specified conditions of the bond, and he cannot be charged with liability except for breach of some specified condition in the bond. See Kuhl v. Chamberlain, 140 Iowa 546, 118 N. W. 776; 21 L. R. A. (N. S.) 766n.

[37] American Surety Co. v. United States, 123 Fed. 287, 59 C. C. A. 256; Westbrook v. Moore, 59 Ga. 204; Merrinane v. Miller, 157 Mich. 279, 118 N. W. 11; Bernhardt v. Dutton, 146 N. Car. 206, 59 S. E. 651.

[38] American Bonding Co. v. Pueblo Investment Co., 150 Fed. 17, 80 C. C. A. 97, 9 L. R. A. (N. S.) 557n.

contracts of suretyship in general, we turn our attention to certain particular contracts of suretyship, and discuss the rules which are peculiar to them. As the subject of negotiable instruments is thoroughly discussed in another part of this work, we will consider very briefly here the relation the parties occupy to the subject of suretyship. It may be stated as a general rule that an indorser of a negotiable instrument, except an indorser without recourse, is a surety.[39] The suretyship element of the contract of an indorser is the same in all indorsements, except in the indorsement without recourse and in an irregular indorsement. An irregular or anomalous indorser is one not a party to the paper as maker, payee or holder, but one whose name is often placed on the back of a note at its inception for the purpose of adding to the maker's credit with the payee or purchaser. Such signature on a note payable to a designated person and appearing before the payee has indorsed the paper has been variously held to be that of an indorser, maker, surety, or guarantor. The so-called "New York Rule" has held him to be an indorser;[40] the so-called "Pennsylvania Rule" makes him a second indorser as to the payee;[41] while under the "Massachusetts rule," the early cases and many of the later ones, he is held to be the maker.[42] Other courts have held that such indorser is a surety for the maker;[43] while other courts for many years held that such indorser was a guarantor.[44] A number of states have solved the question by statute, but, aside

[39] Ohio Thresher & Engine Co. v. Hensel, 9 Ind. App. 328, 36 N. E. 716; Drew v. Robertson, 2 La. Ann. 592; Humphreys v. Vertner, Freem. Ch. 251 (Miss.); Bryant v. Rudisell, 4 Heisk. (Tenn.) 656.

[40] Hooks v. Anderson, 58 Ala. 238, 29 Am. Rep. 745; Fessenden v. Summers, 62 Cal. 484; Spencer v. Allerton, 60 Conn. 410, 22 Atl. 778, 13 L. R. A. 806; Collins v. Everett, 4 Ga. 266; Houston v. Bruner, 39 Ind. 376; Fear v. Dunlap, 1 Green (Iowa) 331; Arnold v. Bryant, 8 Bush (Ky.) 668; Wylie v. Cotter, 170 Mass. 356, 49 N. E. 746, 64 Am. St. 305; Rogers v. Stevenson, 16 Gil. (Minn.) 56; New York L. Ins. Co. v. McKellar, 68 N. H. 326, 44 Atl. 516; Spies v. Gilmore, 1 N. Y. 321, 4 How. Pr. (N. Y.) 444.

[41] Bowler v. Braun, 63 Minn. 32, 65 N. W. 124, 56 Am. St. 449; Central Nat. Bank v. Dreydoppel, 134 Pa. St. 499, 19 Atl. 689, 19 Am. St. 713.

[42] Phillips v. Cox, 61 Ind. 345 (signing as "surety"); Mulcare v. Welch, 160 Mass. 58, 35 N. E. 97; Merchants' Trust &c. Co. v. Jones, 95 Maine 335, 50 Atl. 48, 85 Am. St. 412.

[43] Palmer v. Grant, 4 Conn. 389; Ridley v. Hightower, 112 Ga. 476, 37 S. E. 733; Rogers v. Gibbs, 24 La. Ann. 467; Priedman v. Johnson, 21 Minn. 12.

[44] Jones v. Goodwin, 39 Cal. 493, 2 Am. Rep. 473 (before the code of 1872); Golsen v. Brand, 75 Ill. 148; Rodabaugh v. Pitkin, 46 Iowa 544; Talley v. Burtis, 45 Kans. 147, 25 Pac. 603.

from that, the rule upon which there is tendency toward agreement is that the contract implied by such signature is not fixed by the law merchant but depends largely upon the intention of the parties.[45] The prevailing tendency by statute in at least one-half of the states is to make his liability that of an indorser.[46] Yet where one who is not the maker or payee indorses a nonnegotiable note before its delivery to the payee, he is generally held to be a guarantor; but in a few states he is held to be an original maker, though if the indorsement is made after the delivery of the note, it is deemed to be a contract of guaranty.[47] The drawer of a bill of exchange is the principal debtor before acceptance, but becomes a surety thereafter. The promise of the drawer is to indemnify subsequent holders after acceptance, and his liability thereafter is similar to that of an indorser.[48] Accommodation parties bear the relation of sureties to the parties benefited, and cannot be held liable except in the capacity which they have expressly or impliedly assumed.[49]

§ 3990. Suretyship by surety companies.—In recent years many corporations have been organized for the express purpose of making, guaranteeing, or becoming a surety upon bonds required or authorized by law, and it goes without saying that the contracts of guaranty and suretyship of such corporations are valid. When such surety company acts as surety on a bond, in manner and form prescribed by statute, it seems, in most respects at least, to be treated in all respects the same as a noncorporate surety, and is subject to the same rules of construction as apply to the contracts of other sureties.[50] The instrument must be

[45] Boteler v. Dexter, 9 Mackey (D. C.) 26; Kealing v. Vansickle, 74 Ind. 529, 39 Am. Rep. 101; Owings v. Baker, 54 Md. 82, 39 Am. Rep. 353; Baker v. Robinson, 63 N. Car. 191; Long v. Campbell, 37 W. Va. 665, 17 S. E. 197.

[46] See statutes of the various states.

[47] Killian v. Ashley, 24 Ark. 511, 91 Am. Dec. 519; Ives v. McHard, 2 Ill. App. 176; Irish v. Cutter, 31 Maine 536; Way v. Butterworth, 108 Mass. 509; Peterson v. Russell, 62 Minn. 220, 64 N. W. 555, 29 L. R. A. 612, 54 Am. St. 634; Good v. Martin, 95 U. S. 90, 24 L. ed. 341.

[48] Norton on Bills and Notes (3rd ed.), p. 80.

[49] Braley v. Buchanan, 21 Kans. 274; Chester v. Dorr, 41 N. Y. 279. See the statutes of the several states.

[50] California Savings Bank v. American Surety Co., 82 Fed. 866; United States Fidelity & Guaranty Co. v. Woodson, 145 Fed. 144, 76 C. C. A. 114; Masury v. Westwater, 94 Ill. App. 30; Stewart v. Knight & Jillson Co., 166 Ind. 498, 76 N. E. 743;

signed and executed by the surety company in the manner required by law for signing and executing such instruments, and if the surety company was created in another state, and has complied with the laws of the state in which it is transacting business, it is not necessary to state in the bond which it signs, that it is authorized to transact business in the state.[51] But while it is generally true, as has been stated, that contracts of suretyship by a surety company are governed by the same rules as the contracts of other sureties, some courts make distinctions in construing such contracts. The doctrine that a surety is a favorite of the law does not apply where the undertaking is executed upon a consideration by a corporation engaged in such business for profit.[52] While such corporations are designated "surety companies," their business is usually in every essential that of insurers;[53] and the contract is treated as in the nature of an insurance policy and construed according to the rules of construction applicable to insurance policies.[54]

Bishop v. Freemen, 42 Mich. 533, 4 N. W. 290; United States v. National Surety Co., 92 Fed. 549, 34 C. C. A. 526; N. K. Fairbank Co. v. American Bonding & Trust Co., 97 Mo. App. 205, 70 S. W. 1096; Guarantee Co. of North America v. Mechanics' Savings Bank & Trust Co., 183 U. S. 402, 46 L. ed. 253.

[51] Clopton v. Goodbar (Tex.), 55 S. W. 972.

[52] Lesher v. Fidelity &c Co., 239 Ill. 502, 88 N. E. 208; Brandrup v. Empire State Surety Co., 111 Minn. 376, 127 N. W. 426; Allen v. Eneroth, 111 Minn. 395, 127 N. W. 426; Peabody v. Richard Realty Co., 69 Misc. (N. Y.) 582, 125 N. Y. S. 349; Young v. American Bonding Co., 228 Pa. 373, 77 Atl. 623. See also, United States v. United States Fidelity &c. Co., 178 Fed. 721; Rule v. Anderson (Mo.), 142 S. W. 358, and note in Ann. Cas. 1912B, 1087.

[53] People v. Rose, 174 Ill. 310, 51 N. E. 246, 44 L. R. A. 124; Lesher v. Fidelity Co., 239 Ill. 502, 88 N. E. 208; Crystal Ice Co. v. United Surety Co., 159 Mich. 102, 123 N. W. 619; Hormel v American Bonding Co., 112 Minn. 288, 128 N. W. 12; Illinois Surety Co. v. Hildebrand, 126 N. Y. S. 651; Young v. American Bonding Co., 228 Pa. 373, 77 Atl. 623.

[54] In Tebbets v. Mercantile Credit Guaranty Co., 73 Fed. 95, 19 C. C. A. 281, Peckham, J., said that in the construction of such a contract cases "holding that a surety is a 'favorite of the law' and that a claim against them is strictissimi juris have no application. Corporations entering into contracts like the one at bar may call themseves 'guarantee' or 'surety' companies, but their business is, in all essential particulars, that of insurers who, upon careful calculation of the risk of such business, and with such restrictions of their liability as may seem to them sufficient to make it safe, undertake to assure persons against loss, in return for premiums sufficiently high to make such business commercially profitable. Their contracts are, in fact, policies of insurance and should be treated as such." See also, to this point, Mercantile Credit Guarantee Co. v. Wood, 68 Fed. 529, 15 C. C. A. 563.

TITLE NINE

INDEMNITY CONTRACTS

CHAPTER CXVI.

INDEMNITY CONTRACTS.

§ 3995. Introductory.
3996. Definition.
3997. Not within statute of frauds.
3998. Effect of illegality of act as to which indemnity is given.
3999. Consideration.
4000. Construction and operation.
4001. Joint or several contract and liability.
4002. Time covered—Renewal.
4003. Indemnity by or to trustees.
4004. Indemnity to bail or surety in criminal case.
4005. Indemnity contracts not generally for benefit of third persons.
§ 4006. Indemnity against liens—Labor and materials.
4007. Indemnity against negligence.
4008. Contract to indemnify officer of corporation for indorsing its notes.
4009. Indemnity mortgages.
4010. Performance or fulfilment of contract.
4011. Breach of contract—Recovery —Measure of damages.
4012. Effect of judgment against indemnitee.

§ 3995. **Introductory.**—Indemnity contracts of various kinds are elsewhere treated under particular headings and in connection with the special subjects to which they relate. No specific consideration will, therefore, be given in this chapter to such forms of indemnity contracts as are elsewhere treated. But a brief review of the general subject and an examination of such specific kinds or forms of indemnity contracts as are not elsewhere considered in this work will be made in this chapter.[1]

§ 3996. **Definition.**—An indemnity contract is a contract to indemnify or save harmless from loss. Strictly it is to save

[1] For distinction between indemnity contracts and guaranty or suretyship see the latter title in this work, and the recent case of Western Surety Co. v. Kelley (S. Dak.), 131 N. W. 808. A bond "to indemnify or make good any loss by reason of nonpayment for goods," sold to the principal, and a bond that the parties agree to indemnify the obligee "against any and all loss that may arise," etc., have been held original joint and several undertakings requiring no notice of acceptance. Wheeler v. Rohrer, 21 Ind. App. 477, 52 N. E. 780.

harmless or free from loss or damage in regard to some particular transaction,[2] but the term is often used as including a covenant against liability or an agreement to protect against claims or liability to third persons.[3] Such contracts most often take the form of a bond; but indemnifying mortgages are frequently executed, and various other forms are also found, some not even in writing.[4]

§ 3997. Not within statute of frauds.—The prevailing rule is that a true indemnity contract is an original rather than a collateral contract and is not within the statute of frauds.[5] In a few jurisdictions, however, the opposite view has been taken, and in some instances at least such contracts have been held within the statute of frauds.[6]

§ 3998. Effect of illegality of act as to which indemnity is given.—The mere fact that the act, against the consequences of which the contract purports to indemnify, turns out to be

[2] See Gage v. Lewis, 68 Ill. 604; Valentine v. Wheeler, 122 Mass. 566, 23 Am. Rep. 404; Chace v. Hinman, 8 Wend. (N. Y.) 452, 24 Am. Dec. 39.

[3] See 16 Am. & Eng. Ency. of Law (2d ed.) 168; Black's Law Dict.; Palmyra v. Nichols, 91 Maine 17, 39 Atl. 338; Hough v. Perkins, 2 How. (Miss.) 724; Herring v. Hoppock, 15 N. Y. 409. Compare also, Ordinary v. Connolly, 75 N. J. Eq. 521, 72 Atl. 363, 138 Am. St. 577.

[4] Handsaker v. Pedersen (Wash.), 128 Pac. 230. For discussions as to what are indemnity contracts and decisions as to whether the particular contracts in question were true indemnity contracts see, Hygienic Chemical Co. v. Provident Chemical Works, 176 Fed. 525, 100 C. C. A. 121 (agreement to share costs held not); Switzer v. Henking, 158 Fed. 784, 86 C. C. A. 140, 15 L. R. A. (N. S.) 1151 and note; Hilliard v. Newberry, 153 N. Car. 104, 68 S. E. 1056. In Jenckes v. Rice, 119 Iowa 451, 93 N. W. 384, a writing in the form of a note but containing in addition a statement that it was given to secure the payee against loss in a certain transaction, and to be void if no loss accrued, was held a contract of indemnity and not a promissory note.

[5] Thomas v. Cook, 8 Barn. & C. 728, 15 E. C. L. 728; Reader v. Kingham, 13 C. B. (N. S.) 344; Mountstephen v. Lakeman, L. R. 7 Q. B. 196; Wildes v. Dudlow, L. R. 19 Eq. 198; Burr v. Cross, 3 Cal. App. 414, 86 Pac. 824; Smith v. Delaney, 64 Conn. 264, 29 Atl. 496, 42 Am. St. 181, and note; Anderson v. Spence, 72 Ind. 315, 37 Am. Rep. 162; Spencer v. McLean, 20 Ind. App. 626, 50 N. E. 769, 67 Am. St. 271; Hawes v. Murphy, 191 Mass. 469, 78 N. E. 109; Esch v. White, 76 Minn. 220, 78 N. W. 1114; Patrick v. Barker, 78 Nebr. 823, 112 N. W. 358; Peterson v. Creason, 47 Ore. 69, 81 Pac. 574; Davis v. Patrick, 141 U. S. 479, 35 L. ed. 826, 12 Sup. Ct. 58; Barth v. Graf, 101 Wis. 27, 76 N. W. 1100. See also, 1 Elliott Ev., § 659; and ante vol. 2, §§ 1245, 1246.

[6] Brown v. Adams, 1 Stew. (Ala.) 51, 18 Am. Dec. 36; Spear v. Farmers' &c. Bank, 156 Ill. 555, 41 N. E. 164; May v. Williams, 61 Miss. 125, 48 Am. Rep. 80; Craft v. Lott, 87 Miss. 590, 40 So. 426, 6 Am. & Eng. Ann. Cas. 670; Hurt v. Ford, 142 Mo.

illegal does not render the indemnity contract illegal and invalid.[7] It is generally sufficient if the act is not clearly illegal but is supposed to be legal and performed under claim of right.[8] But if known to be illegal the contract of indemnity would be invalid as against public policy.[9]

§ 3999. **Consideration.**—Indemnity contracts, like other contracts, must be supported by a consideration.[10] But the assumption of the liability or the performance of the act as to which the indemnity is given,[11] or the incurring of expense or forbearance by the indemnitee, or benefit to the indemnitor thereby is usually a sufficient consideration.[12] So, a future consideration

283, 44 S. W. 228, 41 L. R. A. 823. But see Dent v. Arthur, 156 Mo. App. 472, 137 S. W. 285; Hartley v. Sandford, 66 N. J. L. 627, 50 Atl. 454, 55 L. R. A. 206; Nugent v. Wolfe, 111 Pa. St. 471, 4 Atl. 15, 56 Am. Rep. 291.

[7] Marcy v. Crawford, 16 Conn. 549, 41 Am. Dec. 158; Smith v. Ashley, 11 Metc. (Mass.) 367, 45 Am. Dec. 216; Coventry v. Barton, 17 Johns. (N. Y.) 142, 8 Am. Dec. 376. But see Cumpston v. Lambert, 18 Ohio 81, 51 Am. Dec. 442.

[8] Smith v. Delaney, 64 Conn. 264, 29 Atl. 496, 42 Am. St. 181; Anderson v. Farns, 7 Blackf. (Ind.) 343; Jacobs v. Pollard, 10 Cush. (Mass.) 287, 57 Am. Dec. 105; C. F. Jewett Pub. Co. v. Butler, 159 Mass. 517, 34 N. E. 1087, 22 L. R. A. 253; Klock v. Pack, 112 Mich. 670, 71 N. W. 461; Mays v. Joseph, 34 Ohio St. 22; Armstrong v. Clarion, 66 Pa. St. 218, 5 Am. Rep. 368; Kemper v. Kemper, 3 Rand. (Va.) 8. See also, Nelson v. Cook, 17 Ill. 443.

[9] Shackell v. Rosier, 2 Bing. N. Cas. 634, 29 E. C. L. 438; Collier's Admr. v. Windham, 27 Ala. 291, 62 Am. Dec. 767; Buffendeau v. Brooks, 28 Cal. 641; Wright v. Gardner, 98 Ky. 454, 17 Ky. L. 1345, 33 S. W. 622, 35 S. W. 1116; Babcock v. Terry, 97 Mass. 482; Harrington's Admr. v. Crawford, 136 Mo. 467, 38 S. W. 80, 35 L. R. A. 477, 58 Am. St. 653; Riley v. Whittiker, 49 N. H. 145, 6 Am. Rep. 474; Webber's Exrs. v. Blunt, 19 Wend. (N. Y.) 188, 32 Am. Dec. 445; Ives v. Jones, 25 N. Car. 538, 40 Am. Dec. 421; Hopkinson v. Leeds, 78 Pa. St. 396; Ferguson v. Yunt, 13 S. Dak. 120, 82 N. W. 509; Lea v. Collins, 4 Sneed (Tenn.) 393; Arnold v. Clifford, 2 Sumn. (U. S.) 238, Fed. Cas. No. 555; Atkins v. Johnson, 43 Vt. 78, 5 Am. Rep. 260. As to when indemnitor may be treated as a joint tort feasor see Northam v. Casualty Co., 177 Fed. 981; Herring v. Hoppock, 15 N. Y. 409. See also, Vandiver v. Pollak, 107 Ala. 547, 19 So. 180, 54 Am. St. 118 and note.

[10] Rogers v. Kimball, 121 Cal. 247, 53 Pac. 648; Israel v. Reynolds, 11 Ill. 218; Marshall v. Cobleigh, 18 N. H. 485; Myers v. Morse, 15 Johns. (N. Y.) 425.

[11] Carr's Exr. v. Wyley, 23 Ala. 821; Smith v. Delaney, 64 Conn. 264, 29 Atl. 496, 42 Am. St. 181; Seeberger v. Wyman, 108 Iowa 527, 79 N. W. 290; Goodspeed v. Fuller, 46 Maine 141, 71 Am. Dec. 572; Hagar v. Whitmore, 82 Maine 248, 19 Atl. 444; Esch v. White, 76 Minn. 220, 78 N. W. 1114; Jones v. Bacon, 145 N. Y. 446, 40 N. E. 216. See also, Waas v. Anderson, 78 Conn. 718, 61 Atl. 433; James v. Libby, 103 App. Div. (N. Y.) 256, 92 N. Y. S. 1047.

[12] Cliff Foy v. Dawkins, 138 Ala. 232, 35 So. 41; Montgomery Door &c. Co. v. Atlantic Lumber Co., 206 Mass. 144, 92 N. E. 71; Martin v. Meles, 179 Mass. 114, 60 N. E. 397; Western Assur. Co. v. Walden, 117 Mo. App. 438, 94 S. W. 725; Buffington v. Bronson, 61 Ohio St. 231, 56 N. E. 762;

may be sufficient, as where a mortgage is given to indemnify against loss growing out of indorsements to be afterward made by the mortgagee.[13] And in many instances, a promise of indemnity as to a past transaction has been sustained without any new and additional consideration, the original consideration being sometimes regarded as a continuing one;[14] but in other cases, the general rule that a mere past consideration is insufficient has been applied.[15]

§ 4000. **Construction and operation.**—It may be stated generally that such losses, damages, or liabilities are covered by a contract of indemnity, as reasonably appear therefrom to have been within the intention of the parties;[16] but not such as are neither expressly within the terms of the contract nor of such a character that they can reasonably be inferred to have been within the intention of the parties.[17] It has been held, however, that one who accepts and acts on an indemnity bond without objection is bound by the limitations in its terms although it does

Dorwin v. Smith, 35 Vt. 69. See also, Maybee v. Turley, 27 U. C. Q. B. 444; Diamond Match Co. v. United States, 24 Blatchf. (U. S.) 442, 31 Fed. 271; White v. Baxter, 71 N. Y. 254; Manary v. Runyon, 43 Ore. 495, 73 Pac. 1028; and compare Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279; Frank v. Jenkins, 11 Wash. 611, 40 Pac. 220.

[13] Kramer v. Farmers' &c. Bank, 15 Ohio 253; Lyle v. Ducomb, 5 Bin. (Pa.) 585. See also, Western Surety Co. v. Kelley (S. Dak.), 131 N. W. 808.

[14] Suffield (Lord) v. Bruce, 2 Stark. 175; Doty v. Wilson, 14 Johns. (N. Y.) 378; Carroll v. Nixon, 4 Watts & S. (Pa.) 517. See also, South Side Planing Mill Assn. v. Cutler &c. Lumber Co., 64 Ind. 560; Western Assur. Co. v. Walden, 117 Mo. App. 438, 94 S. W. 725; Essig v. Turner, 60 Wash. 175, 110 Pac. 998.

[15] Bulkley v. Landon, 2 Conn. 404; Jones v. Shorter, 1 Ga. 294, 44 Am. Dec. 649; Holloway's Assignee v. Rudy, 22 Ky. L. 1406, 60 S. W. 650, 53 L. R. A. 353; Peck v. Harris, 57 Mo. App. 467; Coffin v. Lockhart, 71 Hun (N. Y.) 262, 54 N. Y. St. 580, 24 N. Y. S. 1025; Mitchell v. Bell, 1 N. Car. 143, 244, Cam. & N. Conf. (N. Car.) 17, Tayl. (N. Car.) 61, 2 Am. Dec. 627. But see where there was a prior understanding, Grim v. Semple, 39 Iowa 570.

[16] Heaton v. Ainley, 108 Iowa 112, 78 N. W. 798; Shea v. McCauliff, 186 Mass. 569, 72 N. E. 69; Home Ins. Co. v. Watson, 59 N. Y. 390; Stone v. Hooker, 9 Cow. (N. Y.) 154. See also, Nash v. Palmer, 5 M. & S. 374; United States Fidelity &c. Co. v. Woodson County, 145 Fed. 144, 76 C. C. A. 114; Benton County Sav. Bank v Boddicker, 105 Iowa 548, 75 N. W. 632, 45 L. R. A. 321, 67 Am. St. 310; Quickel v. Henderson, 59 N. Car. 286. In Forest County v. United Surety Co. of Baltimore, 149 Wis. 323, 136 N. W. 335, it is held that an indemnity bond should be construed most strongly against the party preparing and furnishing it.

[17] Warrum v. Derry, 14 Ind. App. 442, 42 N. E. 1123; Barry v. Larabie, 7 Mont. 179, 14 Pac. 699; French v. Vix, 143 N. Y. 90, 37 N. E. 612; Moorehead v. Duncan, 82 Pa. St. 488. See also, Indianapolis, P. & C. R. Co. v. Browenburg, 32 Ind. 199; Donley

not cover the risks contemplated by the obligee.[18] In accordance with the general rule, if the terms of the contract are broad enough, or such appears therefrom to have been the intention, the indemnity will extend to all claims of the same character or to all loss or damage growing out of the transaction,[19] but if expressly limited to certain specified claims, or, it seems, if it only mentions certain specified claims, without any general terms, it will not extend to others even though of the same character.[20] Contracts of indemnity are generally construed as prospective rather than as past;[21] but they may relate to past or existing liabilities or transactions and will be so construed when such clearly appears to have been the intention.[22] A clear covenant of indemnity is not restricted by a mere recital.[23] But a reference to the principal's contract and a recital of its stipulations as to which the indemnity is given may in effect incorporate it in the indemnity contract or render the indemnitor liable for the breach of such stipulations the same as if the contract were set out in full.[24]

v. Liberty Imp. Bank, 40 Ohio St. 47. And compare Nash v. Palmer, 5 M. & S. 374; Evans v. Renyon, 37 Ch. D. 329, 58 L. T. 700.

[18] Orion Knitting Mills v. United States Fidelity &c. Co., 137 N. Car. 565, 50 S. E. 304, 70 L. R. A. 167. And see as to reading the contract in the light of surrounding circumstances, Bancroft v. Winspear, 44 Barb. (N. Y.) 209; Griffiths v. Hardenbergh, 41 N. Y. 464.

[19] Wood v. Lindley, 12 Ind. App. 258, 40 N. E. 283. See also, White v. De Villiers, 1 Johns. Cas. (N. Y.) 173.

[20] Tanner v. Woolmer, 8 Exch. 482, 22 L. J. Exch. 259. See also, Guaranty Sav. &c. Assn. v. Rutan, 6 Ind. App. 83, 33 N. E. 210; Masonic Sav. Bank's Assignee v. Eschman, 18 Ky. L. 578, 37 S. W. 487; Orion Knitting Mills v. United States Fidelity &c. Co., 137 N. Car. 565, 50 S. E. 304, 70 L. R. A. 167. Where the grantor of land gave his grantee a note to indemnify against liability on certain vendor's lien notes, and it was not intended that the note should represent liquidated damages, it was held that the grantee on afterwards being compelled to pay the vendor's lien notes could recover from such grantor only the amount he was compelled to pay and not the face of the indemnity note. McKinley v. Davidson (Tex. Civ. App.), 146 S. W. 576. See also, Wood v. United States Fidelity &c. Co., 143 Fed. 424.

[21] Warwick v. Hutchinson, 45 N. J. L. 61; Hutchinson v. Warwick, 46 N. J. L. 200. See also, Stokes v. Howerton, 67 N. Car. 50.

[22] Turner v. Gill, 105 Ky. 414, 20 Ky. L. 1253, 49 S. W. 311. See also, Heaton v. Ainley, 108 Iowa 112, 78 N. W. 798.

[23] In re Baker, 51 L. J. Ch. 315, 20 Ch. Div. 230; Parker v. Read, 9 N. H. 121. But recitals showing the subject and intention may restrain or limit the condition or liability in some cases. National Mechanics' Banking Assn. v. Conkling, 90 N. Y. 116, 42 Am. Rep. 405n. See also, London Assur. Corp. v. Bold, 6 Q. B. 514, 8 Jur. 1118, 14 L. J. Q. B. 50.

[24] Ausplund v. Aetna Indemnity Co., 47 Ore. 10, 81 Pac. 577, 82 Pac. 12, so holding even though the under-

§ 4001. Joint or several contract and liability.—Joint and several contracts have been so fully treated in other connections that it is unnecessary to do more here than to state that the rules upon the subject are in general the same in regard to indemnity contracts as in other similar or analogous cases. It is sometimes difficult, however, to determine whether a particular contract or obligation is joint or several as well as the nature of the resulting liability. Where a contract between the stockholders of a company provided that each signer agree "with all the others, and each with such stockholders" as then were or should become liable upon the company's paper as indorsers or otherwise, "that each of the said parties will so indemnify, protect, and save harmless the said stockholders" so liable, or becoming liable, on such paper, "in proportion of each of said stockholder's ownership of said stock, and to that end will, upon the demand of any one or more of said stockholders who shall be called upon as indorsers to pay such paper, contribute * * * in proportion to the stock held by him," it was held that the contract of indemnity was to be construed as several, as respects each of the parties signing it, and that any one of them who had a valid claim thereon against the others might maintain a separate action upon it, against any one so liable for his proper proportion thereof, without joining the others as defendants; and that a delivery of such contract to indemnify against loss or damage by reason of liability as indorser, by one who had signed it, to another of the signers, was a consent that it should be binding on him, although not signed by all of those named in the body of the instrument as parties.[25] But a contract purporting by its terms to be joint and to indemnify a bail is not rendered several by the fact that each of the obligors has annexed or placed after his signature a character and figures indicating certain different sums or amounts of money.[26] And where several signers of a note released one of their number from liability thereon and agreed to indemnify him from any loss or damage on account of the note,

taking did not specifically set out or recite the particular condition breached.

[25] Taylor v. Coon, 79 Wis. 76, 48 N. W. 123; Taylor v. Matteson, 86 Wis. 113, 56 N. W. 829. See also, for several contract, Stevens v. Hall, 19 N. H. 560.

[26] McCullis v. Thurston, 27 Vt. 596.

it was held that the liability was joint and the indemnitee could recover against all of them even though judgment had been rendered against him for only the balance remaining due after one of the indemnitors had paid his proportion of such note.[27]

§ 4002. Time covered—Renewal.—If the indemnity contract expressly limits the act or time covered, as where it undertakes to indemnify an accommodation indorser for a certain note and a single renewal, and no more, the liability of the indemnitor does not extend to subsequent renewals and has been held discharged by a second renewal.[28] But where there is no such limitation and the indemnity is against any liability in consequence of indorsement or the like, it may extend to new notes in renewal and a renewal is not ordinarily a payment for the purpose of indemnity.[29] And where a guaranty against loss on a purchase of stock was extended by agreement to a certain date before which time the executor of the purchaser demanded indemnity of the guarantor, it was held that there was no ground for a contention that the guaranty continued in force for only a reasonable time.[30] It has also been held that where a bond and mortgage are given to indemnify a surety, the mortgagor is liable thereon even though by its terms the bond apparently expires before the expiration of the contract on which the surety is bound.[31]

§ 4003. Indemnity by or to trustees.—It has been held that indemnity to a trustee does not cover losses sustained as beneficiary,[32] and a contract of indemnity by a trustee as such would

[27] Rogers v. Kimball (Cal.), 49 Pac. 719. But see, Rogers v. Kimball, 121 Cal. 247, 53 Pac. 648. See also, for joint contract, Langford v. Broadhead, 63 Hun (N. Y.) 624, 17 N. Y. S. 290; Forgy v. McWilliams, 127 Pa. St. 453, 17 Atl. 1093. And as to joint and several contract, see Hughes v. Oregon R. &c. Co., 11 Ore. 437, 5 Pac. 206.

[28] Moorehead v. Duncan, 82 Pa. St. 488. See also, Usher v. Raymond Skate Co., 163 Mass. 1, 39 N. E. 416.

[29] Sutton v. Mulford, 2 Har. (Del.) 72; Mayer v. Grottendick, 68 Ind. 1; Commercial Bank v. Cunningham, 24 Pick. (Mass.) 270, 35 Am. Dec. 322; Fidelity Trust & Safety Vault Co. v. Lawler, 64 Minn. 144, 66 N. W. 143; Bank of Utica v. Finch, 3 Barb. Ch. (N. Y.) 293, 49 Am. Dec. 175; In re Lytle's Appeal, 36 Pa. St. 131; Bobbitt v. Flowers, 1 Swan (Tenn.) 511. See also, Courier Journal Job Printing Co. v. Schaefer-Meyer Brewing Co., 101 Fed. 699, 41 C. C. A. 614; Nesbit v. Worts, 37 Ohio St. 378.

[30] Plummer v. Emery, 191 Mass. 183, 77 N. E. 690. See also, generally, post, § 4411.

[31] Springs v. Brown, 97 Fed. 405.

[32] Evans v. Benyon, 37 Ch. D. 329, 58 L. T. 700.

doubtless bind him only in his trust capacity and he would not be liable individually in the absence of some other element creating an individual liability. But where an indemnity contract recited that the indemnitors as trustees and as individuals did certain acts, and stated that they held themselves responsible for any cost or damages which might be incurred by the indemnitee, it was held that they were bound both in their fiduciary and in their individual capacities.[33]

§ 4004. Indemnity to bail or surety in criminal case.—There is some conflict among the authorities as to the validity of an indemnity contract or bond given to a bail or surety on a criminal recognizance or the like, and some of the courts hold that such a contract is void as against public policy.[34] The better rule, however, seems to be that such a contract is not necessarily void but is valid and may be enforced in a proper case especially where the indemnity is given by a third person.[35] But a contract to indemnify for executing a certain bond to answer for a specified offense will not cover a more onerous bond for different offenses.[36]

§ 4005. Indemnity contracts not generally for benefit of third persons.—The general rule is that a contract of indemnity is for the benefit of the indemnitee alone, and does not give any right of action thereon to third persons even though the claim is one whereby the indemnitee will be subjected to loss for which

[33] Beekman v. VanDolson, 70 Hun (N. Y.) 288, 24 N. Y. S. 414, 53 N. Y. St. 768.

[34] Herman v. Jeuchner, L. R., 15 Q. B. Div. 561, 54 L. J. Q. B. 340; United States v. Greene, 163 Fed. 442; United States v. Simmons, 47 Fed. 723, 14 L. R. A. 78, and note; Wilson v. Strugnell, 7 Q. B. Div. 548, 50 L. J. M. C. 145. See also, Dunkin v. Hodge, 46 Ala. 523; Ratcliffe v. Smith, 13 Bush (Ky.) 172, and compare Jones v. Orchard, 16 C. B. 614.

[35] Simpson v. Robert, 35 Ga. 180; Stevens v. Hay, 61 Ill. 399; Ellis v. Norman, 19 Ky. L. 1798, 44 S. W. 429; Moloney v. Nelson, 158 N. Y. 351, 53 N. E. 31, affd. 174 U. S. 164, 43 L. ed. 934, 19 Sup. Ct. 622; Carr v. Davis, 64 W. Va. 522, 63 S. E. 326, 20 L. R. A. (N. S.) 58n, 16 Am. & Eng. Ann. Cas. 1031 (principal and dissenting opinions reviewing authorities on both sides); Carr v. Sutton (W. Va.), 74 S. E. 239. See also, Cripps v. Hartnoll, 4 Best & S. 414; Anderson v. Spence, 72 Ind. 315, 37 Am. Rep. 162; Aldrich v. Ames, 9 Gray (Mass.) 76; Mayne v. Fidelity &c. Co., 198 Pa. St. 490, 48 Atl. 469; United States v. Ryder, 110 U. S. 729, 28 L. ed. 308, 4 Sup. Ct. 196.

[36] Barry v. Larabie, 7 Mont. 179, 14 Pac. 699.

he may hold the indemnitor.[37] Thus, it has been held that a third person cannot have an action on a contract by a vendor of corporate stock to protect the vendee against debts owed by the corporation to third persons,[38] nor on a covenant by the lessee of a railroad to save the lessor harmless from damages arising out of past accidents,[39] nor on a contract by contractors to indemnify the owner of a building against loss by injury to others.[40] But it has been held that a guaranty against loss on a purchase of stock running to the purchaser, without mentioning heirs, executors, administrators or assigns, passes as a part of the estate to the purchaser's executor;[41] and there are many cases in which, in jurisdictions where persons are allowed to sue on contracts made for their benefit, bonds and similar indemnity contracts to pay for labor and materials and to save harmless from such claims have been construed and held to inure to the benefit of laborers and materialmen.[42]

§ 4006. Indemnity against liens—Labor and materials.—In many cases conditions or stipulations in building contracts, bonds, or similar indemnity contracts, have been construed as requiring the indemnitor to see that all claims for labor and materials are paid or the building surrendered free from liens.[43] And in a recent case, in line with these and other decisions, it was

[37] German State Bank v. Northwestern &c. Light Co., 104 Iowa 717, 74 N. W. 685; Union Nat. Bank v. Rich, 106 Mich. 319, 64 N. W. 339; State v. St. Louis &c. R. Co., 125 Mo. 596, 28 S. W. 1074; Turk v. Ridge, 41 N. Y. 201; French v. Vix, 143 N. Y. 90, 37 N. E. 612; Wolf v. American Tract Society, 164 N. Y. 30, 58 N. E. 31, 51 L. R. A. 241; Taylor v. Dunn, 80 Tex. 652, 16 S. W. 732, 26 Am. St. 773. See also, Derry v. Morrison, 8 Ind. App. 50, 34 N. E. 107; Warrum v. Derry, 14 Ind. App. 442, 42 N. E. 1123. It is also held that liability of indemnitee to third persons is not increased by indemnity contract. Terry v. Richmond, 944 Va. 537, 27 S. E. 429, 38 L. R. A. 834.

[38] German State Bank v. Northwestern &c. Light Co., 104 Iowa 717, 74 N. W. 685.

[39] Hill v. Omaha, Kansas City & Eastern R. Co., 82 Mo. App. 188.

[40] Wolf v. American Tract Society, 164 N. Y. 30, 58 N. E. 31, 51 L. R. A. 241.

[41] Plummer v. Emery, 191 Mass. 183, 77 N. E. 690.

[42] See Snider v. Greer-Wilkinson Lumber Co. (Ind. App.), 96 N. E. 960; French v. Langdon, 76 Wis. 29, 44 N. W. 1111; and post § 4006, also, Knight & Jillson Co. v. Castle, 172 Ind. 97, 87 N. E. 976, 27 L. R. A. (N. S.) 573 and note. And compare Smith v. Peace, 1 Lea (Tenn.) 586.

[43] Closson v. Billman, 161 Ind. 610, 69 N. E. 449; Lyman v. Lincoln, 38 Nebr. 794, 57 N. W. 531; Ausplund v. Aetna Indemnity Co., 47 Ore. 10, 81 Pac. 577, 82 Pac. 12; McKennon v. Higgins, 47 Ore. 44, 81 Pac. 581.

held that an undertaking by the surety of a building contractor, who had agreed to furnish all labor and materials, to save the obligee harmless from any pecuniary loss resulting from any of the conditions of the contract, rendered such surety liable to make good any loss arising from payment by the owner of mechanics' liens on the building because of failure on the part of the contractor to pay for the labor or materials, even though no express mention was made of mechanics' liens.[44] The question as to whether laborers or materialmen may enforce such indemnity contracts depends upon the terms and construction of the particular contract and the rule in the particular jurisdiction as to whether a third person may enforce a contract made for his benefit. As elsewhere shown the prevailing rule is that such a contract for the benefit of laborers and materialmen may be enforced by them.[45]

§ 4007. **Indemnity against negligence.**—A contract of indemnity against personal injuries should not be construed to indemnify against the negligence of the indemnitee himself unless such an intention clearly appears.[46] So, it is held that a bond given by a building contractor to the owner and undertaking to protect the obligee from damages from accident to persons employed in the construction of the building does not apply to an injury to the contractor's workmen by the negligence of the owner's servant after the owner has taken possession and while

[44] Stoddard v. Hibbler, 156 Mich. 335, 120 N. W. 787, 24 L. R. A. (N. S.) 1075n. See also, Mayes v. Lane, 116 Ky. 566, 25 Ky. L. 824, 76 S. W. 399; Kiewit v. Carter, 25 Nebr. 460, 41 N. W. 286; McRae v. University of the South (Tenn. Ch. App.), 52 S. W. 463; Friend v. Ralston, 35 Wash. 422, 77 Pac. 794. But compare Eureka Stone Co. v. First Christian Church, 86 Ark. 212, 110 S. W. 1042, 126 Am. St. 1088; Boas v. Maloney, 138 Cal. 105, 70 Pac. 1004; Gato v. Warrington, 37 Fla. 542, 19 So. 883; Sterling v. Wolf, 163 Ill. 467, 45 N. E. 218; Smith v. Bowman, 32 Utah 33, 88 Pac. 687, 9 L. R. A. (N. S.) 889n.

[45] See Vol. II ch. 32, Limits of Obligation, § 1418.

[46] Indianapolis, P. & C. R. Co. v. Browenburg, 32 Ind. 199; Mitchell v. Southern R. Co., 124 Ky. 146, 24 Ky. L. 2388, 74 S. W. 216; Perry v. Payne, 217 Pa. 252, 66 Atl. 553, 11 L. R. A. (N. S.) 1173n; Johnson's Admx. v. Richmond &c. R. Co., 86 Va. 975, 11 S. E. 829. See also, Mynard v. Syracuse &c. R. Co., 71 N. Y. 180, 27 Am. Rep. 28; Manhattan R. Co. v. Cornell, 54 Hun (N. Y.) 292, 7 N. Y. S. 557, 27 N. Y. St. 300, affd. 130 N. Y. 637, 29 N. E. 151; San Antonio & A. P. R. Co. v. Adams, 6 Tex. Civ. App. 102, 24 S. W. 839; St. Louis Southwestern R. Co. v. Arnold, 32 Tex. Civ. App. 272, 74 S. W. 819.

the contractor is replacing work rejected by the architect.[47] And such bonds do not ordinarily change the relation of an independent contractor into one of master and servant.[48] Where a surety company undertook to indemnify a county and fiscal court against loss, the company was held not liable for personal injuries caused by an elevator in the courthouse where neither the county nor the fiscal court was liable therefor.[49] So, the bond of a road contractor given to a county "for the prompt, proper and efficient performance of the contract" does not impose a liability for injury to a traveler caused by the negligence of the contractor in allowing the road to get in bad condition, at least where the county is not liable under the law.[50]

§ 4008. Contract to indemnify officer of corporation for indorsing its notes.—In a Wisconsin case, a contract—which was twice before the Supreme Court—between stockholders of a corporation to indemnify such of them as were or should become indorsers on the company's notes and providing that they should be protected "in proportion of each stockholder's ownership of stock" and that each of the signers would, upon demand of any stockholder called upon to pay such paper, contribute in proportion to his stock, was construed as a several contract of indemnity against loss or damage by reason of liability as indorser and not one of indemnity as against mere liability as indorser; and on the first appeal a failure to allege in the complaint that the plaintiff had paid the obligation was, for this reason, held fatal on demurrer.[51] In the second case involving the same contract plaintiff was the president and manager of the company and it was averred that he had paid in full the notes indorsed by him. It was held that it was no defense that plaintiff, being president

[47] Perry v. Payne, 217 Pa. 256, 66 Atl. 553, 11 L. R. A. (N. S.) 1173n. See also, to the same effect as to negligence of employés the cases last cited in the preceding note.

[48] Good v. Johnson, 38 Colo. 440, 88 Pac. 439, 8 L. R. A. (N. S.) 896n; Kirby v. Lackawanna Steel Co., 109 App. Div. (N. Y.) 334, 95 N. Y. S. 833.

[49] Simons v. Gregory, 120 Ky. 116, 27 Ky. L. 509, 85 S. W. 751. See also, Moss v. Rowlett, 112 Ky. 121, 23 Ky. L. 1411, 65 S. W. 153, 358.

[50] Redditt v. Wall (Miss.), 55 So. 45, 34 L. R. A. (N. S.) 152. See also, Schneider v. Cahill (Ky.), 127 S. W. 143, 27 L. R. A. (N. S.) 1009; Kansas City v. O'Connell, 99 Mo. 357, 12 S. W. 791. But compare Solberg v. Schlosser, 20 N. Dak. 307, 127 N. W. 91.

[51] Taylor v. Coon, 79 Wis. 76, 48 N. W. 123.

and manager of the company, had indorsed notes in excess of the amount specified in said contract, without authority from the corporation, and that the company's assets were by its authority improperly applied to pay said excessive notes, and used for its benefit, when it was insolvent, since the company, solvent or not, had a right to ratify and pay such debts, and that the fact that he received an increase of salary for indorsing the company's paper did not preclude him from recourse on a stockholder's contract of indemnity to indorsers of such paper.[52]

§ 4009. Indemnity mortgages.—As already stated, indemnity contracts frequently take the form of mortgages.[53] As the subject of mortgages is fully treated elsewhere, however, little attention is required to be devoted to such contracts here. The obligation or matter against which the mortgagee is intended to be protected should be described or indicated with reasonable certainty; but it is not required to be described with absolute precision,[54] and parol evidence may be admissible to further identify it.[55] So, in a proper case, a mortgage on its face apparently securing an absolute debt or notes for a definite amount, may be shown to have been given merely to indemnify the mortgagee.[56]

[52] Taylor v. Matteson, 86 Wis. 113, 56 N. W. 829.

[53] See Stevens v. Hay, 61 Ill. 399; Duncan v. Miller, 64 Iowa 223, 20 N. W. 161; Mechanics' Sav. Bank v. Thompson, 58 Minn. 346, 59 N. W. 1054; Brooks v. Owen, 112 Mo. 251, 19 S. W. 723, 20 S. W. 492; Steen v. Stretch, 50 Nebr. 572, 70 N. W. 48; Uhler v. Semple, 20 N. J. Eq. 288; Landigan v. Mayer, 32 Ore. 245, 51 Pac. 649, 67 Am. St. 521; Williams v. Silliman, 74 Tex. 626, 12 S. W. 534.

[54] Utley v. Smith, 24 Conn. 290, 63 Am. Dec. 163; Burdett v. Clay, 8 B. Mon. (Ky.) 287; Goddard v. Sawyer, 9 Allen (Mass.) 78; Gilman v. Moody, 43 N. H. 239; Paterson First Nat. Bank v. Byard, 26 N. J. Eq. 255. But see Blandy v. Benedict, 42 Ohio St. 295; Nesbit v. Worts, 37 Ohio St. 378. And that it is confined to the particular matter see, Mercantile Trust Co. v. Hensey, 21 App. D. C. 38; Clark v. Oman, 15 Gray (Mass.) 521; Burt v. Gamble, 98 Mich. 402, 57 N. W. 261; Taylor v. Skiles, 113 Tenn. 288, 81 S. W. 1258.

[55] Chambers v. Prewitt, 172 Ill. 615, 50 N. E. 145; Benton v. Sumner, 57 N. H. 117. So, it may cover the entire amount or loss and not merely the formal money consideration. Smith v. Hamilton, 48 Ga. 467; Harlan County v. Whitney, 65 Nebr. 105, 90 N. W. 993, 101 Am. St. 610. But see Albion State Bank v. Knickerbocker, 125 Mich. 311, 84 N. W. 311.

[56] Mayer v. Grottendick, 68 Ind. 1; Cutler v. Steele, 93 Mich. 204, 53 N. W. 521; Honaker v. Vesey, 57 Nebr. 413, 77 N. W. 1100; McKinster v. Babcock, 26 N. Y. 378; Lawrence v. Tucker, 23 How. (U. S.) 14, 16 L. ed. 474. See also 1 Elliott Ev., § 615; Ashton v. Shepherd, 120 Ind. 69, 22 N. E. 98; Jones v. New York Guaranty Co., 101 U. S. 622, 25 L. ed. 1030.

In a very recent case an agreement of ditch contractors made in Illinois with their surety to indemnify the latter against loss, and that in the event of their being unable to complete the contract they would assign and did assign to the surety such plant as they might have on the work, which was in Minnesota, was held in effect a chattel mortgage and governed by the law of Minnesota.[57]

§ 4010. Performance or fulfilment of contract.—If the indemnitor actually protects the indemnitee and saves him harmless as provided in the indemnity contract this is in general a sufficient performance or fulfilment of the contract and there is no breach no matter how he does it, and the indemnitee cannot rightfully insist that it should be done in any other particular way.[58] And this has been held to be true even though the indemnitor was protected and saved harmless by reason of circumstances not due to the efforts of the indemnitor.[59] But there are many contracts in which it is provided that the indemnitor shall do some particular act and not merely indemnify and save harmless generally, and in such cases a right of action may accrue even though the indemnitee has not yet been damnified.[60]

§ 4011. Breach of contract—Recovery—Measure of damages.—In cases of the kind referred to at the close of the last preceding section there is a breach and a right of recovery, ordinarily, as soon as the time for performance has arrived and the obligor has failed to perform his obligations.[61] And in some

[57] Title Guaranty &c. Co. v. Witmire, 195 Fed. 41. It was also held that, under the Minnesota law, after acquired property became subject to the mortgage; and that the surety became vested with title to the plant under the mortgage and abandonment of work by the contractors before bankruptcy of the contractors and was entitled to the property as against the contractor's trustee in bankruptcy. See also, Wood v. United States Fidelity &c. Co., 143 Fed. 424. As to subrogation and trust for creditors, see Chambers v. Prewitt, 172 Ill. 615, 50 N. E. 145; Hampton v. Phipps, 108 U. S. 260, 27 L. ed. 719, 2 Sup. Ct. 622.

[58] Sergeant v. Ruble, 33 Minn. 354, 23 N. W. 535; Lewis v. Duane, 141 N. Y. 302, 36 N. E. 322. See also, Hoy v. Hansborough, Freem. Ch. (Miss.) 533.

[59] Tufts v. Hayes, 31 N. H. 138. See also, Bedford v. Blythe, 74 Miss. 720, 21 So. 919.

[60] In re Negus, 7 Wend. (N. Y.) 503. See also, Whitney v. Cady, 71 Conn. 166, 41 Atl. 550; Milburn v. Milburn (Ind.), 40 N. E. 1082; Bansimer v. Fell, 39 W. Va. 448, 19 S. E. 545.

[61] See case cited in note 60, also, Pierce v. Plumb, 74 Ill. 326; Dye v. Mann, 10 Mich. 291; Hume v. Hendrickson, 79 N. Y. 117; Crofoot v. Moore, 4 Vt. 204. And see Penny v. Foy, 8 B. & C. 11; Carr v. Roberts,

jurisdictions it has been held that the mere incurring of liability is sufficient to give a right of recovery even on an ordinary strict indemnity bond.[62] But, while this would seem to be correct when the liability has become fixed and established and the contract is to protect against liability,[63] the better rule, where the contract is strictly one of indemnity to save harmless from loss, is that there is no right of recovery until the indemnitee has suffered actual loss or damage.[64] To entitle the indemnitee to recover he must have performed his part of the contract.[65] But it has been held that a judgment against the indemnitee by default,[66] or even by consent,[67] is sufficient to warrant a recovery on the indemnity contract. This certainly can not be true, or at least conclusively entitle one to a recovery, in all cases.[68] An indemnitee is not ordinarily protected against loss where he makes a voluntary payment.[69] But

5 B. & Ad. 78, 27 E. C. L. 39. But compare Gage v. Lewis, 68 Ill. 604.

[62] Rockfeller v. Donnelly, 8 Cow. (N. Y.) 623. But see Chace v. Hinman, 8 Wend. (N. Y.) 452, 24 Am. Dec. 39; Leber v. Kauffelt, 5 Watts & S. (Pa.) 440; Ramsay v. Gervais, 2 Bay (S. Car.) 145, 1 Am. Dec. 635. See also, Beasley v. Newell, 40 S. Car. 16, 18 S. E. 224.

[63] Showers v. Wadsworth, 81 Cal. 270, 22 Pac. 663; Gage v. Lewis, 68 Ill. 604; Gunel v. Cue, 72 Ind. 34; Jones v. Childs, 8 Nev. 121; Beckman v. VanDolsen, 70 Hun (N. Y.) 288, 53 N. Y. St. 768, 24 N. Y. S. 414; Kohler v. Matlage, 72 N. Y. 259; Stroh v. Kimmel, 8 Watts (Pa.) 157; Bellune v. Wallace, 2 Rich. L. (S. Car.) 80; Smith v. Chicago & N. W. R. Co., 18 Wis. 17.

[64] Eddowes v. Argentine Loan & Mercantile Agency Co., 63 L. T. (N. S.) 364. Taliaferro v. Brown, 11 Ala. 702; Solary v. Webster, 35 Fla. 363, 17 So. 646; Resseter v. Waterman, 151 Ill. 169, 37 N. E. 875; Loyd v. Marvin, 7 Blackf. (Ind.) 464; Wilson v. Smith, 23 Iowa 252; Valentine v. Wheeler, 122 Mass. 566, 23 Am. Rep. 404; Weller v. Eames, 15 Gil. (Minn.) 376, 3 Am. Rep. 150; Honaker v. Vesey, 57 Nebr. 413, 77 N. W. 1100; Maloney v. Nelson, 144 N. Y. 182, 39 N. E. 32; Taylor v. Coon, 79 Wis. 76, 48 N. W. 123; Thompson v. Taylor, 30 Wis. 68. See also, Jenckes v. Rice, 119 Iowa 451, 93 N. W. 384; Sherman v. Spalding, 132 Mich. 249, 93 N. W. 613; French v. Vix, 143 N. Y. 90, 37 N. E. 612; Cramer v. Building &c. Assn., 6 S. Dak. 341, 61 N. W. 35.

[65] Winton v. Meeker, 25 Conn. 456; Conn v. Jones, 99 Ga. 608, 26 S. E. 761; Pioneer Sav. &c. Co. v. Freeburg, 59 Minn. 230, 61 N. W. 25. But performance by third person is not necessarily a condition precedent. Kaiser v. Johnson, 107 Ga. 659, 34 S. E. 285; Springfield v. Boyle, 164 Mass. 591, 42 N. E. 333. Releasing the maker of a note by the indemnitee may discharge the indemnitor on a contract of indemnity for indorsement of it. Jones v. Bacon, 145 N. Y. 446, 40 N. E. 216.

[66] Creamer v. Stephenson, 15 Md. 211; Given v. Driggs, 1 Caines (N. Y.) 450.

[67] Conner v. Reeves, 103 N. Y. 527, 9 N. E. 439.

[68] See Lothrop v. Blake, 3 Pa. St. 483. and compare also, Bridgeport Fire &c. Ins. Co. v. Wilson, 20 N. Y. Super. Ct. 427, revd. 34 N. Y. 275; McKinley v. Davidson (Tex. Civ. App.), 146 S. W. 576; Moran v. Wheeler, 87 Tex. 179, 27 S. W. 54.

[69] See Smith v. McGehee, 14 Ala. 404; Tolleson v. Jennings, 60 Ark. 190, 29 S. W. 276; Lombard v. Fiske, 24 Maine 56; New York v. Baird, 176 N. Y. 269, 68 N. E. 364; Bazen

it is not usually necessary that he should wait, where he is clearly liable, for his liability to be enforced by legal proceedings.[70] So, the giving of his own promissory note by the indemnitee and its acceptance in settlement of the liability which he has assumed, as in the case of a surety or indorser, may be sufficient to entitle him to recover on the contract executed to indemnify him for assuming such liability.[71] It is not within the scope of this work to consider the procedure nor the measure of recovery for breach of indemnity contracts, but it may be said generally that the measure of recovery is the full amount of the loss or damage which the indemnitee has sustained, or, in a proper case, the liability he has incurred in the matter covered by the contract,[72] unless limited by the terms or form of the contract.[73] Interest is allowed in a proper case,[74] and the indemnitee is also entitled to be reimbursed for costs to which he has been subjected in the reasonable defense of actions with respect to the matter of the indemnity.[75]

v. Roget, 3 Johns. Cas. (N. Y.) 87; Massey v. Schott, Pet. C. C. (U. S.) 132, Fed. Cas. No. 9262. And compare Wright v. Gardner, 98 Ky. 454, 17 Ky. L. 1345, 33 S. W. 622, 35 S. W. 1116.

[70] Ker v. Mitchell, 2 Chit. 487; Rudd v. Hanna, 4 T. B. Mon. (Ky.) 528; Butler v. Haynes, 3 N. H. 21; Vechte v. Brownell, 8 Paige (N. Y.) 212. See also, Nixon v. Beard, 111 Ind. 137, 12 N. E. 131; Seeberger v. Wyman, 108 Iowa 527, 79 N. W. 290; Creamer v. Stephenson, 15 Md. 211. In New York v. Brady, 151 N. Y. 611, 45 N. E. 1122, it was held that a surety on a contractor's bond, to indemnify a city against actions for personal injuries, was not discharged by the city paying the contractor in full, where the surety made no objection.

[71] Flannagan v. Forrest, 94 Ga. 685, 21 S. E. 712; Bausman v. Credit Guarantee Co., 47 Minn. 377, 50 N. W. 496 (note of indemnitee not yet paid). See also, Bolles v. Beach, 22 N. J. L. 680, 53 Am. Dec. 263. But compare Taylor v. Coon, 79 Wis. 76, 48 N. W. 123.

[72] English v. Grant, 102 Ga. 35, 29 S. E. 157; Keesling v. Frazier, 119 Ind. 185, 21 N. E. 552; Child v. Eureka Powder Works, 44 N. H. 354; Conner v. Reeves, 103 N. Y. 527, 9 N. E. 439. See also, Spear v. Stacy, 26 Vt. 61. And compare Fernandez v. Tormey, 121 Cal. 515, 53 Pac. 1119; Beckley v. Munson, 22 Conn. 299.

[73] Warwick v. Richardson, 10 M. & W. 282; Wood v. Wade, 2 Stark. 167; Griffiths v. Hardenbergh, 41 N. Y. 464; Gipson v. Williams (Tex. Civ. App.) , 27 S. W. 824. See also, Westbrook v. Moore, 59 Ga. 204; Lane v. Richards, 119 Iowa 24, 91 N. W. 786; Union Central Life Ins. Co. v. Prigge, 90 Minn. 370, 96 N. W. 917; Price v. Crozier, 101 Va. 644, 44 S. E. 890. But in some instances where a tort is perpetrated the liability may extend beyond the penalty of the bond. Dyett v. Hyman, 129 N. Y. 351, 29 N. E. 261, 26 Am. St. 533. See also, White v. French, 15 Gray (Mass.) 339; Griffith v. Rundle, 23 Wash. 453, 63 Pac. 199, 55 L. R. A. 381 and note.

[74] Fergus v. Gore, 1 Sch. & Lef. 107; Francis v. Wilson, R. & M. 105; Keesling v. Frazier, 119 Ind. 185, 21 N. E. 552; Griffiths v. Hardenbergh, 41 N. Y. 464; Barth v. Graf, 101 Wis. 27, 76 N. W. 1100.

[75] Lloyd v. Mostyn, 10 M. & W. 478,

§ 4012. Effect of judgment against indemnitee.—A judgment against an indemnitee is evidence, in an action by him on the indemnity contract, of his liability in the action resulting in such judgment;[76] and if the indemnitor was given notice and an opportunity to defend, such judgment is conclusive as to the liability of the indemnitee and its extent.[77] But in the absence of such notice the judgment is merely prima facie evidence thereof.[78] It has also been held that if the indemnity is against judgments, a judgment recovered against the indemnitee is conclusive as against the indemnitor if rendered in a contested action, but only presumptive evidence if rendered on consent of the indemnitee.[79]

2 Dowl. (N. S.) 476; Keesling v. Frazier, 119 Ind. 185, 21 N. E. 552; Curtis v. Banker, 136 Mass. 355; Mott v. Hicks, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550; Newburgh v. Galatian, 4 Cow. (N. Y.) 340. That he must have acted reasonably, see Caldbeck v. Boon, Ir. R. 7 C. L. 32; Beckley v. Munson, 22 Conn. 299; Langford v. Broadhead, 63 Hun (N. Y.) 624, 17 N. Y. S. 290. His attorney's fees for defending such actions have also been allowed. McKenzie v. Underwood, 10 Mackey (21 D. C.) 126. See also, In re Wells, 72 L. T. (N. S.) 359; Howard v. Lovegrove, L. R. 6 Exch. 43, 40 L. J. Exch. 13.

[76] Spratlin v. Hudspeth, Dud. (Ga.) 155; Train v. Gold, 5 Pick. (Mass.) 380; New York v. Brady, 70 Hun (N. Y.) 250, 54 N. Y. St. 1, 24 N. Y. S. 296. See also, 2 Elliott Ev. § 1526.

[77] Showers v. Wadsworth, 81 Cal. 270, 22 Pac. 663; Wright v. Whiting, 40 Barb. (N. Y.) 235; Hart v. Messenger, 46 N. Y. 253.

[78] Train v. Gold, 5 Pick. (Mass.) 380; Stewart v. Thomas, 45 Mo. 42; New York v. Brady, 151 N. Y. 611, 45 N. E. 1122; Browne v. French, 3 Tex. Civ. App. 445, 22 S. W. 581. See also, South Bend Pulley Co. v. Fidelity & Deposit Co., 32 Ind. App. 255, 67 N. E. 269, 68 N. E. 688; Pasewalk v. Bollman, 29 Nebr. 519, 45 N. W. 780, 26 Am. St. 399.

[79] Conner v. Reeves, 103 N. Y. 527, 9 N. E. 439. See also, Kansas City, M. & B. R. Co. v. Southern &c. News Co., 151 Mo. 373, 52 S. W. 205, 45 L. R. A. 380, 74 Am. St. 545.

TITLE TEN

INSURANCE

CHAPTER CXVII.

DEFINITION, NATURE AND MANNER OF MAKING CONTRACT.

§ 4020. Definition.
4021. Different kinds of insurance—Definitions.
4022. What constitutes insurance.
4023. Reinsurance.
4024. Parties.
4025. The insured.
4026. The insurer—Foreign corporations—State control.
4027. Mutual companies and benevolent societies.
4028. The risk.
4029. Contract is personal.
4030. Contract is conditional.
4031. Contract is aleatory.
4032. Indemnity.
4033. Life insurance not a contract of indemnity.
§ 4034. Indemnity in accident insurance.
4035. Subrogation.
4036. Loss caused by negligence.
4037. Form of the contract.
4038. Statutory form — Conditions implied in an oral contract.
4039. Statute of frauds.
4040. Renewal by parol.
4041. Effect of charter provisions.
4042. Revenue stamps.
4043. Enforcement of oral contract.
4044. Kinds of policies.
4045. Completion of contract—Delivery of the policy.
4046. Countersigning by agent.
4047. Contracts made by correspondence.

§ 4020. **Definition.**—In a general sense, insurance is a contract, for a consideration, to pay a sum of money upon the happening of a particular event or contingency.[1] This may be an event which is certain to happen, such as death, or a mere pos-

[1] In a still more general sense it may, of course, comprehend the entire business or system. Insurance has also been held to be a "commodity" within a statute prohibiting any pool, trust, etc., to regulate or fix the price of oil, lumber, coal, grain, provisions, "or any other commodity or article whatever." Beechley v. Mulville, 102 Iowa 602, 70 N. W. 107, 71 N. W. 428, 63 Am. St. 479. See also, Claflin v. United States Credit System Co., 165 Mass. 501, 43 N. E. 293, 52 Am. St. 528; American Surety Co. v. Folk, 124 Tenn. 139, 135 S. W. 778, Ann. Cas. 1912 D. 1024, and note as to what is an "insurance company" and a "contract of insurance." In Physicians' Defense Co. v. Cooper, 199 Fed. 576, it is said: "The principal ingredients of such a contract are the consideration, the risk and the indemnity. The consideration is the premium for the insurer's undertaking; the risk may be said to be the perils or contingencies against which the assured is protected; and the indemnity is the stipulated de-

sibility, such as fire or disaster at sea. Life insurance has features peculiar to itself, but, aside from this, insurance may be defined as a contract where for a stipulated consideration one party undertakes to indemnify another against loss or damage on a designated subject-matter by certain contemplated perils. The kind of insurance is determined by the nature of the peril or of the subject-matter.[2]

§ 4021. Different kinds of insurance—Definitions.—More specifically, the different kinds of insurance may be defined as follows: Fire insurance is a contract whereby one party, for a consideration, agrees to indemnify another against loss or damage to property by fire.

Life insurance is a contract whereby the insurer, in consideration of a certain sum paid in gross or in annual payments, agrees to pay the person in whose favor the insurance is made a certain sum of money or an annuity in the event of the death of the person whose life is insured.[3]

Accident insurance is a contract whereby one, for a consideration, agrees— (*a*) to indemnify another against personal injury resulting from accidents, and (*b*) to pay another a certain sum in case of the death of the insured, caused by accident.[4]

sideratum to be paid to the assured in case he has suffered loss or damage through the perils and contingencies specified."

[2] Numerous definitions are quoted in People v. Rose, 174 Ill. 310, 31 N. E. 246, 44 L. R. A. 124, Woodruff Ins. Cas. 16, and in Physicians' Defense Co. v. Cooper, 199 Fed. 576. See also, Lucena v. Crawfurd, 2 Bos. & P. (N. R.) 269; Dover Glass Works Co. v. American Fire Ins. Co., 1 Marv. (Del.) 32, 29 Atl. 1039, 65 Am. St. 264; State v. Pittsburgh, C. C. & St. L. R. Co., 68 Ohio St. 9, 67 N. E. 93, 64 L. R. A. 405, 96 Am. St. 635. And for further exposition of the origin, nature and history of insurance, see Nye v. Grand Lodge, A. O. U. W., 9 Ind. App. 131, 36 N. E. 429; New England Mut. Marine Ins. Co. v. Durham, 11 Wall. (U. S.) 1, 20 L. ed. 90; also introduction to Elliott on Insurance where a brief but comprehensive history of the subject is given and the works of the leading writers are referred to. This part of the present work is based largely on the text-book mentioned and much is taken therefrom.

[3] See Dalby v. India & London Life Assur. Co., 15 Com. B. 365, 28 Eng. L. & Eq. 312, 80 E. C. L. 365; Nye v. Grand Lodge A. O. U. W., 9 Ind. App. 131, 36 N. E. 429. Life insurance, unlike fire insurance, is not a contract of indemnity.

[4] Healey v. Mutual Accident Assn., 133 Ill. 556, 25 N. E. 52, 9 L. R. A. 371, 23 Am. St. 637, revg. 35 Ill. App. 17. "Life and accident insurance is a contract whereby one party, for a stipulated consideration, agrees to indemnify another against injuries by accident or death from any cause not excepted in the contract." State v. Pittsburgh, C. C. & St. L. R. Co., 68 Ohio St. 9, 67 N. E. 93, 64 L. R. A.

Marine insurance is a contract of indemnity against loss occurring to the subject-matter of the policy from certain perils of the sea to which the ship, merchandise or other interest may be exposed during a certain voyage or a certain period of time.

Guaranty and fidelity insurance is insurance against loss arising from want of fidelity in employés, insolvency of debtors, or the like, or it may be against loss from negligence of employés resulting in personal injury to others, and other more or less similar risks.[5]

Casualty insurance is insurance against loss resulting in bodily injury or the destruction of certain kinds of property. A distinction, however, is generally made between accident and casualty insurance, by which the former is applied to injuries to the body caused by accident, and the latter to accidental injuries to property, such as boilers and plate glass.[6]

Endowment insurance is a contract to pay a certain sum to the insured if he lives a certain length of time, or, if he dies before the time stated, to some person indicated in the contract.[7] These are the principal kinds of insurance, but there may be various forms of these and also other specific kinds depending largely on the subject-matter or authorized purpose.[8]

§ 4022. What constitutes insurance.—The question has often arisen, especially in recent years, as to what constitutes

405, 96 Am. St. 635. As to boiler insurance, see Laclede Fire-Brick Mfg. Co. v. Hartford Steam-Boiler &c. Ins. Co., 60 Fed. 351, 9 C. C. A. 1.

[5] People v. Rose, 174 Ill. 310, 51 N. E. 246, 44 L. R. A. 124; State v. Federal Inv. Co., 48 Minn. 110, 50 N. W. 1028. See also, notes in 33 L. R. A. (N. S.) 513, and in 31 L. R. A. (N. S.) 775; Insurance of fidelity of employé. See Fidelity & Casualty Co. v. Eickhoff, 63 Minn. 170, 65 N. W. 351, 30 L. R. A. 586; Fidelity & Casualty Co. v. Gate City Nat. Bank, 97 Ga. 634, 25 S. E. 392, 33 L. R. A. 821; Mechanics' Sav. Bank & Trust Co. v. Guarantee Co., 68 Fed. 459, affd. 80 Fed. 766, 26 C. C. A. 146 (insurance of employer from liability for negligence). See Anoka Lumber Co. v. Fidelity & Casualty Co., 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689; Standard Life & Acc. Ins. Co. v. Bambrick Bros. Const. Co., 163 Mo. App. 504, 143 S. W. 845.

[6] Employers' Liability Assur. Corp. v. Merrill, 155 Mass. 404, 29 N. E. 529.

[7] As to plans of endowment insurance, see Fuller v. Metropolitan Life Ins. Co., 37 Fed. 163.

[8] As to tontine insurance, see Pierce v. Equitable Life Assur. Soc. of U. S., 145 Mass. 56, 12 N. E. 858, 1 Am. St. 433; Uhlman v. New York L. Ins. Co., 109 N. Y. 421, 660, 17 N. E. 363, 4 Am. St. 482. As to burial insurance and funeral benefits, see State v. Willett, 171 Ind. 296, 86 N. E. 68, 23 L. R. A. (N. S.) 197 and note. As to rent insurance, see Whitney Estate Co. v. Northern Assur. Co., 155 Cal.

insurance and whether certain corporations were engaged in the business of insurance. In one case the articles of incorporation provided "that the general nature of the business to be transacted by this corporation shall be to provide the means for profitably investing, for certificate holders, small sums of money, to be paid in monthly instalments, until the sum so accumulated shall reach a sufficient amount to redeem, in the order of their issuance, all outstanding certificates of the company in force," and the organization was held not to be an insurance company.[9] The court said: "Neither the times nor amounts of payments by the assured, nor the modes of estimating or securing the payment of the sum to be paid by the insurance, are important or controlling in determining whether a transaction is a contract of insurance, but, in order to render it such, it must contain the essential element of indemnity for loss in respect to some specified subject from some specified risks; and, to constitute a contract one of either a life endowment or casualty insurance, the payment of the indemnity must be contingent, either upon the duration of human life, or the happening of a casualty resulting in bodily injury to the insured." But a mutual benefit certificate issued by a fraternal organization not for profit has been held to be a life insurance policy, and the association issuing it was held not entitled to the benefit of a statute providing that societies organized under it, if intended to benefit widows and orphans, should not be deemed insurance companies.[10]

521, 101 Pac. 911, 23 L. R. A. (N. S.) 123n; Palatine Ins. Co. v. O'Brien, 107 Md. 341, 68 Atl. 484, 16 L. R. A. (N. S.) 1055, and note. As to title insurance, see Minnesota Title Ins. & Trust Co. v. Drexel, 70 Fed. 194, 17 C. C. A. 56; Stensgaard v. St. Paul, etc., Ins. Co., 50 Minn. 429, 52 N. W. 910, 17 L. R. A. 575.

[9] State v. Federal Inv. Co., 48 Minn. 110, 50 N. W. 1028. But in some cases benevolent associations not for profit have been held not insurance companies. See State v. Iowa Mut. Aid Assn., 59 Iowa 125, 12 N. W. 782; Northwestern Masonic Aid Assn. v. Jones, 154 Pa. St. 99, 26 Atl. 253, 35 Am. St. 810; State v. Mutual Protection Assn. of Ohio, 26 Ohio St. 19. On this general subject, see post, § 4027.

[10] Head Camp &c. Woodmen of the World v. Gloss, 49 Colo. 177, 112 Pac. 49, 31 L. R. A. (N. S.) 831. See also, to the effect that mutual benefit associations engaged in mutual insurance of the lives of their members are generally deemed in that respect insurance companies, Block v. Valley Mut. Ins. Co., 52 Ark. 201, 20 Am. St. 166. As to insurance against mercantile loss by sales on credit and the like, see Lexington Grocery Co. v. Philadelphia Casualty Co. (N. Car.), 72 S. E. 870. To same effect, Niblack Mut. Ben. Soc. (2d ed.), § 163; Chartrand v. Brace, 16 Colo. 19, 26 Pac. 152, 12 L. R. A. 209, 25 Am.

There are some things against which the policy of the law will not permit insurance. If the contract is in restraint of trade, or if it has a tendency to discourage matrimony, it cannot be enforced. Thus, a corporation which agreed that if a member paid an initiation fee and certain annual dues for nine years and until he was married, and also an assessment upon the marriage of any member, and agreed not to marry within two years, it would pay a certain sum to his wife out of a fund to be collected by assessment upon the members, is not an insurance company.[11]

In a comparatively recent case in North Dakota it was held that a corporation which contracted to guarantee a fixed revenue per acre for farming lands, and as a means of doing so agreed to pay a stipulated sum per acre for the crop grown upon the land, irrespective of its value, was an insurance company within the meaning of the statute regulating foreign insurance companies.[12] So, a contract which binds a company, in consideration of a sum paid, to purchase at a fixed price the accounts which during one year a certain business firm should have against certain ascertained insolvent debtors, or judgment debtors against whom execution should be returned unsatisfied, is an insurance contract.[13]

Guaranteeing the fidelity of officers and the performance of contracts is insurance within the meaning of a statute excepting the business of insurance from those for which corporations may

St. 235; Tebbetts v. Mercantile Credit Guarantee Co., 73 Fed. 95, 19 C. C. A. 281; Bauer v. Samson Lodge, Knights of Phythias, 102 Ind. 262, 1 N. E. 571; Commonwealth v. Wetherbee, 105 Mass. 149; Dolan v. Court Good Samaritan, 128 Mass. 437; Banker's & Merchants' Mut. Ben. Assn. v. Stapp, 77 Tex. 517, 14 S. W. 168, 19 Am. St. 772, note. See also, District Grand Lodge, United Order of Odd Fellows v. Hill, 3 Ala. App. 483, 57 So. 147. Where the order or Grand Lodge and not the endowment department was held liable.

[11] State v. Towle, 80 Maine 287, 14 Atl. 195. Contracts in restraint of marriage are void. See White v. Equitable &c. Union, 76 Ala. 251, 52 Am. Rep. 325; Chalfant v. Payton, 91 Ind. 202, 46 Am. Rep. 586. And see, as to suicide or execution for crime, Ritter v. Mutual Life Ins. Co., 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. 300; Northwestern Mut. Life Ins. Co. v. McCue (U. S.), 32 Sup. Ct. 220. But see, as to insurance of intoxicating liquors, Mechanics' Ins. Co. v. C. A. Hoover Distilling Co., 182 Fed. 590, 105 C. C. A. 128, 31 L. R. A. (N. S.) 873, and note.

[12] State v. Hogan, 8 N. Dak. 301, 78 N. W. 1051, 45 L. R. A. 166, 73 Am. St. 759.

[13] Claflin v. United States Credit System Co., 165 Mass. 501, 43 N. E. 293, 52 Am. St. 528 (under Mass Stat. 1887, ch. 214). So in reference to a similar contract, the Wisconsin court said: "We regard the contract before us as unquestionably a contract of insurance. An insurance contract

be formed.[14] So, an incorporated association for the purpose of obtaining employment for the members while living, and to render pecuniary assistance to the families of deceased members through assessments upon the survivors, is an insurance company within the Minnesota statute.[15] And a contract guaranteeing a party against the loss of a sum of money deposited in a bank is a contract of insurance.[16] But the inspection and certification of the sanitary condition of buildings is not insurance under the New York statute.[17] And a corporation chartered under a Pennsylvania statute for the "accumulation of a fund by assessments for the protection of its members from loss by reason of injury to, or the losing of bicycles," there being no agreement or provision to pay money for any loss, was held not to be an insurance company.[18]

is a contract whereby one party agrees to wholly or partially indemnify another for loss or damage which he may suffer from a specified peril. The peril of loss by insolvency of customers is just as definite and real a peril to a merchant or manufacturer as the peril or loss by accident, fire, lightning, or tornado, and is, in fact, much more frequent. No reason is perceived why a contract of indemnification against this ever-present peril is not just as legitimately a contract of insurance as a contract which indemnifies against the more familiar, but less frequent, peril of fire." Shakman v. United States Credit System Co., 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. 920. And this case is cited with approval by the Supreme Court of North Carolina in the very recent case of Lexington Grocery Co. v. Philadelphia Casualty Co., 72 S. E. 870, to the effect that an agreement protecting a merchant against loss by sales on credit is a contract of insurance. See also, Tebbetts v. Mercantile Credit G. Co., 73 Fed. 95, 19 C. C. A. 281; Mercantile Credit Guarantee Co. v. Wood, 68 Fed. 529, 15 C. C. A. 563; People v. Fidelity & Casualty Ins. Co., 153 Ill. 25, 38 N. E. 752, 26 L. R. A. 295; Casualty Co. v. Carmon, 133 Ky. 748, 118 S. W. 1004; Smith v. National Credit Ins. Co., 65 Minn. 283, 68 N. W. 28, 33 L. R. A. 511; Robertson v. United States Credit System Co., 57 N. J. L. 12, 29 Atl. 421.

[14] People v. Rose, 174 Ill. 310, 51 N. E. 246, 44 L. R. A. 124. See, generally, the note to Hormel & Co. v. American Bonding Co., 112 Minn. 288, in 33 L. R. A. (N. S.) 513.

[15] Brown v. Balfour, 46 Minn. 68, 48 N. W. 604, 12 L. R. A. 373. So a contract of burial insurance for burial and funeral expenses has been held to be within the statute as to insurance. State v. Willett, 171 In. 296, 86 N. E. 68, 23 L. R. A. (N. S.) 197n. State v. Wichita Mut. Burial Assn., 73 Kans. 179, 84 Pac. 757. But compare State v. Taylor, 56 N. J. L. 49, 27 Atl. 797, affd. 56 N. J. L. 715, 31 Atl. 771; Cowan v. New York Caledonian Club, 46 App. Div. (N. Y.) 288, 61 N. Y. S. 714.

[16] Dane v. Mortgage Ins. Corp., L. R. (1894) 1 Q. B. 54.

[17] People v. Rosendale, 142 N. Y. 126, 36 N. E. 806, affg. 76 Hun (N. Y.) 103, 57 N. Y. St. 447, 27 N. Y. S. 837 (under N. Y. laws 1892, ch. 690, § 70).

[18] Commonwealth v. Provident Bicycle Assn., 178 Pa. St. 636, 36 Atl. 197, 36 L. R. A. 589.

§ 4023. **Reinsurance.**—Arnould says that, "Reinsurance is a contract of insurance by which the original insurer becomes himself assured in respect of the same subject, upon the same risks, and under the same conditions as are expressed in the original policy."[19] Thus A, who has insured B, enters into a contract with C, whereby the latter, for a consideration agreed upon, insures A from loss by reason of his contract with B. Such contracts were at one time prohibited in England, but are now valid almost everywhere.[20] As the contract is one of indemnity, the reinsurance may be for an equal or less amount than the original, but cannot be for more.[21] Difficulties arise when the original insurer becomes insolvent, is unable to pay the liability in full, or settles for a sum less than its liability. It is the reinsured, A, who is to be indemnified, and it would seem that where A settles a liability of a certain amount for a less sum, he should be allowed to recover only the latter amount from the reinsurer. This seems to be the correct rule,[22] but where A was insolvent, and had made no settlement with B, the insured, A's receiver recovered the full amount of A's liability from the reinsurer,[23] and in general the insolvency of the reinsured is held to make no difference as to the liability of the reinsurer.[24]

The reinsurance does not necessarily create any contractual re-

[19] 1 Arnould Mar. Ins. (Maclachlan's 6th ed.) 103; Emerigon Ins., ch. 8, § 14; Boulay-Paty, 3 Droit-Mar. 329; 1 Phillips Ins., ch. 3, § 16; Damm v. Damm, 109 Mich. 619, 67 N. W. 984, 63 Am. St. 601; Ruohs v. Traders' Fire Ins. Co., 111 Tenn. 405, 78 S. W. 85, 102 Am. St. 790. See also, Allison v. Fidelity Mut. F. Ins. Co., 81 Nebr. 494, 116 N. W. 274, 129 Am. St. 694, and cases cited.

[20] See note to Barnes v. Hekla Fire Ins. Co., 56 Minn. 38, 57 N. W. 314, 45 Am. St. 438. See also, Merry v. Prince, 2 Mass. 176. But companies are sometimes prohibited from transacting, or not authorized to transact, a reinsurance business. Allison v. Fidelity Mut. F. Ins. Co., 81 Nebr. 494, 116 N. W. 274, 129 Am. St. 694.

[21] Imperial Fire Ins. Co. v. Home Ins. Co., 68 Fed. 698, 15 C. C. A. 609; Illinois &c. Ins. Co. v. Andes Ins. Co., 67 Ill. 362, 16 Am. Rep. 620; Philadelphia Ins. Co. v. Washington Ins. Co., 23 Pa. St. 250.

[22] Illinois Mut. Fire Ins. Co. v. Andes Ins. Co., 67 Ill. 362, 16 Am. Rep. 620. See also, Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind. 443. But compare Cass v. Mercantile Town Mut. Ins. Co., 188 Mo. 1, 86 S. W. 237. And see, Fireman's Fund Ins. Co. v. Aachen &c. Ins. Co., 2 Cal. App. 690, 84 Pac. 253.

[23] Hunt v. New Hampshire Fire &c. Assn., 68 N. H. 305, 38 Atl. 145, 38 L. R. A. 514; Cashau v. Northwestern Nat. Ins. Co., 5 Biss. (U. S.) 476, Fed. Cas. No. 2499; Ex parte, Norwood, 3 Biss. (U. S.) 504, Fed. Cas. No. 10364. See 1 May Ins. (4th ed.), § 11a.

[24] In re Eddystone Marine Ins Co., 61 L. J. Ch. 362; In re Republic Ins. Co., Fed. Cas. No. 11705; Consolidated Real Estate & Fire Ins. Co. v. Cashow, 41 Md. 59. See also, Strong

lation between the reinsurer and the original insured. Emerigon asserts[25] that the original contract subsists precisely as it was made without renewal or alteration. The reinsurance is absolutely foreign to the first insured, with whom the reinsurer contracts no sort of obligation. The risks which the reinsurer has assumed constitute between him and the insurer a contract of reinsurance which is a new contract totally distinct from the first. The original insured has, therefore, in the absence of statutory or other governing provision, no claim against the reinsurer, although his insurer has become insolvent.[26]

The reinsured recovers upon the same evidence that would have been produced against himself by the original insured,[27] and the reinsurer is entitled to the defenses which the original insurer could have asserted against the first insured.[28] The contract of reinsurance must apply to the subject-matter of the original insurance and to risks of the kind specified in the original policy, although the specific risks need not be identical.[29] A contract of reinsurance of marine risks may cover such risks as the insured may have when it is made or may have during the risk. The policy will attach when the interest is acquired.[30]

§ 4024. **Parties.**—The parties to a contract of insurance are usually known as the insured and the insurer, but they are sometimes called assured and assurer, especially in life insurance.[31] And the insurer is also sometimes called an underwriter,

v. Phœnix Ins. Co., 62 Mo. 289, 21 Am. Rep. 417.

[25] Emerigon Ins. (Meredith's ed.), ch. 8, § 14.

[26] Alauzet Traite des Assurance 152; Strong v. Phœnix Ins. Co., 62 Mo. 289, 21 Am. Rep. 417. But see Hunt v. New Hampshire &c. Co., 68 N. H. 305, 38 Atl. 145, 38 L. R. A. 514; Shoaf v. Palatine Ins. Co., 127 N. Car. 308, 37 S. E. 451, 80 Am. St. 804; Ruohs v. Traders' Fire Ins. Co., 111 Tenn. 405, 78 S. W. 85, 102 Am. St. 790. Statutes often provide, in effect, that the reinsurer shall be liable to the insured under the term of the original contract. Federal Life Ins. Co. v. Kerr, 173 Ind. 613, 89 N. E. 398, 91 N. E. 230; Federal Life Ins. Co. v. Arnold, 46 Ind. App. 114, 90 N. E. 493, 91 N. E. 357.

[27] 3 Kent's Com. (14th ed.) 279.

[28] See Gledstanes v. Royal Exch. &c. Corp., 34 L. J. Q. B. 30; Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind. 443.

[29] See discussion in Imperial Fire Ins. Co. v. Home Ins. Co., 68 Fed. 698, 15 C. C. A. 609.

[30] Boston Ins. Co. v. Globe Fire Ins. Co., 174 Mass. 229, 54 N. E. 543, 75 Am. St. 303.

[31] The term "assured" is sometimes applied to the person for whose benefit the policy is effected and not to the party whose life is insured. In Connecticut Mut. Life Ins. Co. v. Luchs, 108 U. S. 498, 27 L.

especially in marine and fire insurance. As insurance is generally transacted by corporations, the insurer is commonly referred to as the company. The relation between the parties is one of contract merely, and their rights are measured by the terms of the written contract called the policy.[32] The parties must be legally competent to make a legal and binding contract.

§ 4025. **The insured.**—Insurance against loss by fire is not a contract for necessities for which an infant may be held.[33] Such a contract is merely voidable, however, at the option of the infant and is otherwise binding upon the company.[34] There is a conflict as to the right of a mutual insurance company to insure the life of an infant. It is said that it cannot be done, as there could not be the mutuality of obligation which is at the foundation of every contract,[35] but the answer is that where there is no legal obligation to pay the dues, and a failure to do so merely results in loss of membership, the contract imposes no obligation upon the infant which he is not legally competent to perform.[36] The courts recognize the right of an infant to repudiate a contract of life insurance, but where it is manifestly for the benefit of the infant he is allowed to recover only the unearned portion of the premium which he has paid where an attempt was made to recover the entire amount of the premiums paid. The court said:[37]

ed. 800, 2 Sup. Ct. 949, it is said: "The application of either term (assured or insured) to the party for whose benefit the insurance is effected, or to the party whose life is insured, has generally depended upon its collocation and context in the policy." It is most often used as referring to the beneficiary. Cyrenius v. Mutual Life Ins. Co., 145 N. Y. 576, 40 N. E. 225; Smith v. Aetna L. Ins. Co., 5 Lans. (N. Y.) 545, affd. 49 N. Y. 211; Hogle v. Guardian L. Ins. Co., 4 Abb. Prac. (N. S.) (N. Y.) 346, 29 N. Y. Super. Ct. 567. See also, Pierce v. Charter Oak Life Ins. Co., 138 Mass. 151; New York Life Ins. Co. v. Ireland (Tex.), 17 S. W. 617, 14 L. R. A. 278.

[32] Uhlman v. N. Y. Life Ins. Co., 109 N. Y. 421, 660, 17 N. E. 363, 4 Am. St. 482.

[33] New Hampshire Mut. Fire Ins. Co. v. Noyes, 32 N. H. 345. See also, vol. 1, § 301, n. 19.

[34] Monaghan v. Agricultural Fire Ins. Co., 53 Mich. 238, 18 N. W. 797.

[35] In re Globe Mut. Ben. Assn., 63 Hun (N. Y.) 263, 17 N. Y. S. 852, 43 N. Y. St. 756, affd. 135 N. Y. 280, 32 N. E. 122, 17 L. R. A. 547. It seems that the receiving of an infant as a member of a co-operative or assessment insurance company may be prevented by injunction. See In re Globe Mut. Ben. Assn., 135 N. Y. 280, 32 N. E. 122, 17 L. R. A. 547. But see, as to right of infant to contract for life insurance under New York statute, Hamm v. Prudential Ins. Co., 137 App. Div. (N. Y.) 504, 122 N. Y. S. 35.

[36] Chicago Mut. Life Indemnity Assn. v. Hunt, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549.

[37] Johnson v. Northwestern Mut.

"Life insurance in a solvent company, at the ordinary and usual rates, for an amount reasonably commensurate with the infant's estate, and his financial ability to carry it, is a provident, fair, and reasonable contract, and one which it is entirely proper for the insurance company to make with him, assuming that it practices no fraud or other unlawful means to secure it; and if such should prove to be the character of this contract the plaintiff could not recover the premiums which he has paid in, so far as they were intended to cover the current annual risk assumed by the company under the policy." So, as a general rule, married women may obtain insurance upon their property.[38] An alien friend may make a valid contract of insurance, but an alien enemy, that is, a citizen of the country with whom the nation of the first party is at war, has no such capacity.[39]

Where a loss occurs after the death of the party insured, and before the appointment of an administrator, "the insured," for the purpose of giving notice and making proofs of loss, must be either the person who, in the course of time, will be appointed to administer the estate, or the persons interested in the estate who expect to benefit by the insurance. The former not being in existence, it is the duty of the latter to make all reasonable efforts to see that the covenants of the policy are complied with, and to use such agencies as the law provides to secure such results.[40]

§ 4026. The insurer—Foreign corporations—State control. —In the beginning all insurance contracts were made by individuals, but in modern times the business is conducted almost entirely by corporations organized under laws which provide for their creation and control, and there are two ordinary classes, namely,

Life Ins. Co., 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 26 L. R. A. 187, 45 Am. St. 473.

[38] Queen Ins. Co. v. Young, 86 Ala. 424, 5 So. 116, 11 Am. St. 51; Commercial Ins. Co. v. Spankneble, 52 Ill. 53, 4 Am. Rep. 582; Solmes v. Rutger's Fire Ins. Co., 42 N. Y. (3 Keyes) 416, 4 Abb. Dec. (N. Y.) 279, 5 Abb. Pr. (N. S.) (N. Y.) 201. But see, American Ins. Co. v. Avery, 60 Ind. 566.

[39] Clarke v. Morey, 10 Johns. (N. Y.) 69. See note to 96 Am. Dec. 624-630. A license to trade may be granted to such alien: McStea v. Matthews, 50 N. Y. 166. See also, vol. 1, § 265. See, as to insurance in name of prospective corporation which is afterward organized and then ratifies, Kline v. Royal Ins. Co., 192 Fed. 378.

[40] Matthews v. American Cent. Ins. Co., 154 N. Y. 449, 48 N. E. 751, 39 L. R. A. 433, 61 Am. St. 627.

stock companies and mutual companies, while some companies are of a mixed character and partake somewhat of the nature of both. It has been held that the business of insurance is not commerce, and hence is under the control of the states and not of the general government.[41] The state has extensive control of the business of insurance. It has been held that the state may permit such business to be carried on by corporations only,[42] and it may prescribe the conditions upon which domestic or foreign corporations may engage in the business.[43] Foreign corporations may be entirely excluded from the state[44] or admitted upon such terms as are judged proper for the protection of the policy-holders within the state. These conditions may extend to the form and legal effect of the company's policy as well as to the general manner of the transaction of its business,[45] and it is said that they may be reasonable or unreasonable, as they are entirely within the control of the legislative department of the state.[46]

Where the business is confined to corporations, the prohibitions extend to citizens of other states as well as to the home state. The business may be subjected to regulation, but when it is transacted by individuals there can be no discrimination between citizens of equal standing and merit.[47] By the weight of

[41] Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 15 Sup. Ct. 207.

[42] Commonwealth v. Vrooman, 164 Pa. St. 306, 30 Atl. 217, 24 L. R. A. 250, 44 Am. St. 603.

[43] State v. Phipps, 50 Kans. 609, 31 Pac. 1097, 18 L. R. A. 657, 34 Am. St. 152, and note collecting authorities; State v. Stone, 118 Mo. 388, 24 S. W. 164, 25 L. R. A. 243, 40 Am. St. 388, and note. As to the power to regulate and control the business of insurance companies already created, see Chicago Life Ins. Co. v. Needles, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. 681; State v. Eagle Ins. Co., 50 Ohio St. 252, 33 N. E. 1056; State v. Ackerman, 51 Ohio St. 163, 37 N. E. 828, 24 L. R. A. 298, and note on the general subject.

[44] Daggs v. Orient Ins. Co., 136 Mo. 382, 38 S. W. 85, 35 L. R. A. 227, 58 Am. St. 638; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. 281; Security Mut. Ins. Co. v. Prewitt, 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. 619, and other cases there cited.

[45] Berry v. Knights Templars' &c. Indemnity Co., 46 Fed. 439, affd. 50 Fed. 511, 1 C. C. A. 561. See Commonwealth v. Nutting, 175 Mass. 154, 55 N. E. 895, 78 Am. St. 483, affd. 183 U. S. 553, 46 L. ed. 324, 22 Sup. Ct. 238; National Life Ins. Co. v. State Comrs. of Insurance, 25 Mich. 321; State v. Fricke, 102 Wis. 107, 77 N. W. 732, 78 N. W. 455.

[46] Hartford Fire Ins. Co. v. Comr. of Ins., 70 Mich. 485, 38 N. W. 474. As to the retaliatory statutes in force in many of the states, see Elliott Priv. Corp. (4th ed.), § 263; People v. Fidelity & Casualty Ins. Co., 153 Ill. 25, 38 N. E. 752, 26 L. R. A. 295. See also, vol. 1, §§ 267, 554.

[47] Hoadley v. Purifoy, 107 Ala. 276, 18 So. 220, 30 L. R. A. 351; State v.

authority, the failure to comply with the conditions imposed by the state cannot be shown as a defense to an action on a policy issued by the company which has not complied with the law.[48] And it has likewise been held that an action may be maintained in one state upon an insurance policy of a company in such state on property in another state in which it is not authorized to do business.[49]

§ 4027. Mutual companies and benevolent societies.—The first incorporated insurance companies were joint stock corporations, but many are now organized upon the mutual plan. Such companies are regulated by special statutes, but for certain purposes all are treated as insurance companies. In some states mutual companies, at least of some kinds, do not come under the statutes which are intended for the general regulation of insurance companies, while in some instances the statutes apply

Stone, 118 Mo. 388, 24 S. W. 164, 25 L. R. A. 243, 40 Am. St. 386. See further as to restrictions upon a business of individuals or unincorporated associations from another state: Commonwealth v. Vrooman, 164 Pa. St. 306, 30 Atl. 217, 25 L. R. A. 250, 44 Am. St. 603; Commonwealth v. Reinoehl, 163 Pa. St. 287, 29 Atl. 896, 25 L. R. A. 247, and note in 25 L. R. A. 238. And it is held that the legislature cannot prohibit citizens of other states from entering into contracts outside of the state insuring property within its boundaries. Swing v. Hill, 165 Ind. 411, 75 N. E. 658. See also, Swing v. B. E. Brister & Co., 87 Miss. 516, 40 So. 146; Nutting v. Massachusetts, 183 U. S. 553, 46 L. ed. 324, 22 Sup. Ct. 238.

[48] Phenix Ins. Co. v. Pennsylvania R. Co., 134 Ind. 215, 33 N. E. 970, 20 L. R. A. 405; Ganser v. Fireman's Fund Ins. Co., 34 Minn. 372, 25 N. W. 943. See also, McCord v. Illinois Nat. Fire Ins. Co., 47 Ind. App. 602, 94 N. E. 1053, ante, vol. 1, § 554, n. 40. Nor, on the other hand, does it prevent the company from defending on the other grounds. American Wireless &c. Co. v. Superior Court, 153 Cal. 533, 96 Pac. 15, 17 L. R. A. (N. S.) 1117, and note, 126 Am. St. 125. As to the right of a citizen of one state to make a contract of insurance outside of the state with a company which is not authorized to do business within the state, see Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. 427 (sought to be distinguished in Swing v. Cameron, 145 Mich. 175, 108 N. W. 506, 9 L. R. A. (N. S.) 417). As to the enforcement of contracts made by companies not authorized to transact business in a state, see Elliott Priv. Corp. (4th ed.), § 268; State Mut. Fire Ins. Assn. v. Brinkley &c. Co., 61 Ark. 1, 31 S. W. 157, 29 L. R. A. 712, 54 Am. St. 191; Pennypacker v. Capital Ins. Co., 80 Iowa 56, 45 N. W. 408, 8 L. R. A. 236, 20 Am. St. 395. Contract made by mail by such a company: Rose v. Kimberly, 89 Wis. 545, 62 N. W. 526, 27 L. R. A. 556, 46 Am. St. 855; Seamans v. Temple Co., 105 Mich. 400, 63 N. W. 408, 28 L. R. A. 430, 55 Am. St. 457. See also, note to Swing v. Cameron, 145 Mich. 175, 108 N. W. 506, in 9 L. R. A. (N. S.) 417.

[49] Strampe v. Minnesota Farmers' Mut. Ins. Co., 109 Minn. 364, 123 N. W. 1083, 26 L. R. A. (N. S.) 999n, 134 Am. St. 781, and note, where the authorities are reviewed and distinguished.

even to individuals, partnerships and unincorporated associations.[50]

Another form of organization is known as the mutual benevolent associations. It requires close scrutiny, however, to discover any element of benevolence in the contracts issued by some of these institutions. Of one such the court said:[51] "It is apparent, from an examination of its charter, and its method of doing business, that the defendant is a mutual life insurance company on the assessment plan. Its business is insurance and nothing else. There is not a social, charitable, or benevolent feature in its organization or the conduct of its business. It has no lodges, pays no sick dues, and distributes no aid, and gives no attention to members in distress or poverty. It deals with its members on the strictest business principles. The policy-holders get nothing for which full value has not been paid by the assured, but the assured may pay much, and the policy-holder receive nothing, by reason of the forfeiture of the policy for a violation of some one of its numerous conditions."

It is sometimes a question whether such organizations are engaged in the insurance business within the meaning of the law, and if so whether they should be required to comply with the statutory conditions imposed upon insurance companies. When they are properly organized for benevolent and protective purposes under special statutes, they are not usually governed by the general laws regulating the business of insurance,[52] and it is generally held that certificates of such associations do not constitute "other insurance" within the meaning of the question in the ap-

[50] State v. Stone, 118 Mo. 388, 24 S. W. 164, 25 L. R. A. 243, 40 Am. St. 388; People v. Loew, 23 Misc. (N. Y.) 574, 52 N. Y. S. 799. A policy holder in a mutual company has a right to proper inspection of the books. State v. German Mut. L. Ins. Co., (Mo. App.) 152 S. W. 618.

[51] Berry v. Knights Templars' &c. Indemnity Co., 46 Fed. 439, affd. 50 Fed. 511, 1 C. C. A. 561. See also, National Union v. Marlow, 74 Fed. 775, 21 C. C. A. 89, and cases there cited; Pennsylvania Mut. Life Ins. Co. v. Mechanics' Savings Bank & Trust Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33. And, as to the rights of the parties in fraternal and assessment insurance, see also, Supreme Commandery Knights of Golden Rule v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332; Bauer v. Samson Lodge, 102 Ind. 262, 1 N. E. 571, and note in 52 Am. St. 552, 555.

[52] State v. Bankers' & Merchants' Mut. Ben. Assn., 23 Kans. 499; Commercial League Assn. of America v. People, 90 Ill. 166; Commonwealth v. Equitable Ben. Assn., 137 Pa. St. 412, 18 Atl. 1112; State v. Whitmore, 75 Wis. 332, 43 N. W. 1133. See National Union v. Marlow, 74 Fed. 775,

plication;[53] but, as already shown in a preceding section, many fraternal and so-called benevolent associations have been held to be, to some extent at least, mutual insurance companies.

In Iowa it has been held that where the main purpose is that of life insurance, or insurance against sickness and disability, the company is amenable to the laws of the state relating to insurance corporations, and must, therefore, comply with the statutory requirements relating to insurance companies organized in other states.[54] In Michigan it was said that as an insurance contract is an agreement by which one party, for a consideration, promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest, all mutual benefit and co-operative associations or mere voluntary associations are, strictly speaking, insurance organizations, whenever, in consideration of periodical contributions, they engage to pay the member or his designated beneficiary a benefit upon the happening of a specified contingency.[55] But an association organized for benevolent purposes, under the supervision of a supreme body, which secured its members by the lodge system, on application and after a satisfactory medical examination, required an initiation fee and assessments, and which, in the case of accidental disability, paid a weekly amount, and upon the death of a member, to be shown by proper proof, returned the amount of the assessment paid, less benefits received, was held not a life insurance company within the meaning of the statutes requiring such companies doing business in the state to make a deposit with the state treasurer.[56] It has also been held that a corporation organized "to give financial aid and benefit to the widows, orphans and heirs or devisees of deceased members," and declared by statute not to be an insurance corporation, cannot contract for endowment insurance payable to a member when he reaches a certain age.[57]

21 C. C. A. 89 (under Mo. Stat. (1909) ch. 33, art. 10).

[53] See Pennsylvania Mutual Life Ins. Co. v. Mechanics' Savings Bank & Trust Co., 73 Fed. 653, 19 C. C. A. 316, 38 L. R. A. 33.

[54] State v. Nichols, 78 Iowa 747, 41 N. W. 4.

[55] Rensenhouse v. Seeley, 72 Mich. 603, 40 N. W. 765.

[56] Rensenhouse v. Seeley, 72 Mich. 603, 40 N. W. 765.

[57] Rockhold v. Canton Masonic Mut. Ben. Soc., 129 Ill. 440, 21 N. E. 794, 2 L. R. A. 420.

§ 4028. **The risk.**—It is essential to every contract of insurance that there should be a risk to which the subject-matter is, or may be, subjected, and this risk should be a real one.[58] "It is of the very essence of insurance and forms the principal foundation of the contract. * * * The insurer takes upon himself the peril which the property or interest of others is liable to encounter. The very life of the contract involves the presumption that the thing is or will be exposed to some danger."[59]

Almost any contingent or unknown event, however, whether past or future, which may damnify a person having an insurable interest or create a liability against him, may be insured against. Whatever has an appreciable pecuniary value and is subject to loss or deterioration, or of which one may be deprived, or that he may fail to realize, whereby his pecuniary interest is or may be prejudiced, may properly constitute the subject-matter of insurance. This rule, however, is subject to the limitation that whatever the law discourages or disapproves of, whether by special statute or on the general principles enforced by the common law in the interest of good morals and good order and general public policy, will not be encouraged by insurance.[60] Thus, a valid contract can not be made for the protection of an interest in a lottery or other gambling enterprise, as a contract insuring an illegal business is void.[61] But the general rule is that an interest in property which the law permits a party to own and use under certain restrictions, although the property is in fact being illegally used, may be insured. A contract of insurance against a stock of liquors illegally kept for sale is generally held valid.[62] It was said

[58] See Stevenson v. Snow, 3 Burr. 1237. And it is held that if the loss has already occurred before the policy is in force or a binding contract made and the insured knows it, there can be no ratification thereafter so as to bind the insured because there is no risk. Kline v. Royal Ins. Co., 192 Fed. 378.

[59] 1 Joyce Ins., § 16.

[60] 1 May Ins. (4th ed.), § 71. See Phenix Ins. Co. v. Clay, 101 Ga. 331, 28 S. E. 853, 65 Am. St. 307.

[61] Mount v. Waite, 7 Johns. (N. Y.) 434. But compare Boardman v. Merrimack Mut. Fire Ins. Co., 8 Cush. (Mass.) 583, where merely collateral, as of building in part of which a lottery was carried on. See also, as to insurance on house of prostitution or furniture therein, Conithan v. Royal Ins. Co., 91 Miss. 386, 45 So. 361, 18 L. R. A. (N. S.) 214, and note.

[62] See Mechanics' Ins. Co. v. C. A. Hoover Distilling Co., 182 Fed. 590, 105 C. C. A. 128, 31 L. R. A. (N. S.) 873 and note, and cases cited in note 63.

in Michigan:[63] "By insuring his property, the insurance company had no concern with the use he may make of it, and as it is susceptible of lawful uses, no one can be held to contract concerning it in an illegal manner, unless the contract itself is for a directly illegal purpose. Collateral contracts in which no illegal design enters, are not affected by an illegal transaction with which they may be remotely connected." It was recently held that an English company could legally insure the property of a foreigner from capture by the government of the insurer in contemplation of war between the countries of the insurer and the insured.[64]

§ 4029. Contract is personal.—The contract of insurance is personal,[65] and does not, unless expressly so provided, run with the property. It does not pass with the title of the property,[66] but in this respect a distinction must be noted between a contract of insurance and a covenant to insure made between parties relative to land.[67] In one of the earliest cases,[68] Lord Hardwicke said: "To whom, or for what loss, are they to make satisfaction?

[63] Niagara Fire Ins. Co. v. DeGraff, 12 Mich. 124; Erb v. German-American Ins. Co., 98 Iowa 606, 67 N. W. 583, 40 L. R. A. 845; People's Ins. Co. v. Spencer, 53 Pa. St. 353, 91 Am. Dec. 217; Carrigan v. Lycoming Fire Ins. Co., 53 Vt. 418, 38 Am. Rep. 687. And see Armstrong v. Toler, 11 Wheat. (U. S.) 258, 6 L. ed. 468. In Massachusetts an insurance upon liquors illegally kept for sale is void (Lawrence v. National Fire Ins. Co., 127 Mass. 557, note), but sales made during a brief period of expiration of license will not invalidate a policy (Hinckley v. Germania Fire Ins. Co., 140 Mass. 38, 1 N. E. 737, 54 Am. Rep. 445).

[64] Driefontein Consolidated Gold Mines v. Janson, L. R. (1901) 2 K. B. 419. The decision seems to be a departure from well settled principles. See Richardson v. Maine Fire & Marine Ins. Co., 6 Mass. 102, 4 Am. Dec. 92.

[65] Nordyke & Marmon Co. v. Gery, 112 Ind. 535, 13 N. E. 683, 2 Am. St. 219; Deming Inv. Co. v. Dickerman, 63 Kans. 728, 66 Pac. 1029, 88 Am. St. 265 and note; Heller v. National Marine Bank, 89 Md. 602, 43 Atl. 800, 45 L. R. A. 438, 73 Am. St. 212. See also, Bartling v. German Mut. &c. Ins. Co. (Iowa), 134 N. W. 864; Davis v. Bremer County &c. Fire Ins. Assn. (Iowa), 134 N. W. 860, and cannot be assigned without consent of company.

[66] Shadgett v. Phillips & Co., 131 Ala. 478, 31 So. 20, 56 L. R. A. 461, 90 Am. St. 95; Lett v. Guardian Fire Ins. Co., 125 N. Y. 82, 25 N. E. 1088; McDonald v. Black's Admr., 20 Ohio 185, 55 Am. Dec. 448; Quarles v. Clayton, 87 Tenn. 308, 10 S. W. 505, 3 L. R. A. 170; Carpenter v. Providence Washington Ins. Co., 16 Pet. (U. S.) 495, 10 L. ed. 1044. See also, Pelzer Mfg. Co. v. Sun Fire Office, 36 S. Car. 213, 15 S. E. 562; Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. 379. For a case in which it attached to the property under the particular policy, see Waring v. Indemnity Fire Ins. Co., 45 N. Y. 606, 6 Am. Rep. 146.

[67] Thomas' Admrs. v. Vonkapff's Exrs., 6 Gill & J. (Md.) 372.

[68] Sadler's Co. v. Badcock, 2 Atk. 557.

Why, to the person insured, and for the loss he may have sustained; for it cannot properly be called insuring the thing, for there is no possibility of doing it, and therefore must mean insuring the person from damage." In another early case[69] it was said that these policies are no insurance on the specific things mentioned to be insured, nor do such insurances attach to the realty or in any manner go with the same as incident thereto by any conveyance or assignment, but they are only special agreements with the person insuring against such loss or damage as they may sustain. The party insured must have the property at the time of the loss, or he can sustain no loss, and consequently can be entitled to no satisfaction.

§ 4030. **A conditional contract.**—The contract is also conditional. The risks "are the occasion of the contract being made, and without exposure to them it never applies."[70] "Where the risk has not been run," said Lord Mansfield, "whether its not being run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned."[71] Many other conditional provisions are found in insurance contracts.[72]

§ 4031. **An aleatory contract.**—In an ordinary contract the thing given or done by one party is considered as an equivalent of what is given or done by the other, but an element of wager enters into every insurance contract. If no loss occurs, the insurer gains the amount of the premium; if loss occurs, the insured receives the amount of his loss, which is generally much greater than the premium. By reason of this element of chance the contract is said to be aleatory.[73]

[69] Lynch v. Dalzel, 3 Bro. Cas. Parl. 497, quoted in Park Ins. 453.

[70] 1 Arnould Mar. Ins. 10.

[71] Connecticut Mut. Life Ins. Co. v. Pyle, 44 Ohio St. 19, 4 N. E. 465, 58 Am. Rep. 781, quoting from Tyrie v. Fletcher, Cowp. 668, to the same effect as in the text.

[72] Born v. Home Ins. Co., 110 Iowa 379, 81 N. W. 676, 80 Am. St. 300. See note to Cooledge v. Continental Ins. Co., 67 Vt. 14, 30 Atl. 798.

[73] In the case of the ordinary straight life insurance, however, death at some time is certain and the only contingency or uncertainty is as to the time. See, to the effect that there must be an element of chance and that a fire or marine insurance policy "lost or not lost" is aleatory if the loss is unknown but not so if it has already occurred and is known, Kline v. Royal Ins. Co., 192 Fed. 378.

§ 4032. Indemnity.—A basic principle of every contract of insurance affecting an interest in property is that of indemnity.[74] This means that the object of the contract is, in the event of loss, to place the insured as nearly as possible within the terms and conditions of the policy, in the same situation as before the loss. The value of the interest may be determined after the loss, or by the contract. A policy of insurance is not a perfect contract of indemnity, however, and the general statement must be taken with this qualification, that the parties may agree beforehand in estimating the value of the subject or of the interest by way of liquidated damages.[75] Where the valuation is previously determined and inserted in the contract it will usually be taken as conclusive in the absence of gross or fraudulent overvaluation. Reinsurance is likewise properly considered as a contract of indemnity.[76]

§ 4033. Life insurance not a contract of indemnity.—Life insurance, however, is not a contract of indemnity, but simply a contract in consideration of a fixed payment annually or otherwise, as determined by the contract, to pay a greater sum upon the happening of a future, certain event. It much resembles a fire or marine valued policy, and an early decision treated it as a contract of indemnity and held that a creditor who had insured the life of his debtor could not recover on the policy where the executors paid the debt after the death of the debtor and before an action was brought on the policy.[77] But this decision was unsatisfactory to the courts and the business community,[78] and was finally reversed in a carefully considered case, where it was

[74] The principle is so well established as scarcely to require the citation of authorities. See generally, Castellain v. Preston, L. R. 11 Q. B. Div. 380; Bartling v. German Mut. &c. Ins. Co. (Iowa), 134 N. W. 864; Morrison's Admr. v. Tennessee Marine & Fire Ins. Co., 18 Mo. 262, 59 Am. Dec. 299; McDonald v. Black's Admr., 20 Ohio 185, 55 Am. Dec. 448; Mercantile Mut. Ins. Co. v. Folsom, 18 Wall. (U. S.) 237, 21 L. ed. 827. See article on "Indemnity the Essence of Insurance," Proc. Am. Bar Assn. (1887), 261; Wilson v. Hill, 3 Metc. (Mass.) 66. As already intimated, however, life insurance is exceptional in this respect.

[75] Irving v. Manning, 1 H. L. Cas. 287.

[76] Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind. 443; Bartlett v. Fireman's Fund Ins. Co., 77 Iowa 155, 41 N. W. 601.

[77] Godsall v. Boldero, 9 East. 721.

[78] See Bunyan Life Ins. (2d ed.), Part I, ch. 1, § 7.

squarely decided that a contract of life insurance is not a contract of indemnity.[79] It was said that such a contract "really is what it is on the face of it,—a contract to pay a certain sum in the event of death. It is valid at common law; and, if it is made by a person having an interest in the duration of the life, it is not prohibited by the statute." It is unnecessary to discuss the reasons which have led most of our courts to accept the view that life insurance is not a contract of indemnity, as the controversy is now practically closed and the leading decisions are cited in the notes.[80] The difficulty is in disposing of cases where creditors insure the lives of their debtors for the purpose of securing the payment of their debts. Some respectable authorities hold with much force and reason that such contracts are for indemnity only,[81] and statements are occasionally found to the effect that all insurance contracts are contracts of indemnity.[82]

§ 4034. Indemnity in accident insurance.—An accident insurance policy, from one point of view, may be regarded as a contract of indemnity in so far, at least, as it protects against personal injury resulting from accident; but it resembles an ordinary life insurance contract in so far as it provides for the payment to another person of a fixed sum in case of death by accident. Death covered by an ordinary life policy is certain to occur, but death by accident is no more liable to occur than loss by fire under a fire insurance contract. So, in a recent case, it is said that accident or casualty insurance is not strictly a contract of indemnity but is more in the nature of life insurance and of an investment contract and that the insurance company has no right of

[79] Dalby v. India & London Life Assur. Co., 15 C. B. 365, 80 E. C. L. 365, 28 Eng. L. & Eq. 312.

[80] That life insurance is not a contract of indemnity, see also, Scott v. Dickson, 108 Pa. St. 6, 56 Am. Rep. 192. See too, Nye v. Grand Lodge A. O. U. W., 9 Ind. App. 131, 36 N. E. 429; Emerick v. Coakley, 35 Md. 188; Mutual Life Ins. Co. v. Allen, 138 Mass. 24, 52 Am. Rep. 245.

[81] Exchange Bank v. Loh, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372; Miller v. Eagle &c. Ins. Co., 2 E. D. Smith (N. Y.) 268. In Cooper v. Shaeffer, 7 Sad. (Pa.) 405, 11 Atl. 548, it was held that where disproportion between the amount of the insurance and the debt is gross, the policy is void as a wager policy. See Grant's Admrs. v. Kline, 115 Pa. St. 618, 9 Atl. 150.

[82] Thus, an eminent jurist recently said: "The very essence of any definition of insurance is indemnity for loss in respect of a specified subject. The contract of life insurance, or of insurance upon a life, in the ordinary form, is a contract to pay a certain sum of money on the death of the in-

subrogation.[83] But in Illinois it was recently said that, "A policy of accidental insurance is issued and accepted for the purpose of furnishing indemnity against accidents, or death caused by accidental means."[84]

§ 4035. **Subrogation.**—"In fire insurance, as in marine insurance," says Mr. Justice Gray,[85] "the insurer, upon paying to the assured the amount of a loss on the property insured, is doubtless subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss. But the right of the insurer against such other person does not rest upon any relation of contract or of privity between them. It arises out of the nature of the contract of insurance as a contract of indemnity, and is derived from the assured alone, and can be enforced in his right only. By the strict rules of the common law, it must be asserted in the name of the assured; in a court of equity or of admiralty, or under some state codes, it may be asserted by the insurer in his own name; but in any form of remedy the insurer can take nothing by subrogation but the rights of the assured; and if the assured has no right of action, none passes to the insurer."

§ 4036. **Loss caused by negligence.**—A contract of insurance covers a loss occasioned by the negligence of the insured,

sured." State v. Federal Inv. Co., 48 Minn. 110, 50 N. W. 1028. See also, May Ins. (4th ed.) 7; Bevin v. Connecticut Mut. Life Ins. Co., 23 Conn. 244; Kennedy v. New York Life Ins. Co., 10 La. Ann. 809.

[83] Gatzweiler v. Milwaukee Elec. R. & Light Co., 136 Wis. 34, 116 N. W. 633, 18 L. R. A. (N. S.) 211n, 128 Am. St. 1057. See also, Ætna Life Ins. Co. v. Parker, 30 Tex. Civ. App. 521, 72 S. W. 621, affirmed in part and reversed in part in 96 Tex. 287, 72 S. W. 168, 580, 621.

[84] Healey v. Mutual Acc. Assn., 133 Ill. 556, 25 N. E. 52, 9 L. R. A. 371, 23 Am. St. 637. See Employers' Liability Assur. Corp. v. Merrill, 155 Mass. 404, 29 N. E. 529. And compare State v. Pittsburgh, C. C., & St. L. R. Co., 68 Ohio St. 9, 67 N. E. 93, 64 L. R. A. 405, 96 Am. St. 635. See to the effect that there is no liability for death where policy covers only "disability," Hill v. Travelers' Ins. Co., 146 Iowa 133, 124 N. W. 898, 28 L. R. A. (N. S.) 742, and note.

[85] St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co., 139 U. S. 223, 35 L. ed. 154, 11 Sup. Ct. 554. See also, King v. Victoria Ins. Co., A. C. 250; West of England Fire Ins. Co. v. Isaacs, L. R. (1896) 2 Q. B. 377, affd. in 66 L. J. Q. B. 36; St. Louis, A. & T. R. Co. v. Fire Assn., 55 Ark. 163, 18 S. W. 43; Fairgrieve v. Marine Ins. Co., 94 Fed. 686, 37 C. C. A. 190; Egan v. British &c. Marine Ins. Co., 193 Ill. 295, 61 N. E. 1081, 86 Am. St. 342. But see as to accident and life insurance, Gatzweiler v. Milwaukee Electric R. & Light Co., 136 Wis. 34, 116 N. W. 633, 128 Am. St. 1057, note to American

unless the negligence is so gross as to show an evil intent.[86] And the burning of the property by the insured while insane will not absolve the insurer in the absence of any provision to that effect.[87] If the loss is caused by some one other than the insured, the wrongdoer must not be released without the consent of the insurer, as such a release would bar the right of action upon the insurance contract.[88] So, where the wrongdoer pays the insured, with knowledge of the fact that the insurer has made a payment under the policy, it is a fraud upon the insurer, and will not protect the wrongdoer.[89] But the mere fact that the property insured was burned by some one closely related to the insured without the latter's knowledge or participation will not release the insurer.[90]

§ 4037. **Form of the contract.**—It is customary to reduce the contract of insurance to writing, but this is not necessary unless required by statute, as a parol contract of insurance is valid.[91] An oral contract of insurance was good under the com-

Bonding Co. v. National &c. Bank, 99 Am. St. 504.

[86] Angier v. Western Assur. Co., 10 S. Dak. 82, 71 N. W. 761, 66 Am. St. 685; Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 136 U. S. 408, 34 L. ed. 398, 10 Sup. Ct. 934; Pool v. Milwaukee Mechanics' Ins. Co., 91 Wis. 530, 65 N. W. 54, 51 Am. St. 919. See Union Ins. Co. v. Smith, 124 U. S. 405, 8 Sup. Ct. 534, 31 L. ed. 497.

[87] Bindell v. Kenton County Assessment Fire Ins. Co., 128 Ky. 389, 108 S. W. 325, 17 L. R. A. (N. S.) 189, 129 Am. St. 303, and note. See also, Williams v. Hays, 143 N. Y. 442, 38 N. E. 449, 26 L. R. A. 153, 42 Am. St. 743.

[88] Newcomb v. Cincinnati Ins. Co., 22 Ohio St. 382, 10 Am. Rep. 746; Hall v. Nashville &c. R. Co., 13 Wall. (U. S.) 367, 20 L. ed. 594.

[89] Connecticut Fire Ins. Co. v. Erie R. Co., 73 N. Y. 399, 29 Am. Rep. 171; Allen v. Chicago & N. W. R. Co., 94 Wis. 93, 68 N. W. 873.

[90] Feibelman v. Manchester Fire Assur. Co., 108 Ala. 180, 19 So. 540 (burning by agent); Plinsky v. Germania Fire & Marine Ins. Co., 32 Fed. 47 (property burned by husband of insured); Gove v. Farmers' Mut. Fire Ins. Co., 48 N. H. 41, 97 Am. Dec. 572, 2 Am. Rep. 168 (buildings burned by wife of insured).

[91] Western Assur. Co. v. McAlpin, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. 423; Emery v. Boston Marine Ins. Co., 138 Mass. 398; Ganser v. Fireman's Fund Ins. Co., 34 Minn. 372, 25 N. W. 943, 38 Minn. 74, 35 N. W. 584; King v. Phœnix Ins. Co., 195 Mo. 290, 92 S. W. 892, 113 Am. St. 678; First Baptist Church v. Brooklyn Fire Ins. Co., 19 N. Y. 305; Fish v. Cottenet, 44 N. Y. 538, 4 Am. Rep. 715; Ruggles v. American Cent. Ins. Co., 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. 674; North British & M. Fire Ins. Co. v. Lambert, 26 Ore. 199, 37 Pac. 909; Benner v. Fire Assn., 229 Pa. 75, 78 Atl. 44, 140 Am. St. 706, and note; Croft v. Hanover Fire Ins. Co., 40 W. Va. 508, 21 S. E. 854, 52 Am. St. 902. In Cockerill v. Cincinnati Mut. Ins. Co., 16 Ohio 148, it was held that a contract of insurance must be in writing; but the case was reversed in Dayton Ins. Co. v. Kelly, 24 Ohio St. 345, 15 Am. Rep.

mon law.[92] It has sometimes been held that an oral contract of insurance is invalid, but "it is now well settled, that a policy is only evidence of the contract, and the latter may be shown by parol, when the policy has not been written, or is withheld, unless such contract is forbidden by statute, or a provision of the company's charter which is brought to the notice of the other contracting party. * * * And, as in other cases of parol contracts, the terms of the agreement, and the assent of the parties to them, may be shown by their acts, and the attending circumstances, as well as the words they have employed."[93] But in view of the custom of insurance companies of using written policies, it is said that there is a strong presumption, where no policy has been issued and no premium paid, that no contract has been entered into,[94] and the necessary elements must be present in order to constitute even an oral contract of insurance.[95]

§ 4038. Statutory form—Conditions implied in an oral contract.—Many states now prescribe a form of contract known as the standard policy, but such statutes do not change the rule, and an oral contract is binding if it can be proved by satisfactory evidence. A parol contract to insure or for insurance is, unless other terms are agreed upon, usually construed as an agreement to insure upon the terms expressed in the written policy ordinarily issued by the company,[96] and where a standard

612. As to the validity of an oral contract of insurance, generally, see Newark Mach. Co. v. Kenton Ins. Co., 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768, and elaborate note. In a number of states there are statutes providing that a contract of insurance need not be under seal. See, generally, the elaborate note to Stephenson v. Allison, 165 Ala. 238, in 138 Am. St. 26.

[92] Emerigon says: "Valin and Pothier agree in saying, that in insurance the writing is only required for the proof of the contract; * * * that the writing is extrinsic to the substance of the agreements. They are reduced to writing for the purpose of more easily preserving their proof. * * * But this common-law rule ceases its operation in all cases where writing is expressly required by law." Emerigon Ins. (Meredith's ed., 1850) 25.

[93] Newark Mach. Co. v. Kenton Ins. Co., 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768, and note.

[94] Equitable Life Assur. Soc. v. McElroy, 83 Fed. 631, 28 C. C. A. 365; Heiman v. Phœnix &c. Ins. Co., 17 Gil. (Minn.) 127, 10 Am. Rep. 154.

[95] See Whitman v. Milwaukee Fire Ins. Co., 128 Wis. 124, 107 N. W. 291, 5 L. R. A. (N. S.) 407, and note, 116 Am. St. 25, as to the formal elements and what is necessary to a complete present oral contract of insurance. See also, Summers v. Mutual L. Ins. Co., 12 Wyo. 369, 75 Pac. 937, 66 L. R. A. 812, 109 Am. St. 992; and note to Stephenson v. Allison, 138 Am. St. 31.

[96] Barre v. Council Bluffs Ins. Co., 76 Iowa 609, 41 N. W. 373; Salisbury

policy is required an oral contract is presumed to contemplate insurance upon the terms and subject to the conditions of such policy. Hence, in such a case, the rights of one whose property is destroyed by fire after an oral contract to insure, but before the policy is issued, are subject to the provisions of the standard policy, and he can recover only upon compliance with the conditions required by such policy. "This contract of insurance," says Chief Justice Parker,[97] "although verbal, embraced within it the provisions of the standard policy of fire insurance, which the legislature in its wisdom formulated for the protection of both insured and insurer. It is usual for the company to issue a policy of insurance evidencing the contract between the parties; but the policy accomplishes nothing more than that, for, when the contract is entered into between the agent and the owner, whether the binder be verbal or in writing, it includes within it the standard form of policy, and the contract is a completed one."

§ 4039. Statute of frauds.—A contract of insurance is not within the provisions of the statute of frauds which requires "every agreement which by its terms is not to be performed within one year from the making thereof to be in writing." The thing to be done under such a contract depends upon a contingency which may happen within one year.[98] So, an agreement to make a policy or renew a policy or a contract of reinsurance is not within the statute.[99]

v. Hekla Fire Ins. Co., 32 Minn. 458, 21 N. W. 552; Lipman v. Niagara Fire Ins. Co., 121 N. Y. 454, 24 N. E. 699, 8 L. R. A. 719; Karelsen v. Sun Fire Office, 122 N. Y. 545, 25 N. E. 921; Newark Mach. Co. v. Kenton Ins. Co., 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768; Eames v. Home Ins. Co., 94 U. S. 621, 24 L. ed. 298.

[97] Hicks v. British American Assur. Co., 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424. A policy issued in pursuance of an oral contract to insure will be presumed to embody all the terms of the contract, and in the absence of fraud or mistake will be conclusive as to the terms of such contract. McLaughlin v. Equitable Life Assur. Soc., 38 Nebr. 725, 57 N. W. 557. But a parol contract to issue a policy is not merged in a written policy which does not cover all the terms of the parol contract. Nebraska & I. Ins. Co. v. Seivers, 27 Nebr. 541, 43 N. W. 351.

[98] Sanford v. Orient Ins. Co., 174 Mass. 416, 54 N. E. 883, 75 Am. St. 358; Commercial Mut. Marine Ins. Co. v. Union Mut. Ins. Co., 19 How. (U. S.) 318, 15 L. ed. 636; Franklin Ins. Co. v. Colt, 20 Wall. (U. S.) 560, 22 L. ed. 423; Croft v. Hanover Fire Ins. Co., 40 W. Va. 508, 21 S. E. 854, 52 Am. St. 902.

[99] Howard Ins. Co. v. Owens, 94 Ky. 197, 14 Ky. L. 881, 21 S. W. 1037; Walker v. Metropolitan Ins. Co., 56 Maine 371; Sanborn v. Fireman's Ins. Co., 16 Gray (Mass.) 448, 77 Am. Dec. 419; Wiebeler v. Mil-

§ 4040. Renewal by parol.—An existing written policy of insurance may be renewed by parol.[1] An insurance company cannot limit its power of action by a provision in a policy that the power that made the contract cannot modify it. Hence, it has been held that a policy may be renewed by a parol agreement of an authorized agent of the company, although it contains a provision that it shall not be so renewed, and the making of the parol agreement amounts to a waiver of the provisions in the policy.[2] But there is much conflict upon the general subject as to when agents are authorized to waive such provisions.

§ 4041. Effect of charter provisions.—Where the charter of an insurance company requires the contract to be in writing, there are well considered cases holding that it has no power to make an oral contract of insurance.[3] If the insured has knowledge of the limitations contained in the corporate charter, it is reasonable that he should be bound thereby, but it is difficult to state general rules applicable to all cases. At all events, charter provisions relating to the execution of a policy should not, in the absence of words of restriction or a plain denial of such power, be construed to limit the power of the corporation or to prevent it from making parol contracts within the ordinary scope of its charter powers.[4] A statute which requires all policies to be signed by the president and countersigned by the secretary of the corporation will not prevent the making of a valid oral contract to insure.[5] And where the charter limited the power of the corpo-

waukee &c. Ins. Co., 30 Minn. 464, 16 N. W. 363.

[1] McCabe v. Ætna Ins. Co., 9 N. Dak. 19, 81 N. W. 426, 47 L. R. A. 641, reviewing the cases pro and con.

[2] Royal Ins. Co. v. Beatty, 119 Pa. St. 6, 12 Atl. 607, 4 Am. St. 622; Cohen v. Continental Fire Ins. Co., 67 Tex. 325, 3 S. W. 296, 60 Am. Rep. 24.

[3] Spitzer v. St. Mark's Ins. Co., 6 Duer (N. Y.) 6; Benner v. Fire Assn. of Phila., 229 Pa. 75, 78 Atl. 44, 140 Am. St. 706; Head v. Providence Ins. Co., 2 Cranch (U. S.) 127, 2 L. ed. 229; Franklin Ins. Co. v. Colt, 20 Wall. (U. S.) 560, 22 L. ed. 423. But see King v. Phenix Ins. Co., 195 Mo. 290, 92 S. W. 892, 113 Am. St. 678.

[4] See 1 Joyce Ins., § 35; May Insurance (4th ed.), §§ 14, 22, 23, 128; King v. Phœnix Ins. Co., 195 Mo. 290, 92 S. W. 892, 113 Am. St. 678, and cases cited; Henning v. United States Ins. Co., 2 Dill. (U. S.) 26, Fed. Cas. No. 6366.

[5] Sanborn v. Fireman's Ins. Co., 16 Gray (Mass.) 448, 77 Am. Dec. 419; Commercial Mut. Marine Ins. Co. v. Union Mut. Ins. Co., 19 How. (U. S.) 318, 15 L. ed. 636; Henning v. United States Ins. Co., 2 Dill. (U. S.) 26, Fed. Cas. No. 6366. Contra Henning v. United States Ins. Co., 47 Mo. 425, 4 Am. Rep. 332.

ration to make valid insurance by a policy not under seal and signed by the president and secretary, it was held that, before a policy was executed, a general agent of the company might make a parol agreement that a policy would be issued, and that a court of equity would compel the corporation specifically to perform such an agreement.[6]

§ 4042. **Revenue stamps.**—It is generally held that a statute which requires an insurance policy to bear a revenue stamp does not necessarily affect the validity of the contract. If such contracts are in fact reduced to writing, they require a stamp under the Federal Statute, but the great majority of the state courts hold that the laws of congress in regard to the admission of unstamped instruments in evidence apply only to the federal courts.[7] "It has been repeatedly decided," says Judge Cooley,[7a] "that the act of congress which provided that certain papers not stamped should not be received in evidence must be limited in its operation to the federal courts. * * * Several of these cases have gone still farther, and declared that congress cannot preclude parties from entering into contracts permitted by the state laws, and that to declare them void is not a proper penalty for the enforcement of tax laws."

§ 4043. **Enforcement of oral contract.**—A valid oral contract to insure may, in a proper case, be either specifically enforced, or the court may award damages as in an action upon the policy.[8] Where the negotiations have reached a point where noth-

[6] Security Fire Ins. Co. v. Kentucky &c. Ins. Co., 7 Bush (Ky.) 81, 3 Am. Rep. 301; Constant v. Allegheny Ins. Co., 3 Wall. Jr. (U. S.) 313, Fed. Cas. No. 3136.

[7] Small v. Slocumb, 112 Ga. 279, 37 S. E. 481, 53 L. R. A. 130, 81 Am. St. 50; Wingert v. Zeigler, 91 Md. 318, 46 Atl. 1074, 51 L. R. A. 316, 80 Am. St. 453; Carpenter v. Snelling, 97 Mass. 452; King v. Phœnix Ins. Co., 195 Mo. 290, 92 S. W. 892, 113 Am. St. 678; Knox v. Rossi, 25 Nev. 96, 57 Pac. 179, 48 L. R. A. 305, 83 Am. St. 566; Southern Ins. Co. v. Estes, 106 Tenn. 472, 62 S. W. 149, 52 L. R. A. 915, 82 Am. St. 892. See also, Hooper v. Whitaker, 130 Ala. 324, 30 So. 355; Garland v. Gaines, 73 Conn. 662, 49 Atl. 19, 84 Am. St. 182, and note. Unless stamp was omitted with intent to defraud. Green v. Holway, 101 Mass. 243, 3 Am. Rep. 339; Hitchcock v. Sawyer, 39 Vt. 412. See also, Griffin v. Ranney, 35 Conn. 239. The leading case holding the contrary is Chartiers Co. v. McNamara, 72 Pa. St. 278, 13 Am. Rep. 673.

[7a] See Cooley Const. Lim. (6th ed.), 592n.

[8] Prudential Ins. Co. v. Sullivan, 27 Ind. App. 30, 59 N. E. 873; Security Fire Ins. Co. v. Kentucky &c. Ins. Co., 7 Bush (Ky.) 81, 3 Am. Rep. 301; Gerrish v. German Ins. Co., 55

ing remains for either party but to execute what has been agreed upon, the courts will usually compel the issuance of the policy and the indemnification of the insured. Where it appeared that a voyage was undertaken with the understanding that the risk had been accepted by the insurer, and that the policy would be issued and the premium paid when demanded, it was said:[9] "It is well established law that upon clear proof that a contract has been made to do something, the consummation of which involves the execution of a written instrument, which is afterward refused to be made, a court of equity will coerce the execution of the written contract which the parol evidence has shown was agreed upon."

§ 4044. **Kinds of policies.**—Various forms of policies are to be found in the different kinds and systems of insurance, but the principal general classes, some of which are used in one kind of insurance and some in others are open or valued, wager or interest, time or voyage.

A valued policy is one in which the amount of the indemnity to be paid in the event of loss is fixed by the terms of the contract. An open policy is one in which the sum to be paid is left to be determined in the event of a loss. Under the former the actual value of the subject-matter need not be proved, as the sum agreed upon is conclusive unless it appears that there was fraud or such excessive overvaluation as in itself to raise the presumption of fraud.[10] A policy may be open as to certain articles and valued as to others.[11]

N. H. 355; Franklin Ins. Co. v. Colt, 20 Wall. (U. S.) 560, 22 L. ed. 423; Summers v. Mut. L. Ins. Co., 12 Wyo. 369, 75 Pac. 937, 66 L. R. A. 812, 109 Am. St. 992, and note.

[9] Union Cent. L. Ins. Co. v. Phillips, 102 Fed. 19, 41 C. C. A. 263; Phœnix Ins. Co. v. Ryland, 69 Md. 437, 16 Atl. 109, 1 L. R. A. 548; Woody v. Old Dominion Ins. Co., 31 Grat. (Va.) 362, 31 Am. Rep. 732; Kohne v. Ins. Co. of North America, 1 Wash. (U. S.) 93, Fed. Cas. No. 7920.

[10] Cushman v. Northwestern Ins. Co., 34 Maine 487; Borden v. Hingham &c. Ins. Co., 18 Pick. (Mass.) 523; Holmes v. Charlestown Mut. Fire Ins. Co., 10 Metc. (Mass.) 211, 43 Am. Dec. 428; Alsop v. Commercial Ins. Co., 1 Sumn. (U. S.) 451, Fed. Cas. No. 262. In many states all policies are required by statutes to be valued. As to the policy of such legislation, see a paper in Proc. Am. Bar Assn. (1887) 261, by Henry Jackson, Esq.

[11] Post v. Hampshire Mut. Fire Ins. Co., 12 Metc. (Mass.) 555, 46 Am. Dec. 702. And see, for definition and explanation of open and valued policies, Lycoming Ins. Co. v. Mitchell, 48 Pa. St. 367. See also, as to a further meaning of open or running pol-

A wager policy is one in which it appears by its terms that the insured has no interest in the subject-matter of the insurance. It is a disputed question whether such policies were valid at the common law, but however that may have been, they are now universally prohibited. An interest policy is one in which it appears by its terms that the insured has an interest in the subject-matter.[12]

A time policy is one in which the duration of the risk is fixed for a definite period of time, while a voyage policy is one in which the duration of the risk is determined by geographical limits. It is applicable to transportation upon land or water.[13]

§ 4045. Completion of the contract—Delivery of the policy.—A contract of insurance is completed when the terms have been agreed upon between the parties.[14] The reciprocal rights and obligations of the parties date from that time, without reference to the execution and delivery of the policy, unless these elements are embraced within the terms agreed upon, or the statute makes such a delivery a condition precedent to the validity of the contract.[15] But if there is no agreement or acceptance of risk without delivery of the policy, delivery must be shown;[16] and if there has been no payment of the premium and no delivery of the policy, the contract is prima facie incomplete, and the party claiming the existence of a contract must show that it was the intention of the parties that there should be an operative contract.[17] It is ordinarily necessary that the policy should be deliv-

icy on cargo, Orient Mut. Ins. Co. v. Wright, 23 How. (U. S.) 404, 16 L. ed. 527.

[12] Williams v. Smith, 2 Caines (N. Y.) 13, and note; Alsop v. Commercial Ins. Co. 1 Sumn. (U. S.) 451, Fed. Cas. No. 262. See also, note to Howe's Exr. v. Griffin's Admr., 126 Ky. 373, 103 S. W. 714, 128 Am. St. 296; Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. ed. 251.

[13] See also, May Ins. (4th ed.), § 34; Boehm v. Combe, 2 M. & S. 172.

[14] Stephenson v. Allison, 165 Ala. 238, 51 So. 622, 138 Am. St. 26, and note; Lum v. United States Ins. Co., 104 Mich. 397, 62 N. W. 562.

[15] Western Assur. Co. v. McAlpin, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. 423. See as to statutes or provisions making delivery essential note in 138 Am. St. 33, 47-53.

[16] Rogers v. Charter Oak Life Ins. Co., 41 Conn. 97; Kerr v. Milwaukee Mechanics' Ins. Co., 117 Fed. 442, 54 C. C. A. 616; Folb v. Phœnix Ins. Co., 109 N. Car. 568, 13 S. E. 798.

[17] Faunce v. State &c. Assur. Co., 101 Mass. 279; Heiman v. Phœnix &c. Ins. Co., 17 Gil. (Minn.) 127, 10 Am. Rep. 154; Lightbody v. North American Ins. Co., 23 Wend. (N. Y.)

ered before the contract is binding upon the insurance company, unless the facts are such as to entitle the party to recover upon an oral contract to insure or of insurance. This does not, however, require actual manual delivery, as an agreement upon all the terms and the issue and transmission to the agent of the company for delivery without conditions are equivalent to delivery to the insured.[18] But a mere conditional delivery of the policy to an agent, to be delivered to the insured upon the payment of the premium or the like, is not a delivery to the insured.[19] Delivery is a question of intent and may be shown by any act intended to signify that the instrument shall have present validity.[20] The policy may be conditionally delivered, and the performance of the condition be made a condition precedent to the existence of the contract of insurance.[21] The possession of the policy by the insured makes a prima facie case, but this may be overthrown by

18; Idaho Forwarding Co. v. Fireman's Fund Ins. Co., 8 Utah 41, 29 Pac. 826, 17 L. R. A. 586. See also, Milwaukee Mechanics' Ins. Co. v. Graham, 181 Ill. 158, 54 N. E. 914; Blue Grass Ins. Co. v. Cobb, 109 Ky. 339, 22 Ky. L. 857, 58 S. W. 981.

[18] New England Fire & Marine Ins. Co. v. Robinson, 25 Ind. 536; Whitaker v. Farmers' Union Ins. Co., 29 Barb. (N. Y.) 312; Franklin Fire Ins. Co. v. Colt, 20 Wall. (U. S.) 560, 22 L. ed. 423. See also, Stephenson v. Allison, 165 Ala. 238, 51 So. 622, 138 Am. St. 26, and note; Harrigan v. Home Life Ins. Co., 128 Cal. 531, 58 Pac. 180, 61 Pac. 99. And compare Roberta Mfg. Co. v. Royal Exch. Assur. Co. (N. Car.), 76 S. E. 865.

[19] Wainer v. Milford &c. Ins. Co., 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598. In this Massachusetts case it is said: "Previous to the time of receiving the policy, he had paid no money and signed no obligation other than the application. It is clear, upon this statement, that there was no oral contract of insurance, and no contract contemplated except upon the delivery of the policy and the payment of the premium. The agent was the agent of the defendant to receive the premium and deliver the policy for it, and there is no evidence that he had authority to deliver the policy except upon payment of the premium. There was no contract of insurance until the payment of the premium and delivery of the policy." See also, Moore v. Farmers' Mut. Ins. Assn., 107 Ga. 199, 33 S. E. 65; New v. Germania Fire Ins. Co., 171 Ind. 33, 85 N. E. 703, 131 Am. St. 245; Hartford Fire Ins. Co. v. Wilson, 187 U. S. 467, 47 L. ed. 261, 23 Sup. Ct. 189. And see, generally, as to conditions at inception of policy, note in 13 L. R. A. (N. S.) 826-870.

[20] Commercial Ins. Co. v. Hallock, 27 N. J. L. 645, 72 Am. Dec. 379. And see, generally, as to constructive delivery and to the effect that delivery and completion of the contract are questions of intent: Phœnix Assur. Co. v. McAuthor, 116 Ala. 659, 22 So. 903, 67 Am. St. 154; Brown v. American Cent. Ins. Co., 70 Iowa 390, 30 N. W. 647; Heiman v. Phœnix &c. Ins. Co., 17 Gil. (Minn.) 127, 10 Am. Rep. 154; Newark Mach. Co. v. Kenton Ins. Co., 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768. As to waiver of payment of premium by delivery of policy, see De Michele v. London &c. Fire Ins. Co. (Utah), 120 Pac. 846.

[21] Harnickell v. New York Life Ins. Co., 111 N. Y. 390, 18 N. E. 632, 2 L. R. A. 150; Benton v. Martin, 52 N. Y. 570.

evidence that it was never actually delivered, or that it was obtained by misrepresentation and fraud.[22]

§ 4046. **Countersigning by agent.**—When a policy provides that it shall not be binding until countersigned by a certain agent, it is invalid without such signature,[23] at least in the absence of an estoppel or waiver, but it has been held that an oral agreement for insurance may be enforced notwithstanding such a provision even in the charter or statute.[24]

§ 4047. **Contracts made by correspondence.**—Contracts of insurance are frequently made by correspondence, and it is not always easy to determine whether a contract has been completed. Such contracts are governed, in general, by the following rules: 1. When an offer has been made and a letter of acceptance mailed within a reasonable time, the contract is complete. 2. The recall of an offer sent by mail, in order to be of any effect, must reach the party to whom it is addressed before the acceptance is mailed. 3. An acceptance, in order to complete the contract, must be unconditional and in accordance with the terms of the offer. 4. The acceptance need not be by letter, but may be by any other method sufficient to show a formal determination to accept, communicated or put in a way to be communicated to the party making the offer. A mere mental assent, not communicated, is insufficient, and this is also true of silence or neglect to respond, although the party has done all that is required of him. Changes or modifications made by either party after the terms of the contract are agreed upon must be accepted by the other party. Thus, if an agent agrees with the applicant upon the terms of the insurance, subject to the approval of the principal, and the principal returns the policy with certain modifications, the contract is not consummated until the new terms are accepted by the

[22] Faunce v. State &c. Assur. Co., 101 Mass. 279.

[23] Lynn v. Burgoyne, 13 B. Mon. (Ky.) 400; Peoria Marine & Fire Ins. Co. v. Walser, 22 Ind. 73; Hardie v. St. Louis &c. Ins. Co., 26 La. Ann. 242; Badger v. American &c. Ins. Co., 103 Mass. 244, 4 Am. Rep. 547; Noyes v. Phœnix &c. Ins. Co., 1 Mo. App. 584. Contra Norton v. Phœnix &c. Ins. Co., 36 Conn. 503, 4 Am. Rep. 98. In Myers v. Keystone &c. Ins. Co., 27 Pa. St. 268, 67 Am. Dec. 462, it is said that such a provision in the policy may be dispensed with where the intention is clearly shown.

[24] King v. Phœnix Ins. Co., 195 Mo. 290, 92 S. W. 892, 113 Am. St. 678. See also ante, § 4041, note 5.

applicant.[25] Delivery to the insured by mail usually takes effect as of the date of the deposit in the postoffice rather than as of the date of actual reception.[26]

[25] Myers v. Keystone &c. Ins. Co., 27 Pa. St. 268, 67 Am. Dec. 462. See also, Richmond v. Travelers' Ins. Co., 123 Tenn. 307, 130 S. W. 790, 30 L. R. A. (N. S.) 954. See, generally, as to acceptance, note in 138 Am. St. 63. As to contracts by correspondence generally, see Adams v. Lindsell, 1 Barn. & Ald. 681; New v. Germania Fire Ins. Co., 171 Ind. 33, 85 N. E. 703, 131 Am. St. 245; Thayer v. Middlesex &c. Ins. Co., 10 Pick. (Mass.) 326; McCulloch v. Eagle Ins. Co., 1 Pick. (Mass.) 278; Mactier's Admrs. v. Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; article in Western Jurist, June, 1882, p. 337, et seq. But retention of policy beyond designated time may complete the contract. Swing v. Marion Pulp Co., 47 Ind. App. 199, 93 N. E. 1004.

[26] Triple Link Mut. Indemnity Assn. v. Williams, 121 Ala. 138, 26 So. 19, 77 Am. St. 34; Travelers' Fire Ins. Co. v. Globe Soap Co., 85 Ark. 169, 107 S. W. 386, 122 Am. St. 22; Armstrong v. Mut. Life Ins. Co. of New York, 121 Iowa 362, 96 N. W. 954; Commonwealth Mut. Fire Ins. Co. v. Wm. Knabe & Co. Mfg. Co., 171 Mass. 265, 50 N. E. 516; Dailey v. Preferred Masonic Mut. Acc. Assn., 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171, revd. 102 Mich. 299, 60 N. W. 694, 26 L. R. A. 171; Peever Mercantile Co. v. State Mut. Fire Assn., 23 S. Dak. 1, 119 N. W. 1008. But see, as to effect of condition that policy shall not take effect unless delivered when the person whose life is insured is in good health, or the like, the elaborate note in 17 L. R. A. (N. S.) 1144. But see also, generally New v. Germania Fire Ins. Co., 171 Ind. 33, 85 N. E. 703, 131 Am. St. 245.

CHAPTER CXVIII.

INSURABLE INTEREST IN PROPERTY.

§ 4055. Subject-matter—Insurable interest.
4056. Definition.
4057. Nature of insurable interest.
4058. Different interests.
§ 4059. Time of interest.
4060. Continuity of interest.
4061. Nature of interest.
4062. Illustrations.

§ 4055. **Subject-matter — Insurable interest.** — The property or life in which the interest exists is commonly called the subject-matter of the insurance, but this is not strictly accurate, as the real subject of the insurance is the interest, and not the property. The person having the interest in the property is insured against loss to the extent of that interest. The requirement that a party shall have an interest in the property covered by the policy of insurance rests upon the fundamental principle that contracts of insurance are for indemnity, and not for profit. There can be no indemnity where there is no loss, and no loss where there is no interest. Life insurance is also more or less affected by this principle. The courts have not, however, in the development of this department of insurance law, been guided by any very clearly defined principle.

§ 4056. **Definition.**—It may be said broadly, with a fair degree of accuracy, that every interest in property or in relation thereto or liability in respect thereof, of such a nature that a contemplated peril may directly damnify the insured, is an insurable interest. In life insurance every person has an insurable interest in the life and health of himself or any person on whom he depends wholly or in part for support or education, or any person under a legal obligation to him for the payment of money, or respecting property or services of which death or illness might delay or prevent the performance, and of any person upon whose

life any estate or interest in him depends. "It would seem, therefore," said the New York Court of Appeals in a comparatively recent case, "that whenever there is a real interest to protect and a person is so situated with respect to the subject of insurance that its destruction would or might reasonably be expected to impair the value of that interest, an insurance on such interest would not be a wager within the statute, whether the interest was an ownership in or a right to the possession of the property, or simply an advantage of a pecuniary character having a legal basis, but dependent upon the continued existence of the subject. It is well settled that a mere hope or expectation, which may be frustrated by the happening of some event, is not an insurable interest."[1]

§ 4057. **Nature of insurable interest.**—In speaking of the nature of an insurable interest, Mr. Joyce, following the language of Mr. Justice Story, says:[2] "An insurable interest is sui generis, and peculiar in its texture and operation. It sometimes exists where there is not any present property, or jus in re or jus ad rem. It may cover inchoate rights, or rights in expectation, such as profits or commissions. Again, a person may be so circumstanced that it is important that a thing should have a continued existence; or he may be so related to, or concerned in the same, that he would almost positively derive a certain benefit or advantage therefrom but for its exposure to risks and dangers, in which case he is interested in its safety or situation."

§ 4058. **Different interests.**—So, as there may be various distinct interests in a subject-matter, it follows that different parties may have distinct insurable interests in the same property.[3]

[1] Riggs v. Commercial Ins. Co., 125 N. Y. 7, 25 N. E. 1058, 10 L. R. A. 684, 21 Am. Rep. 716. See also, Lucena v. Crawfurd, 3 Bos. & P. 101; Williams v. Roger Williams Ins. Co., 107 Mass. 377, 9 Am. Rep. 41; Loomis v. Eagle Life & Health Ins. Co., 6 Gray (Mass.) 396; Wainer v. Milford Mut. Fire Ins. Co., 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598; Trinity College v. Travelers' Ins. Co., 113 N. Car. 244, 18 S. E. 175, 22 L. R. A. 291; Warnock v. Davis, 104 U. S. 775, 26 L. ed. 924. A person need not hold the title if he is so situated that he would suffer loss or damage by the destruction of the property. Home Ins. Co. v. Mendenhall, 164 Ill. 458, 45 N. E. 1078, 36 L. R. A. 374.

[2] 2 Joyce Ins., § 888.

[3] Strong v. Manufacturers' Ins. Co., 10 Pick. (Mass.) 40, 20 Am. Dec. 507; Herkimer v. Rice, 27 N. Y. 163; Columbian Ins. Co. v. Lawrence, 2 Pet. (U. S.) 25, 7 L. ed. 335. Ease-

And there are many instances, as will hereinafter appear, in which one having no strict legal title, and even in which one, only secondarily liable on an obligation, may have an insurable interest in the property primarily charged with such liability.[4]

§ 4059. Time of interest.—It was formerly held that the interest necessary to support an insurance on property must exist at the time the contract is made and at the time of the loss.[5] Perhaps the greater number of cases announce this doctrine,[6] although there is a decided tendency toward applying the same rule to fire insurance that has always been held to apply to marine and life insurance.[7] It certainly is sufficient, so far as concerns inter-

ment of support in part of a wall is an insurable interest. Nelson v. Continental Ins. Co., 182 Fed. 783, 31 L. R. A. (N. S.) 598; Guiterman v. German-American Ins. Co., 111 Mich. 626, 70 N. W. 135. See also, Scott v. Dixie F. Ins. Co., 70 W. Va. 533, 74 S. E. 659, 40 L. R. A. (N. S.) 152.

[4] Mahoney v. State Ins. Co. (Iowa), 110 N. W. 1041, 9 L. R. A. (N. S.) 490, and note. See also Germania Fire Ins. Co. v. Thompson, 95 U. S. 547, 24 L. ed. 487; Hooper v. Robinson, 98 U. S. 528, 25 L. ed. 219; Royal Ins. Co. v. Stinson, 103 U. S. 25, 26 L. ed. 473; note in 66 L. R. A. 657; post, § 4062.

[5] Lynch v. Dalzell, 3 Brown Parl. Cas. 431; Sadlers Co. v. Badcock, 2 Atk. 554; Fowler v. New York Indemnity Ins. Co., 26 N. Y. 422; Hancox v. Fishing Ins. Co., 3 Sumn. (U. S.) 132, Fed. Cas. No. 6013; contra Chrisman v. State Ins. Co., 16 Ore. 283, 18 Pac. 466; Home Ins. Co. v. Mendenhall, 164 Ill. 458, 45 N. E. 1078, 36 L. R. A. 374; Dickerman v. Vermont Mut. Fire Ins. Co., 67 Vt. 99, 30 Atl. 808. The authorities on both sides are collected in a note to 52 L. R. A. 330.

[6] This is the rule in Massachusetts. Clinton v. Norfolk Mut. F. Ins. Co., 176 Mass. 486, 57 N. E. 998, 50 L. R. A. 833, 79 Am. St. 325.

[7] In Sun Ins. Office v. Merz, 64 N. J. L. 301, 45 Atl. 785, 52 L. R. A. 330, the court said, with reference to the claim that the insurable interest must exist at the time the contract is made: "This was formerly considered to be the rule with relation to fire policies, and was so declared both by text writers and in decided cases, although a contrary view was always taken in construing life and marine policies. Why any such variance in construction existed it is difficult to understand; for, certainly, if a contract to insure after-acquired property against fire is a wagering contract, and therefore void, because against public policy, a contract to insure such property against marine risks, or a contract to insure the life of a person in favor of one who, at the time of the taking out of the policy, has no interest therein, are equally wagering contracts, and, if such contracts are prohibited by public policy, should equally be considered void. But, although the earlier cases on fire insurance laid down the rule enunciated by the Supreme Court, experience has taught that the necessities of business and the adequate protection of property require the same methods of insurance against loss by fire as have always existed with relation to losses by the perils of the sea; and reflection has led to the conclusion that contracts of insurance upon property in which the insured has no interest at the time of the issuing of the policy are not wagers if he acquires an interest during the life of the policy, and retains it at the time when the loss occurs." That there must be an interest at the

est at the time the contract is made, if the insured has an interest under any status of ownership at that time unless inquiry is made for the specific interest.[8] With reference to the rule in marine insurance, a learned writer, who is quoted with approval by the Supreme Court of the United States, says:[9] "It is now established that an insurable interest whilst the risk is still pending, and at the time of loss, is sufficient;" and that the assured need not also allege or prove that he was interested at the time the contract was effected; "indeed, it is every day's practice to effect insurances in which the allegation of interest at the time of effecting the policy could not be made with any degree of truth, as, for instance, where goods are insured on a return voyage long before they are bought." A fire insurance policy may cover goods purchased after a policy has gone into effect.[10] So, crops not yet grown may be legally insured.[11]

§ 4060. **Continuity of interest.**—It follows from what has been said in the preceding section that the interest need not be continuous. In those jurisdictions which hold that the interest need not exist at the time the policy is taken out, it is sufficient if it exists at some time during the risk and at the time of the loss. Policies now generally contain a provision forbidding a change of title or the alienation of the property under a penalty of forfeiture. This provision is effective,[12] but in its absence the contract is merely suspended during the time the interest is gone, and revives to secure the new interest acquired before the loss.[13] A condition against alienation is strictly construed and refers

time of the loss, see Davis v. Bremer &c. Fire Assn. (Iowa), 134 N. W. 860, and cases cited.

[8] Lycoming Fire Ins. Co. v. Haven, 95 U. S. 242, 24 L. ed. 473.

[9] Arnould Mar. Ins. (Maclachlan's 6th ed.) 59; quoted in Hooper v. Robinson, 98 U. S. 528, 25 L. ed. 219. See also, Lucena v. Crawfurd, 2 Bos. & P. (N. R.) 269, 6 Rev. Rep. 623; Boston Ins. Co. v. Globe Fire Ins. Co., 174 Mass. 229, 54 N. E. 543, 75 Am. St. 303.

[10] Mills v. Farmers' Ins. Co., 37 Iowa 400; West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289, 80 Am. Dec. 573; Western & Atlantic Pipe Lines v. Home Ins. Co., 145 Pa. St. 346, 22 Atl. 665, 27 Am. St. 703. Policy held to cover a horse acquired in exchange for the one owned when it was taken out. See Wood v. Rutland &c. Ins. Co., 31 Vt. 552, and note to Strong v. Manufacturers' Ins. Co., 10 Pick. (Mass.) 40, 20 Am. Dec. 507.

[11] Grant v. Parkinson, 3 Bos. & P. 85n.

[12] Home Mut. Fire Ins. Co. v. Hauslein, 60 Ill. 521.

[13] Worthington v. Bearse, 12 Allen (Mass.) 382, 90 Am. Dec. 152; Clinton v. Norfolk Mut. F. Ins. Co., 176 Mass. 486, 57 N. E. 998, 50 L. R. A. 833, 79 Am. St. 325. See also, Hooper

only to an entire and absolute divestiture of interest.[14] If, at the time of the loss, a partial interest remains, recovery may be had to that extent.[15] Thus, where the insured incumbered personal property contrary to the provisions of the policy, it was held that he was nevertheless entitled to recover if the lien had been removed before the time of the loss.[16] A life policy originally valid is generally held not to be invalidated by loss of interest.[17]

§ 4061. **Nature of interest.**—The interest which may be insured must be neither illegal nor immoral.[18] It may be either legal or equitable,[19] but it is not necessary that the party should have either a legal or equitable title to the property.[20] The interest may be either conditional or contingent. Thus, Arnould asserts that:[21] a vested interest in possession is not necessary to give the right of insuring. An expectancy coupled with a present existing title to that out of which the expectancy arises may be an insurable interest. Judge Story says:[22] "Inchoate rights, founded upon subsisting titles, unless prohibited by the policy of the law,

v. Hudson River Fire Ins. Co., 15 Barb. (N. Y.) 415, affd. 17 N. Y. 424.

[14] Dolliver v. St. Joseph &c. Ins. Co., 9 Ins. L. J. 289, and note on "alienation"; Power v. Ocean Ins. Co., 19 La. 28, 36 Am. Dec. 665; Clinton v. Norfolk Mut. Fire Ins. Co., 176 Mass. 486, 57 N. E. 998, 50 L. R. A. 833, 79 Am. St. 325; Jackson v. Massachusetts Mut. Fire Ins. Co., 23 Pick. (Mass.) 418.

[15] Cowan v. Iowa State Ins. Co., 40 Iowa 551, 20 Am. Rep. 583; Ayres v. Hartford Fire Ins. Co., 17 Iowa 176, 85 Am. Dec. 553; Ætna Fire Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90. See monographic note to Lane v. Maine Mut. Fire Ins. Co., 12 Maine 44, 28 Am. Dec. 150.

[16] Omaha Fire Ins. Co. v. Dierks, 43 Nebr. 569, 61 N. W. 745. But see Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. 379.

[17] Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. ed. 251. In this case Mr. Justice Bradley said: "In a lucid judgment delivered by Baron Parke in the Exchequer Chamber, in the case of Dalby v. India &c. Assur. Co., decided in 1854, 15 C. B. 365, it was held that the true meaning of the statute is, that there must be an interest at the time that the insurance is effected, but that it need not continue until death."

[18] Lord v. Dall, 12 Mass. 115, 7 Am. Dec. 38; Carrigan v. Lycoming F. Ins. Co., 53 Vt. 418, 38 Am. Rep. 687.

[19] The holder of such interest may describe himself as owner. Guest v. New Hampshire Fire Ins. Co., 66 Mich. 98, 33 N. W. 31; Elliott v. Ashland Mut. Fire Ins. Co., 117 Pa. St. 548. See also, Scott v. Dixie F. Ins. Co., 70 W. Va. 535, 74 S. E. 152, 40 L. R. A. (N. S.) 152.

[20] Carter v. Humboldt Fire Ins. Co., 12 Iowa 287; Rohrbach v. Germania &c. Ins. Co., 62 N. Y. 47, 20 Am. Rep. 451; National Filtering Oil Co. v. Citizens' Ins. Co., 106 N. Y. 535, 541, 13 N. E. 337, 60 Am. Rep. 473; Kludt v. German Mut. F. Ins. Co. (Wis.) 140 N. W. 321.

[21] 1 Arnould Mar. Ins. 57.

[22] Hancox v. Fishing Ins. Co., 3 Sumn. (U. S.) 132, Fed. Cas. No. 6013.

are insurable." An interest under a contract which is not enforcible either at law or equity is not insurable.[23] An insurable interest does not necessarily imply ownership of the property or even a right to its possession.[24] It has been held that a person may insure his interest in expected commissions,[25] or, in what seems an extreme case, an expected catch of fish.[26] But in all such cases an expectation of profit or benefit must arise out of some subject in which the party is actually interested at the time of the loss, and it is not enough that he only expects to be interested in such property.[27] A person who is liable to others for the loss or destruction of property in which he has no actual interest may have an insurable interest therein. Thus, common carriers, warehousemen, pawnbrokers and such persons have an insurable interest in the property for which they are made responsible by statute or custom.[28] So, a railroad company which is liable by law for injury to property along its line, caused by fire from its engines, has an insurable interest in such property.[29] The fact that the interest may possibly be defeated does not prevent it from being insurable.[30]

§ 4062. Illustrations.—The following cases will illustrate the interest which the courts have generally recognized as insurable:—a vendee of land in possession under an executory contract of purchase, who is entitled to a deed upon payment

[23] Perry v. Mechanics' Mut. Ins. Co., 11 Fed. 478; Redfield v. Holland Purchase Ins. Co., 56 N. Y. 354, 15 Am. Rep. 424.

[24] One who has neither the legal nor equitable title, nor the right of possession of property, has an insurable interest if he will derive a benefit from its continuing to exist, or suffer a loss by its destruction. Hanover Fire Ins. Co. v. Bohn, 48 Nebr. 743, 67 N. W. 774, 58 Am. St. 719. See note to Rochester Loan & Banking Co. v. Liberty Ins. Co., 44 Nebr. 537, 62 N. W. 877, 48 Am. St. 745.

[25] Putnam v. Mercantile Mar. Ins. Co., 5 Metc. (Mass.) 386.

[26] Swift v. Mercantile Mut. Ins. Co., 113 Mass. 287.

[27] Warren v. Davenport Fire Ins. Co., 31 Iowa 464, 7 Am. Rep. 160; Hayes v. Milford Mut. Fire Ins. Co., 170 Mass. 492, 49 N. E. 754; Rohrbach v. Germania &c. Ins. Co., 62 N. Y. 47, 20 Am. Rep. 451. In Eastern R. Co. v. Relief Fire Ins. Co., 98 Mass. 420, Mr. Justice Gray said: "By the law of insurance, any person has an insurable interest in property, by the existence of which he receives a benefit, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of the property itself."

[28] Phœnix Ins. Co. v. Erie &c. Transp. Co., 117 U. S. 312, 29 L. ed. 873, 6 Sup. Ct. 750, 1176.

[29] Chapman v. Atlantic & St. L. R. Co., 37 Maine 92; Perley v. Eastern R. Co., 98 Mass. 414, 96 Am. Dec. 645; Eastern R. Co. v. Relief Fire Ins. Co., 105 Mass. 570.

[30] Stirling v. Vaughan, 11 East 619.

of the purchase-money;[31] one who is in possession under a parol contract and who has paid part of the purchase-money;[32] the owner of an interest in a vessel acquired under an oral contract of purchase;[33] a person holding possession under a contract to purchase from the equitable owner;[34] a vendor who has contracted to convey;[35] a purchaser at an execution sale;[36] a person in possession of real estate under a bona fide claim of right to the ownership of the same;[37] one in possession of the property of another, to whom he has advanced part of the purchase-money, and from whom he holds a power of attorney to sell the property;[38] one in possession of property under an agreement to care for, rent and keep insured;[39] contractors and builders in buildings in process of construction, for which they are to receive payment upon completion;[40] the owner of land, in buildings in the process of construction upon the land;[41] one who has expended money upon another's prop-

[31] Loventhal v. Home Ins. Co., 112 Ala. 108, 20 So. 419, 33 L. R. A. 258, 57 Am. St. 17; Smith v. Phœnix Ins. Co., 91 Cal. 323, 27 Pac. 738, 13 L. R. A. 475, 25 Am. St. 191; Grange Mill Co. v. Western Assur. Co., 118 Ill. 396, 9 N. E. 274; Davidson v. Hawkeye Ins. Co., 71 Iowa 532, 32 N. W. 514, 60 Am. Rep. 818; Hartford Fire Ins. Co. v. Keating, 86 Md. 130, 38 Atl. 29, 63 Am. St. 499; Dupreau v. Hilbernia Ins. Co., 76 Mich. 615, 43 N. W. 585, 5 L. R. A. 671; Imperial Fire Ins. Co. v. Dunham, 117 Pa. St. 460, 12 Atl. 668, 2 Am. St. 686. These cases consider what is meant by an "unconditional and sole" title. One in possession claiming under a deed. Sanford v. Orient Ins. Co., 174 Mass. 416, 54 N. E. 883, 75 Am. St. 358.

[32] Wainer v. Milford Mut. Fire Ins. Co., 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598; Tuckerman v. Home Ins. Co., 9 R. I. 414. In Gilman v. Dwelling-House Ins. Co., 81 Maine 488, 17 Atl. 544, the conditions of the contract had been broken, but no advantage had been taken of it.

[33] Amsinck v. American Ins. Co., 129 Mass. 185.

[34] Carpenter v. German Amer. Ins. Co., 135 N. Y. 298, 31 N. E. 1015.

[35] Wheeling Ins. Co. v. Morrison, 11 Leigh (Va.) 354, 36 Am. Dec. 385. As to both vendor and vendee see Grunauer v. Westchester F. Ins. Co., 72 N. J. L. 289, 62 Atl. 418, 3 L. R. A. (N. S.) 107.

[36] Curtis v. Home Ins. Co., 1 Biss. (U. S.) 485, Fed. Cas. No. 3503. See also, Cropper v. Brown, 76 N. J. Eq. 406, 74 Atl. 989, 139 Am. St. 770. And one whose property had been sold on execution, where his judgment creditors possessed the right of redemption. Cone v. Niagara Falls F. Ins. Co., 60 N. Y. 619, affg. 3 Thomp. & C. (N. Y.) 33.

[37] Miller v. Alliance Ins. Co., 7 Fed. 649, 19 Blatchf. (U. S.) 308.

[38] Brugger v. State Inv. Ins. Co., 5 Sawy. (U. S.) 304, Fed. Cas. No. 2051.

[39] Cross v. National Fire Ins. Co., 132 N. Y. 133, 30 N. E. 390; Graham v. Fire Ins. Co., 48 S. Car. 195, 26 S. E. 323, 59 Am. St. 707. A party in possession, under an agreement with the owner to pay for the insurance, may, as agent, insure for the owner's benefit. Schaeffer v. Anchor Mut. Fire Ins. Co., 113 Iowa 652, 85 N. W. 985.

[40] German Fire Ins. Co. v. Thompson, 43 Kans. 567, 23 Pac. 608.

[41] In Foley v. Manufacturers' & Builders' Fire Ins. Co., 152 N. Y. 131,

erty with the owner's consent;[42] lien creditors in the property to which the lien attaches;[43] the holder of a mechanic's lien;[44] the mortgagor and the mortgagee in the property mortgaged;[45] a mortgagor, although the mortgage debt is the full value of the property;[46] a mortgagor of personal property;[47] an administrator in the property of the estate;[48] commission merchants in property sold, but not removed;[49] a common carrier in goods in

46 N. E. 318, 43 L. R. A. 665, it was held that the owner had an insurable interest to the extent of the value of a building being erected upon his land, under a contract requiring it to be completed within a certain time, not yet expired, although the loss, in the absence of insurance, would fall on the contractor. "The fact that improvements on the land may have cost the owner nothing, or that, if destroyed by fire, he may compel another person to replace them without expense to him, or that he may recoup his loss by resort to a contract liability of a third person, in no way affects the liability of the insurer, in the absence of any exemption in the policy." In St. Clara Female Academy v. Northwestern Nat. Ins. Co., 98 Wis. 257, 73 N. W. 767, 67 Am. St. 805, the court said: "It is well settled that in the absence of fraud or mistake, unless otherwise provided by the contract of insurance, if the insured has some insurable interest in the property covered by such contract, the whole amount of damages to the property, not exceeding that named in the policy, is recoverable by such person if the damages thereto reach that sum, or if, by the contract itself and the law governing the subject, the face value of the policy must be taken as liquidated damages."

[42] Looney v. Looney, 116 Mass. 283.

[43] Longhurst v. Star Ins. Co., 19 Iowa 364; Bell v. Western &c. Ins. Co., 5 Rob. (La.) 423, 39 Am. Dec. 542; Insurance Co. v. Stinson, 103 U. S. 25, 26 L. ed. 473.

[44] Stout v. City Fire Ins. Co., 12 Iowa 371, 79 Am. Dec. 539.

[45] King v. State &c. Ins. Co., 7 Cush. (Mass.) 1, 54 Am. Dec. 683; Hanover Fire Ins. Co. v. Bohn, 48 Nebr. 743, 67 N. W. 774, 58 Am. St. 719; Traders' Ins. Co. v. Robert, 9 Wend. (N. Y.) 404, revd. 17 Wend. (N. Y.) 631; Carpenter v. Providence Washington Ins. Co., 16 Pet. (U. S.) 495, 10 L. ed. 1044; Manson v. Phenix Ins. Co., 64 Wis. 26, 24 N. W. 407, 54 Am. Rep. 573. See also, Mahoney v. State Ins. Co. (Iowa), 110 N. W. 1041, 9 L. R. A. (N. S.) 490 and note; Key v. Continental Ins. Co., 101 Mo. App. 344, 74 S. W. 162.

[46] Owner of equity of redemption, Royal Ins. Co. v. Stinson, 103 U. S. 25, 26 L. ed. 473.

[47] Kronk v. Birmingham Fire Ins. Co., 91 Pa. St. 300. As to the amount for which a mortgagee or mortgagor may insure, see Guest v. New Hampshire Fire Ins. Co., 66 Mich. 98, 33 N. W. 31; French v. Rogers, 16 N. H. 177; Excelsior Fire Ins. Co. v. Royal Ins. Co., 55 N. Y. 343, 14 Am. Rep. 271; Smith v. Columbia Ins. Co., 17 Pa. St. 253, 55 Am. Dec. 546. Each of several mortgagees has an insurable interest to the extent of his interest, Fox v. Phenix F. Ins. Co., 52 Maine 333. Where the destruction of the property would leave the debt unpaid, the debtor in possession of the pledged property has an insurable interest to the extent of the value of the property which would have gone to pay the debt. Nussbaum v. Northern Assur. Co., 37 Fed. 524, 1 L. R. A. 704.

[48] Sheppard v. Peabody Ins. Co., 21 W. Va. 368.

[49] One may in his own name insure the property of another for the benefit of the owner without his previous authority or sanction, and it will inure to the benefit of the owner upon the subsequent adoption of it, even after a loss has occurred. Waring v. Indemnity Fire Ins. Co., 45 N. Y. 606, 6 Am. Rep. 146.

his care;[50] a warehouseman in goods stored with him;[51] a cotton compress company in cotton received to press;[52] agents, commission merchants and others having custody of and responsibility for property;[53] the trustee and the cestui que trust in the trust property;[54] the assignee in insolvency in the assigned property;[55] the surety on a distiller's bond required by the revenue law, in whisky in store;[56] a partner in the entire property of the firm;[57] a creditor in goods which he has sold under a contract by which he is to receive his pay out of the proceeds of the goods when sold by the vendee;[58] a simple contract creditor in the specific property in the estate of the deceased debtor where the estate may be subjected to a proceeding in rem for the payment of the debts and is insufficient for that purpose;[59] an attaching creditor in the property attached or levied upon under an execution, but such creditor must insure his own interest, and cannot avail himself of the debtor's insurance;[60] a judgment creditor upon the property of the debtor upon which his judgment is a lien,[61] but a general judgment creditor, under ordinary circumstances, has no insurable interest in the specific property of his debtor;[62] the owner in goods concealed from his creditor;[63] the owner in goods which have been levied upon by his creditor and sold under execution, so long as the right to redeem remains;[64] an insolvent

[50] Phenix Ins. Co. v. Erie & W. Trans. Co., 117 U. S. 312, 29 L. ed. 873, 6 Sup. Ct. 750, 1176.

[51] Pelzer Mfg. Co. v. St. Paul &c. Ins. Co., 41 Fed. 271; Pelzer Mfg. Co. v. Sun Fire Office, 36 S. Car. 213, 15 S. E. 562.

[52] California Ins. Co. v. Union Compress Co., 133 U. S. 387, 33 L. ed. 730, 10 Sup. Ct. 365.

[53] Waring v. Indemnity Fire Ins. Co., 45 N. Y. 606, 6 Am. Rep. 146; Western & Atlantic Pipe Lines v. Home Ins. Co., 145 Pa. St. 346, 22 Atl. 665, 27 Am. St. 703; Roberts v. Firemen's Ins. Co., 165 Pa. St. 55, 30 Atl. 450, 44 Am. St. 642.

[54] Ex parte Houghton, 17 Ves. 258; Young v. Union Ins. Co., 24 Fed. 279; Hartford Fire Ins. Co. v. Keating, 86 Md. 130, 38 Atl. 29, 63 Am. St. 499; Carpenter v. Providence Washington &c. Ins. Co., 16 Pet. (U. S.) 495, 10 L. ed. 1044.

[55] Herkimer v. Rice, 27 N. Y. 163.

[56] Germania Fire Ins. Co. v. Thompson, 95 U. S. 547, 24 L. ed. 487.

[57] Manhattan Ins. Co. v. Webster, 59 Pa. St. 227, 98 Am. Dec. 332.

[58] Roos v. Merchants' Mut. Ins. Co., 27 La. Ann. 409.

[59] Creed v. Sun Fire Office of London, 101 Ala. 522, 14 So. 323, 23 L. R. A. 177, 46 Am. St. 134.

[60] Donnell v. Donnell, 86 Maine 518, 30 Atl. 67.

[61] Rohrbach v. Germania &c. Ins. Co., 62 N. Y. 47, 20 Am. Rep. 451; Caley v. Hoopes, 86 Pa. St. 493.

[62] Grevemeyer v. Southern Mut. Fire Ins. Co., 62 Pa. St. 340, 1 Am. Rep. 420.

[63] Goulstone v. Royal Ins. Co., 1 Fost. & F. 276.

[64] Cone v. Niagara Fire Ins. Co., 60 N. Y. 619.

debtor in goods which have passed to the assignee;[65] a lessor in leased property;[66] a lessee in property leased;[67] a landlord in the goods of his tenant which are liable to distress;[68] an officer in goods held by him under an attachment or levy;[69] a life tenant in the property in his possession;[70] a remainder-man in the property in the possession of the life tenant;[71] a tenant in common in the property;[72] a husband in the community property;[73] in the property in which he is a tenant by entirety[74] or even by curtesy;[75] and a husband in the buildings on land purchased and paid for by him but conveyed to his wife, where he has in fact possession and the beneficial use of the premises.[76] But, in general, where the husband has no cognizable estate or interest and no possession or control, he has no insurable interest in his wife's property.[77] By the weight of authority a stockholder in a private

[65] Marks v. Hamilton, 16 Jur. 152.

[66] Sherwood v. Harral, 39 Conn. 333; Philadelphia Tool Co. v. British Amer. Assur. Co., 132 Pa. St. 236, 19 Atl. 77, 19 Am. St. 596.

[67] Imperial Fire Ins. Co. v. Murray, 73 Pa. St. 13. As to the amount of the interest of the lessee, see Home Ins. Co. v. Gibson, 72 Miss. 58, 17 So. 13. A tenant who has verbally agreed to keep the property insured has an insurable interest. Berry v. American Cent. Ins. Co., 132 N. Y. 49, 30 N. E. 254, 28 Am. St. 548, and note.

[68] Columbia Ins. Co. v. Cooper, 50 Pa. St. 331.

[69] White v. Madison, 26 N. Y. 117, 26 How. Pr. (N. Y.) 481. The officer cannot effect insurance on property held by him at the expense of the parties. Burke v. Brig M. P. Rich, 1 Cliff. (U. S.) 509.

[70] Cross v. National Fire Ins. Co., 132 N. Y. 133, 30 N. E. 390.

[71] Redfield v. Holland Purchase Ins. Co., 56 N. Y. 354, 15 Am. Dec. 424.

[72] Annely v. De Saussure, 26 S. Car. 497, 2 S. E. 490, 4 Am. St. 725.

[73] Hanover Fire Ins. Co. v. Shrader, 11 Tex. Civ. App. 255, 31 S. W. 1100, 32 S. W. 344; Merchants' Ins. Co. v. Devyer, 1 Posey Unrep. Cas. (Tex.) 441.

[74] Clawson v. Citizens' Mut. Fire Ins. Co., 121 Mich. 591, 80 N. W. 573, 80 Am. St. 538.

[75] Abbott v. Hampden Mut. Fire Ins. Co., 30 Maine 414. See also, Caldwell v. Stadacona F. & L. Ins. Co., 11 Can. Sup. Ct. 212; Mutual Fire Ins. Co. v. Deale, 18 Md. 26, 79 Am. Dec. 673; Doyle v. American F. Ins. Co., 181 Mass. 139, 63 N. E. 394; Harris v. York Mut. Ins. Co., 50 Pa. St. 341. But compare Planters' Mut. Ins. Co. v. Loyd, 71 Ark. 292, 75 S. W. 725; Traders' Ins. Co. v. Newman, 120 Ind. 554, 22 N. E. 428.

[76] Kludt v. German Mut. F. Ins. Co. (Wis.), 140 N. W. 321; Horsch v. Dwelling-House Ins. Co., 77 Wis. 4, 45 N. W. 945, 8 L. R. A. 806.

[77] Clark v. Dwelling-House Ins. Co., 81 Maine 373, 17 Atl. 303; Tyree v. Virginia Fire & Marine Ins. Co., 55 W. Va. 63, 46 S. E. 706, 66 L. R. A. 657, and note, 104 Am. St. 983. See also, Traders Ins. Co. v. Newman, 120 Ind. 554, 22 N. E. 428; Glaze v. Three R. F. M. Ins. Co., 87 Mich 349, 49 N. W. 595; Bassett v. Ins. Co., 85 Nebr. 85, 122 N. W. 703, 19 Am. & Eng. Ann. Cas. 252. But see where the law gives the husband a present interest or right of enjoyment. Doyle v. Am. F. Ins. Co., 181 Mass. 139, 63 N. E. 394; Webster v. Dwelling House Ins. Co., 53 Ohio St. 558, 42 N. E. 546, 30 L. R. A. 719, 53 Am. St. 658; Warren v. Springfield F. Ins. Co., 13 Tex. Civ. App. 466, 35 S. W. 810.

corporation also has an insurable interest in the corporate property.[78] But a manufacturing corporation has no implied power to insure the life of its president and carry the policy after he has retired from office.[79]

[78] Ætna Fire Ins. Co. v. Kennedy, 161 Ala. 600, 50 So. 73, 135 Am. St. 160; Warren v. Davenport Fire Ins. Co., 31 Iowa 464, 7 Am. Rep. 160; Riggs v. Commercial &c. Ins. Co., 125 N. Y. 7, 25 N. E. 1058, 10 L. R. A. 684, 21 Am. St. 716; Seaman v. Enterprise &c. Ins. Co., 5 McCrary (U. S.) 558, 18 Fed. 250. Contra Dictum in Philips v. Knox County Mut. Ins. Co., 20 Ohio 174.

[79] Victor v. Louise Cotton Mills, 148 N. Car. 107, 61 S. E. 648, 16 L. R. A. (N. S.) 1020n. Nor, it would seem, has a corporation an insurable interest in the life of its members or stockholders. Trinity College v. Travelers' Ins. Co., 113 N. Car. 244, 18 S. E. 175, 22 L. R. A. 291; Tate v. Commercial Bldg. Assn., 97 Va. 74, 33 S. E. 382, 45 L. R. A. 243, 75 Am. St. 770. But see Mechanics' Nat. Bank v. Comins, 72 N. H. 12, 55 Atl. 191, 101 Am. St. 650.

CHAPTER CXIX.

INSURABLE INTEREST IN LIVES.

§ 4065. Common-law rule.
4066. English statute—Not in force in this country.
4067. Cases regarding life insurance as indemnity and requiring pecuniary interest.
4068. The modern rule—Pecuniary interest not required.
4069. Creditor's insurable interest.
4070. Mere form disregarded.
4071. Continuance of interest in life.
4072. Interest of beneficiary designated by insured.
4073. Interest of the assignee.
§ 4074. Interest based upon relationship.
4075. Illustrations of insurable interest in life.
4076. Right of assignee without interest to recover premiums paid.
4077. Want of interest as a defense under incontestable clause.
4078. Insurable interest must be pleaded and proved.
4079. Description of interest in application or policy.

§ 4065. **Common-law rule.**—At common law a contract of life insurance was admittedly a wager, and hence required no interest to support it, but the statute of 14 Geo. III, ch. 48 made an interest in the life essential. Some courts have held that this statute was merely declaratory of the common law, but the better opinion is otherwise, and it is certain that many such contracts were held valid before the statute was enacted.[1] Baron Parke says:[2] "As to insurance on lives, it is perfectly clear that all contracts for wager-policies, and wagers which were not contrary to the policy of the law, were legal contracts." In some of the early cases in this country it was said that life insurance contracts do not require an insurable interest in the absence of a statute such as had been enacted in England. In an early case in Missouri it was held that no interest was required;[3] and the courts of New

[1] Emerigon Ins. 159; Asseviedo v. Cambridge, 10 Mod. 77; Depaba v. Ludlow, 1 Comyns 360; Dean v. Dicker, 2 Strange 1250.

[2] Dalby v. India & London Life Assurance Co., 15 C. B. 365.

[3] Chisholm v. National Capitol Life &c. Ins. Co., 52 Mo. 213, 14 Am. Rep. 414. But see Whitmore v. Supreme Lodge Knights and Ladies of Honor, 100 Mo. 36, 13 S. W. 495; Trenton Mut. Life & Fire Ins. Co. v. Johnson, 24 N. J. L. 576. At least the interest need only exist when the policy is taken out. Mowry v. Home Life Ins. Co., 9 R. I. 346.

Jersey and Rhode Island are notably liberal in sustaining life insurance policies, although in Rhode Island some insurable interest is required.[4] Thus, in that state it was said that a policy on another's life is just as dangerous and tempting to crime where there is an interest as where there is not. But the rule was early settled, as stated by Chancellor Kent, that, "A wager contract is void, if it be against the principles of public policy, equally as if it contravened a positive law."[5] So, in an early Pennsylvania case,[6] it was said that, "A policy therefore made without interest, is a wager policy, and has nothing in common with insurance, but name and form. It is not subservient to the true interests of fair trade and commerce; but is pregnant with as much mischief, both public and private, as can proceed from any species of gaming, which the legislature has hitherto found it necessary to repress."

§ 4066. **English statute—Not in force in this country.**—In a case in Wisconsin, the court, after stating the rule that an interest in life is required, said[7] that the theory upon which the decisions are based is that such a contract is nothing more than a wagering or gambling contract, and hence is against public policy, and therefore void. It is very questionable whether such a policy was void by the common law of England prior to 1774. In that year, the statute of 14 Geo. III, ch. 48 was enacted, which is to the effect that thereafter "no insurance shall be made by any person or persons, bodies politick or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no

[4] See Cronin v. Vermont Life Ins. Co., 20 R. I. 570, 40 Atl. 497.

[5] See the following early cases, Amory v. Gilman, 2 Mass. 1 (marine case discussing wager policies); Mount v. Waite, 7 Johns. (N. Y.) 434 (insurance on lottery tickets. The contract was held void as against public policy; but as the plaintiff had not violated any statute, and was hence not in pari delicto, Chancellor Kent allowed him to recover the premium paid.); Lord v. Dall, 12 Mass. 115, 7 Am. Dec. 38 (sister in the life of brother. This is the first American life insurance case.); Ruse v. Mutual Ben. L. Ins. Co., 23 N. Y. 516.

[6] Pritchet v. Ins. Co. of North America, 3 Yeates (Pa.) 458.

[7] Hurd v. Doty, 86 Wis. 1, 56 N. W. 371, 21 L. R. A. 746. As to what is a wagering policy, see Metropolitan Life Ins. Co. v. O'Brien, 92 Mich. 584, 52 N. W. 1012.

interest, or by way of gambling or wagering; and that every assurance made, contrary to the true intent and meaning hereof, shall be nul and void, to all intents and purposes whatsoever." The court further said that this statute was never in force in Wisconsin and was never received and acted upon in this country.

§ 4067. Cases regarding life insurance as indemnity and requiring pecuniary interest.—In some cases of somewhat recent date it is argued that life insurance contracts are simply for the indemnification of the beneficiary, who can, therefore, recover only the actual amount of his loss caused by the death of the insured; and that the interest in life which is insurable is simply pecuniary and that only one who is so situated toward the life that he will suffer a money loss by the death has an insurable interest. Under this rule the amount of the policy must bear some reasonble relation to the value of the interest. By treating the policy as in the nature of a valued policy and holding that it lapses upon the loss of the interest, the contract is rested upon the principle of indemnity. But, by the weight of authority, life insurance contracts are not for indemnity, but merely for the payment of a stipulated sum of money upon the happening of a certain event at an uncertain time in the future. Modern forms commonly contemplate investment as well as protection, and pass freely by assignment with the consent of the company. Life insurance contemplates protection and often profit, while all other insurance is properly for indemnification only. One purchases indemnity from loss; the other invests in the hope of gain. The law recognizes this difference and sustains insurance upon lives because experience has shown that it is a beneficent contract and that the fears of the early courts and legislators were merely fanciful. But gambling contracts are invalid without reference to their subject-matter, and a wager in the form of a life insurance contract is no exception to this rule. It was thought at first that human life was too sacred to be made the subject of a contract, but this idea passed, leaving the rule that it could be insured under conditions which were supposed to neutralize the temptation of the beneficiary to destroy the life. This safeguard is found in the rule which requires that the beneficiary of the policy must, at least when the

insurance is effected, have such an interest in the continuation of the life as to remove the temptation to hasten the event from which he would receive a financial benefit. Ordinarily, the interest is a pecuniary one which is thus set againt the financial interest in the death. But the reason of the rule does not require the interest to be of this character, as there are other conditions which experience teaches us are of equal or even greater potency. If the purpose of requiring an interest is to remove the temptation to destroy life, it is apparent that the temptation of a creditor to destroy the life of his insolvent debtor is greater than that of a father to destroy the life of his weak-minded and helplessly crippled child. The prohibition is against wager or speculative contracts, and when the circumstances are such as to free the contract from this implication it should be sustained, although the interest is not pecuniary. It will be found, however, that there are many decisions to the effect that a pecuniary interest is necessary.[8]

§ 4068. The modern rule—Pecuniary interest not required. —It is settled that an interest in the continuance of the life of the insured is necessary to support a contract of life insurance.[9] The difficulty is in defining this interest; but a strictly pecuniary interest is not generally required.[10] As said by Mr. Justice Field:[11] "It is not easy to define with precision what will in all

[8] See language used in Cronin v. Vermont Life Ins. Co., 20 R. I. 570, 40 Atl. 497; Phenix Mut. Life Ins. Co. v. Bailey, 13 Wall. (U. S.) 616, 20 L. ed. 501. See also, Life Ins. Clearing Co. v. O'Neill, 106 Fed. 800, 45 C. C. A. 641, 54 L. R. A. 225, and some of the cases there cited in the note.

[9] Little v. Arkansas Nat. Bank (Ark.), 152 S. W. 280; Amick v. Butler, 111 Ind. 578, 12 N. E. 518, 60 Am. Rep. 722; Whitmore v. Supreme Lodge Knights and Ladies of Honor, 100 Mo. 36, 13 S. W. 495; Holmes v. Gilman, 138 N. Y. 369, 34 N. E. 205, 20 L. R. A. 566, 34 Am. St. 463, and notes; Trinity College v. Travelers' Ins. Co., 113 N. Car. 244, 18 S. E. 175, 22 L. R. A. 291; Ulrich v. Reinoehl, 143 Pa. St. 238, 22 Atl. 862, 13 L. R. A. 443, 24 Am. St. 534 (involving the question to what extent creditor may insure life of his debtor); Crotty v. Union Mut. Life Ins. Co., 144 U. S. 621, 36 L. ed. 566, 12 Sup. Ct. 749. See note to 57 Am. Dec. 93-105.

[10] Chisholm v. National Capitol Life Ins. Co., 52 Mo. 213, 14 Am. Rep. 414; Appeal of Elliott's Exrs., 50 Pa. St. 75, 88 Am. Dec. 525. See also, Reed v. Provident Sav. Life Assur. Soc., 190 N. Y. 111, 82 N. E. 734. Notes in 53 L. R. A. 817 and 54 L. R. A. 225, and Woods v. Riner, 130 Ky. 162, 113 S. W. 79, 19 L. R. A. (N. S.) 233, and cases referred to in the following sections herein.

[11] Warnock v. Davis, 104 U. S. 775, 26 L. ed. 924. See generally, as to life insurance, where there is no in-

cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful—as operating more efficaciously—to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise, the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned, as being against public policy."

§ 4069. Creditor's insurable interest.—The amount of the insurance, where the interest is of a pecuniary nature, must bear some proper relation to the value of the interest.[12] It is well

surable interest, being a wagering contract and invalid, McRae v. Warmack, 98 Ark. 52, 135 S. W. 807, 33 L. R. A. (N. S.) 949; Howe's Exrs. v. Griffin's Admr., 126 Ky. 373, 103 S. W. 714, 128 Am. St. 296, and note; Fuller v. Metropolitan Life Ins. Co., 70 Conn. 647, 41 Atl. 4; Mutual Life Ins. Co. v. Lane, 151 Fed. 276; Exchange Bank v. Loh, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372; American Mut. Life Ins. Co. v. Bertram, 163 Ind. 51, 70 N. E. 258, 64 L. R. A. 935; New York Life Ins. Co. v. Greenlee, 42 Ind. App. 82, 84 N. E. 1101; Metropolitan Life Ins. Co. v. Elison, 72 Kans. 199, 83 Pac. 410, 3 L. R. A. 934, 115 Am. St. 189; Union Cent. Life Ins. Co. v. Hilliard, 63 Ohio St. 478, 59 N. E. 230, 53 L. R. A. 462, 81 Am. St. 644.

[12] "Creditors, however, hold only what is necessary for their indemnity for the debt, and the representatives of the insured will be entitled to the balance." Metropolitan Life Ins. Co. v. O'Brien, 92 Mich. 584, 52 N. W. 1012; Grant's Admrs. v. Kline, 115 Pa. St. 618, 9 Atl. 150; Downey v. Hoffer, 110 Pa. St. 109, 20 Atl. 655; Page v. Burnstine, 102 U. S. 664, 26 L. ed. 268. See note on "Insurable interest in the life of another," 57 Am. Dec. 93-105. A moral claim does not constitute an insurable interest on behalf of one as

settled that a creditor has an insurable interest in the life of his debtor,[13] but if the amount which a creditor takes upon the life of his debtor is grossly disproportionate as compared with the debt, the contract will be treated as a wager, and, therefore, void.[14] In the jurisdictions which permit the assignment of a valid existing policy to a person without interest, the assignee may recover the entire amount of the policy.[15] But in a comparatively recent case in Pennsylvania[16] the court laid down the rule for determining the amount of a creditor's insurable interest as follows: "A creditor may lawfully take out a policy of insurance on the life of his debtor in an amount sufficient to cover the debt, with interest, on the cost of such insurance, with interest thereon, during the period of the expectancy of life according to the Carlisle Tables. If such amount be exceeded the policy may be a wagering transaction." Where the policy is taken out by the debtor the assigned as security for his creditor, the former paying the premium, the personal representatives of the insured are entitled to the balance after the creditor's debt is paid.[17]

a creditor. Guardian Mut. Life Ins. Co. v. Hogan, 80 Ill. 35, 22 Am. Rep. 180.

[13] Von Lindenau v. Desborough, 3 Car. & P. 353, 8 Barn. & C. 586; Dalby v. India & London Life Assurance Co., 15 C. B. 365; Amick v. Butler, 111 Ind. 578, 12 N. E. 518, 60 Am. Rep. 722; Rittler v. Smith, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844, and note. Even though the debt may be barred by the Statute of Limitations, Curtiss v. Ætna Life. Ins. Co., 90 Cal. 245, 27 Pac. 211, 25 Am. St. 114; Chicago Title & Trust Co. v. Haxtun, 129 Ill. App. 626; Townsend v. Tyndale, 165 Mass. 293, 43 N. E. 107, 52 Am. St. 513; Rawls v. American Mut. Life Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280.

[14] See Givens v. Veeder, 9 N. Mex. 256, 50 Pac. 316. In Cammack v. Lewis, 15 Wall. (U. S.) 643, 21 L. ed. 244, a policy for $3,000 was taken out to secure a debt of $70 owed by L to C. The latter paid the premiums for one year. L then gave C his note for $3,000 without consideration, with an agreement back that in case of the death of L, C would pay L's widow one-third of the policy. It was held that C could retain only the amount of his debt with such sums as he had advanced. As said in Fox v. Penn Mut. L. Ins. Co., 4 Big L. & A. Ins. 458: "If a man should owe me $10, I cannot go and insure his life to the extent of $10,000." See also, Mowry v. Home Life Ins. Co., 9 R. I. 346.

[15] See Wright v. Mutual &c. Assn., 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. 749.

[16] Ulrich v. Reinoehl, 143 Pa. St. 238, 22 Atl. 862, 13 L. R. A. 443, 24 Am. St. 534; Wheeland v. Atwood, 192 Pa. St. 237, 43 Atl. 946, 73 Am. St. 803. See also, Exchange Bank v. Loh, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372; Hays v. Lapeyre, 48 La. Ann. 749, 19 So. 821, 35 L. R. A. 647; Carson v. Vicksburg Bank, 75 Miss. 167, 22 So. 1, 37 L. R. A. 559, 65 Am. St. 596; Fisher v. Donovan, 57 Nebr. 361, 77 N. W. 778, 44 L. R. A. 383; Roberts v. Winton, 100 Tenn. 484, 45 S. W. 673, 41 L. R. A. 275.

[17] Morris v. Georgia Loan &c. Co., 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 506, and note; Amick v. Butler, 111

§ 4070. Mere form disregarded.—The courts will not permit the mere form of a policy to cover and protect a wager contract.[18] Thus, where the contract recited that the insured had himself paid the first premium, the insurer was allowed to show that the premium was in fact paid by the beneficiary, who had no insurable interest.[19] So where it appeared that the person insured was only a nominal party to the contract, and that the beneficiary named in the policy had in reality procured the insurance and paid the premiums, it was held that, "in order that the transaction may be taken out of the category of wagering contracts, the beneficiary must have had an insurable interest of a pecuniary character, or of that nature, either present or prospective, at the time the policy had its inception."[20] The essential thing is that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insurer has no interest.[21] The manner of the payment of the premium may be of much importance in determining whether the policy is speculative, and the tendency is to condemn contracts where the premium is paid by the beneficiary who has no insurable interest, although the policy was taken out by the insured. Thus, a policy is held invalid, although the insured himself made the application, where it appeared that the beneficiary paid the premiums.[22]

Ind. 578, 12 N. E. 518, 60 Am. Rep. 722. See Hale v. Life Indemnity &c. Co., 65 Minn. 548, 68 N. W. 182; Bendet v. Ellis, 120 Tenn. 277, 111 S. W. 795, 18 L. R. A. (N. S.) 114, 127 Am. St. 1000. In Rittler v. Smith, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844, it was held that a creditor could insure the life of his debtor and collect the amount, although his debt had been paid before the death of the debtor; but the relation between the debt and the policy must not be grossly disproportionate. As to who are legal representatives within the meaning of a life insurance policy, see note to Rose v. Wortham, 95 Tenn. 505, 32 S. W. 458, 30 L. R. A. 609. See also, generally as to assignment to creditor, Fitzgerald v. Rawlings, 114 Md. 470, 79 Atl. 915, Am. & Eng. Ann. Cas. 1912A, 650 and note.

[18] Guardian Mut. Life Ins. Co. v. Hogan, 80 Ill. 35, 22 Am. Rep. 180; Whitmore v. Supreme Lodge Knights and Ladies of Honor, 100 Mo. 36, 13 S. W. 495.

[19] United Brethren Mut. Aid Soc. v. McDonald, 122 Pa. St. 324, 1 L. R. A. 238, 9 Am. St. 111.

[20] Amick v. Butler, 111 Ind. 578, 12 N. E. 518, 60 Am. Rep. 722. See also, Allen v. Hartford Life Ins. Co., 72 Conn. 693, 45 Atl. 955; Davis v. Brown, 159 Ind. 644, 65 N. E. 908; Bromley's Admr. v. Washington Life Ins. Co., 122 Ky. 402, 28 Ky. L. 1300, 92 S. W. 17, 5 L. R. A. (N. S.) 747, 121 Am. St. 467; Bendet v. Ellis, 120 Tenn. 277, 111 S. W. 795, 18 L. R. A. (N. S.) 114, 127 Am. St. 1000.

[21] Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. ed. 251.

[22] Trinity College v. Travelers' Ins.

§ 4071. **Continuance of interest in life.**—In fire and marine insurance contracts the insured is indemnified for the loss of interest existing at the time of the loss. But in life insurance it is only necessary that an interest exist at the time the contract is made. It is the prevailing rule that if the contract is originally valid it is not affected by the loss of interest unless such is the necessary result of the provisions of the policy.[23] Thus, where a married woman is named as the beneficiary in an ordinary policy of insurance on the life of her husband, the policy remains in force although she obtains a divorce before his death.[24] But where the insurance is in a mutual benefit association, it has been held that the relation of husband and wife must, by the ordinary terms of the contract, exist at the time of the death.[25] There is,

Co., 113 N. Car. 244, 18 S. E. 175, 22 L. R. A. 291. See Burton v. Connecticut Mut. Life Ins. Co., 119 Ind. 207, 21 N. E. 746, 12 Am. St. 405; Rawls v. American Mut. Life Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280; Burke v. Prudential Ins. Co., 155 Pa. St. 295, 26 Atl. 445. See also, Cisna v. Sheibley, 88 Ill. App. 385; Tate v. Commercial Bldg. Assn., 97 Va. 74, 33 S. E. 382, 45 L. R. A. 243, 75 Am. St. 770.

[23] Caldwell v. Grand Lodge of United Workmen, 148 Cal. 195, 82 Pac. 781, 2 L. R. A. (N. S.) 653, 113 Am. St. 219; Manhattan Life Ins. Co. v. Hennessy, 99 Fed. 64, 39 C. C. A. 625; Sides v. Knickerbocker Life Ins. Co., 16 Fed. 650; Schmidt v. Hauer (Iowa), 111 N. W. 966; Rittler v. Smith, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844 (creditor after payment of debt); In re Corson's Appeal, 113 Pa. St. 438, 6 Atl. 213, 57 Am. Rep. 479; Scott v. Dickson, 108 Pa. St. 6, 56 Am. Rep. 192; Phœnix Mut. Life Ins. Co. v. Bailey, 13 Wall. (U. S.) 616, 20 L. ed. 501; Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. ed. 251. The well-known case of Godsall v. Boldero, 9 East 72 (1807), grew out of a policy issued on the life of England's great prime minister, William Pitt, taken out by a creditor. After Pitt's death his debts were paid by the nation, and it was held that as life insurance was a contract of indemnity there could be no recovery on the policy. But this case was overruled: Loomis v. Eagle Life & Health Ins. Co., 6 Gray (Mass.) 396; Rawls v. American Mut. Life Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280; Mowry v. Home Life Ins. Co., 9 R. I. 346. See, however, Cheeves v. Anders, 87 Tex. 287, 28 S. W. 274, 47 Am. St. 107.

[24] McGrew v. Mutual Life Ins. Co. of New York, 132 Cal. 85, 64 Pac. 103, 84 Am. St. 20; White v. Brotherhood of American Yeomen, 124 Iowa 293, 99 N. W. 1071, 66 L. R. A. 164, and note, 104 Am. St. 323; Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. ed. 251; also notes in 3 L. R. A. (N. S.) 478, and 39 L. R. A. (N. S.) 370. See, however, under particular contracts, Farra v. Braman, 171 Ind. 529, 86 N. E. 843; Tyler v. Odd Fellows' Mut. Relief Assn., 145 Mass. 134, 13 N. E. 360; Dahlin v. Knights of Modern Maccabees, 151 Mich. 644, 115 N. W. 975; Overhiser v. Overhiser, 63 Ohio St. 77, 57 N. E. 965, 50 L. R. A. 552; and under statutes in some states, see Green v. Green, 147 Ky. 608, 144 S. W. 1073, 39 L. R. A. (N. S.) 370, and note.

[25] Tyler v. Odd Fellows' Mut. Relief Assn., 145 Mass. 134, 13 N. E. 360; Schonfield v. Turner, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189.

however, a line of cases holding that the assignee of a life insurance policy must have an insurable interest notwithstanding the fact that it was valid when issued.[26] And it is said by the Supreme Court of the United States that "If a policy of insurance be taken out by a debtor on his own life, naming a creditor as beneficiary, or with a subsequent assignment to a creditor, the general doctrine is that on payment of the debt the creditor loses all interest therein, and the policy becomes one for the benefit of the insured, and collectible by his executors or administrators."[27]

§ 4072. Interest of beneficiary designated by insured.—One who takes insurance upon his own life and pays the premiums may make the insurance payable to any person he may name in the policy, and such person need have no interest in the life of the insured.[28] As said in South Carolina,[29] "It is firmly established

[26] See § 4073.

[27] Crotty v. Union Mut. Life Ins. Co., 144 U. S. 621, 36 L. ed. 566, 12 Sup. Ct. 749. In Manhattan Life Ins. Co. v. Hennessy, 99 Fed. 64, 39 C. C. A. 625, it was said that this case is not in its results in conflict with the previous statements of the court; that is not necessary that the interest continue to the time of the death.

[28] Fitzgerald v. Hartford &c. Ins. Co., 56 Conn. 116, 13 Atl. 673, 17 Atl. 411, 7 Am. St. 288; Foster v. Preferred Acc. Ins. Co., 125 Fed. 536; Union &c. League v. Walton, 109 Ga. 1, 34 S. E. 317, 52 L. R. A. 442, 77 Am. St. 350; Martin v. Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. 620; Amick v. Butler, 111 Ind. 578, 12 N. E. 518, 60 Am. Rep. 722; Mutual Life Ins. Co. v. Allen, 138 Mass. 24, 52 Am. Rep. 245; Heinlein v. Imperial Life Ins. Co., 101 Mich. 250, 59 N. W. 615, 25 L. R. A. 627, 45 Am. St. 409; Murphy v. Red, 64 Miss. 614, 1 So. 761, 60 Am. Rep. 68; Vivar v. Supreme Lodge K. of P., 52 N. J. L. 455, 20 Atl. 36; Olmsted v. Keyes, 85 N. Y. 593; Sabin v. Phinney, 134 N. Y. 423, 31 N. E. 1087, 30 Am. St. 681; Albert v. Mutual Life Ins. Co., 122 N. Car. 92, 30 S. E. 327, 65 Am. St. 693; Pacific Mut. L. Ins. Co. v. O'Neil (Okla.), 130 Pac. 270; Eckel v. Renner, 41 Ohio St. 232; Northwestern Masonic Aid Assn. v. Jones, 154 Pa. St. 99, 26 Atl. 253, 35 Am. St. 810; Clark v. Allen, 11 R. I. 439, 23 Am. Rep. 496. See note in 128 Am. St. 311, and note in 16 L. R. A. (N. S.) 555. Contra Helmetag's Admr. v. Miller, 76 Ala. 183, 52 Am. Rep. 316; Missouri Valley Life Ins. Co. v. Sturges, 18 Kans. 93, 26 Am. Rep. 761; Basye v. Adams, 81 Ky. 368, 5 Ky. L. 91; Roller v. Moore's Admr., 86 Va. 512, 10 S. E. 241, 6 L. R. A. 136. See also, note to 16 Am. St. 906. A mere friend has not an insurable interest, and cannot be the beneficiary of a life insurance policy, although the insured voluntarily makes it payable to him: Caudell v. Woodward, 96 Ky. 646, 16 Ky. L. 742, 29 S. W. 614.

[29] Crosswell v. Connecticut Indemnity Assn., 51 S. Car. 103, 28 S. E. 200. So, in Georgia it was said in Union Fraternal League v. Walton, 109 Ga. 1, 34 S. E. 317, 46 L. R. A. 424, 77 Am. St. 350: "Beyond all controversy a man has an insurable interest in his own life, and we fail to see, when, having that interest, he enters into a contract with an insurer by which, for a stipulated sum, which he periodically pays, the insurer becomes liable to pay a given sum of money at the death of the

that insurance procured by one person on the life of another, in which the party effecting the insurance has no interest, is void as a wager contract against public policy, which condemns gambling speculation upon human life. But it is also well settled that a person may insure his own life and make the policy payable to whomsoever he chooses, even though a beneficiary who has no insurable interest in his life, provided the transaction is bona fide, and not a mere cover to evade the law against wager policies. In such case the interest which the insured has in his own life supports the policy, and prevents it from being condemned as a wager contract." In nearly all the cases in which this rule has been applied, the insured paid the premiums; but it has been held to apply even where the premiums were paid by the beneficiary.[30]

§ 4073. Interest of the assignee.—The question whether a policy valid at its inception may afterward, before the death of the insured, be assigned to one who has no insurable interest in the life of the insured has been much discussed, and the authorities are in hopeless conflict.[31] If no interest appears, it is said that the law will presume that the policy was taken out for a spec-

insured, why he who is most interested, whether actuated by the ties of relationship, motives of friendship, gratitude, sympathy or love, may not make the object of his consideration the recipient of his own bounty. If it be replied that a temptation is extended to the beneficiary by improper means to hasten the time when he should receive the amount of the policy,—and it is for this reason that such contracts will only be upheld when the idea of temptation is rebutted by the natural ties of blood or affinity,—we might well ask ourselves why executory devises, bequests, provisions for support and maintenance provided for friends and even strangers, are not subject to the same inhibition as being against public policy. But while, as we have before said, many adjudicated cases, frequently contrary to natural justice, clearly hold that, unless the beneficiary or assignee has an insurable interest in the life of the insured, the policy or assignment is void, we shall undertake to show by authority that such is not the rule of the law."

[30] Fidelity Mut. Life Assn. v. Jeffords, 107 Fed. 402, 46 C. C. A. 377, 53 L. R. A. 193, and cases cited. See also, Stockwell v. Mut. L. Ins. Co. of N. Y., 140 Cal. 198, 78 Pac. 833, 98 Am. St. 25; Smith v. Union Ins. Co., 25 R. I. 260, 55 Atl. 715, 105 Am. St. 882; Bendet v. Ellis, 120 Tenn. 277, 111 S. W. 795, 18 L. R. A. (N. S.) 114, 127 Am. St. 1000. And it is held that where the insurance is for the benefit of one who has an insurable interest it is immaterial that the person who pays the premiums has no such interest. Prudential Ins. Co. v. Leyden's Admx., 20 Ky. L. 881, 47 S. W. 767; McCann v. Metropolitan Life Ins. Co., 177 Mass. 280, 58 N. E. 1026.

[31] See Gordon v. Ware Nat. Bank, 132 Fed. 444, 65 C. C. A. 580, 67 L. R. A. 550; and see notes to Rylander v. Allen (Ga.), 6 L. R. A. (N. S.) 128 (in which the authorities are classified by states); Metropolitan Life Ins. Co. v. Elison, 72 Kans. 199,

ulative purpose.[32] Some courts are less liberal than others. Thus, it is held by some that the interest that exists when the contract is made must continue to the death of the insured, or, at least, must exist at that time, and that the assignee of a valid policy must also have an insurable interest in the life of the insured. As said by Mr. Justice Field:[33] "If there be any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the assured, it is difficult to see why that reason is not as cogent and operative against a party taking out an assignment of a policy upon the life of a person in which he has no interest. The same ground which invalidates the one should invalidate the other—so far, at least, as to restrict the right of the assignee to the sums actually advanced by him." This rule seems to prevail in Alabama,[34] Kansas,[35] Kentucky,[36] North Carolina,[37] Pennsylvania,[38] Texas,[39] Tennessee,[40] and per-

83 Pac. 410, 3 L. R. A. (N. S.) 934, 115 Am. St. 189; Morrell v. Trenton &c. Ins. Co., 10 Cush. (Mass.) 282, 57 Am. Dec. 92; Currier v. Continental Life Ins. Co., 57 Vt. 496, 52 Am. Rep. 134.

[32] United Brethren Mut. Aid Soc. v. McDonald, 122 Pa. St. 324, 15 Atl. 439, 1 L. R. A. 238, 9 Am. St. 111.

[33] Warnock v. Davis, 104 U. S. 775, 26 L. ed. 924. That this is still the doctrine of the Supreme Court, see Manhattan Life Ins. Co. v. Hennessy, 99 Fed. 64, 39 C. C. A. 625.

[34] Stoelker v. Thornton, 88 Ala. 241, 6 So. 680, 6 L. R. A. 140. The disposition may be made by will: Alabama Gold Line Ins. Co. v. Mobile Mut. Ins. Co., 81 Ala. 329, 1 So. 561; Helmetag's Admr. v. Miller, 76 Ala. 183, 52 Am. Rep. 316.

[35] Missouri Valley Life Ins. Co. v. McCrum, 36 Kan. 146, 12 Pac. 517, 59 Am. Rep. 537; Missouri Valley Life Ins. Co. v. Sturges, 18 Kans. 93, 26 Am. Rep. 761. See also, Metropolitan Life Ins. Co. v. Elison, 72 Kans. 199, 83 Pac. 410, 3 L. R. A. (N. S.) 934, 115 Am. St. 189.

[36] Basye v. Adams, 81 Ky. 368, 5 Ky. L. 91; Bromley's Admr. v. Washington Life Ins. Co., 122 Ky. 402, 28 Ky. L. 1300, 92 S. W. 17, 5 L. R. A. (N. S.) 747, 121 Am. St. 467 (notwithstanding incontestable clause where the arrangement was illegal and made in advance). An assignment is valid only in so far as necessary to secure advances made by the assignee. Beard v. Sharp, 100 Ky. 606, 18 Ky. L. 1029, 38 S. W. 1057.

[37] Powell v. Dewey, 123 N. Car. 103, 31 S. E. 381, 68 Am. St. 818.

[38] Hoffman v. Hoke, 122 Pa. St. 377, 15 Atl. 437, 1 L. R. A. 229. The original beneficiary who assigned to one without interest can recover: Carpenter v. United States Life Ins. Co., 161 Pa. St. 9, 28 Atl. 943, 23 L. R. A. 571, 41 Am. St. 880. See, too, Keystone Mut. Ben. Assn. v. Norris, 115 Pa. St. 446, 8 Atl. 638, 2 Am. St. 572. A took out a policy on her life assigned it to her husband, who, being subsequently unable to pay the premiums, assigned it absolutely to C to pay a debt, which, had A lived out her life expectancy, would have amounted to about the amount of the policy. This was held not a wagering policy. Wheeland v. Atwood, 192 Pa. St. 237, 43 Atl. 946, 73 Am. St. 803.

[39] Schonfield v. Turner, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189; Price v. Supreme Lodge, 68 Tex. 361, 4 S. W. 633. The policy in such case is for the benefit of the original beneficiary.

[40] Clement v. New York Life Ins. Co., 101 Tenn. 22, 46 S. W. 561, 42

haps, the United States courts.[41] It is not, however, always followed to its logical conclusion, as all the reasons which forbid the assignment of a policy to a person without interest apply where there is a loss of interest. But an assignee without interest will be protected to the extent of the money advanced by him for the payment of premiums.[42] It is held in Texas that the beneficiary named in the policy, who has no interest, will hold the proceeds of the policy as trustee for the legal representatives of the insured, and that the assignee without interest will only hold it to the extent of his debt.[43] Mere want of interest in the assignee of a valid policy does not in this jurisdiction invalidate the policy. The insurer must perform his contract and leave it to the court to determine to whom the money belongs.[44]

A more liberal rule has been adopted in many states, where it is held that a policy supported by an interest at its inception is a mere chose in action, which may be assigned to a person who has no insurable interest in the life.[45] Such an assignment does not create a new contract, but merely continues the old contract in force. A person may thus insure his own life and either name or assign the policy to whomsoever he chooses without reference to the interest of such beneficiary in his life. The rule that the assignee of a valid policy need not have an insurable interest in the life insured seems to prevail in Arkansas,[46] California,[47] Colo-

L. R. A. 247, 70 Am. St. 650 (notwithstanding incontestable cause). But see, Bendet v. Ellis, 120 Tenn. 277, 111 S. W. 795, 18 L. R. A. (N. S.) 114, 127 Am. St. 1000, seeming to uphold it so far as restricted to the right of the assignee to moneys advanced by him.

[41] Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. ed. 251; Cammack v. Lewis, 15 Wall. (U. S.) 643, 21 L. ed. 244. See, however, New York Mut. Life Ins. Co. v. Armstrong, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. 877; Currier v. Continental Life Ins. Co., 57 Vt. 496, 52 Am. Rep. 134. See also, as to Louisiana, Missouri and Virginia: Hays v. Lapeyre, 48 La. Ann. 749, 19 So. 821, 35 L. R. A. 647, apparently limiting Stuart v. Sutcliffe, 46 La. Ann. 240, 14 So. 912; Mutual Life Ins. Co. v. Richards, 99 Mo. App. 88, 72 S. W. 487; Tate v. Commercial Bldg. Assn., 97 Va. 74, 33 S. E. 382, 45 L. R. A. 243, 75 Am. St. 770.

[42] Page v. Burnstine, 102 U. S. 664, 26 L. ed. 268; Warnock v. Davis, 104 U. S. 775, 26 L. ed. 924. See § 4076.

[43] The policy is valid and collectible, but the proceeds go to the parties legally entitled thereto: Equitable Life Ins. Co. v. Hazlewood, 75 Tex. 338, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. 893; Schonfield v. Turner, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189.

[44] Cheeves v. Anders, 87 Tex. 287, 28 S. W. 274, 47 Am. St. 107.

[45] See notes to 26 Am. St. 23; also, Hogue v. Minnesota Packing &c. Co., 59 Minn. 39, 60 N. W. 812.

[46] Matlock v. Bledsoe, 77 Ark. 60, 90 S. W. 848.

[47] Derring's Civil Code, Cal., § 2764. See Curtiss v. Ætna Life Ins. Co.,

rado,[48] Georgia,[49] Illinois,[50] Indiana,[51] Maryland,[52] Massachusetts,[53] Michigan,[54] Mississippi,[55] New Hampshire,[56] New York,[57] Ohio,[58] Rhode Island,[59] Vermont,[60] Wisconsin,[61] South Carolina,[62] and perhaps several other states,[63] and in England,[64] and Canada.[65]

90 Cal. 245, 27 Pac. 211, 25 Am. St. 114.

[48] Sheets v. Sheets, 4 Colo. App. 450, 36 Pac. 310.

[49] Union Fraternal League v. Walton, 109 Ga. 1, 34 S. E. 317, 46 L. R. A. 424, 77 Am. St. 350; Rylander v. Allen, 125 Ga. 206, 53 S. E. 1032, 6 L. R. A. (N. S.) 128.

[50] Martin v. Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. 620; Bloomington Mut. Life Ben. Assn. v. Blue, 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558. See also, Moore v. Chicago Guaranty Fund Life Soc., 178 Ill. 202, 52 N. E. 882.

[51] State v. Tomlinson, 16 Ind. App. 662, 45 N. E. 1116, 59 Am. St. 335; Amick v. Butler, 111 Ind. 578, 12 N. E. 518, 60 Am. Rep. 722. In Prudential Ins. Co. v. Hunn, 21 Ind. App. 525, 52 N. E. 772, 69 Am. St. 380, it was held that a policy issued to one upon the life of another who has no insurable interest, is a wagering contract and void. In Franklin Life Ins. Co. v. Hazzard, 41 Ind. 116, 13 Am. Rep. 313, the court said: "In our opinion, no one should hold a policy upon the life of another in whose life he has no insurable interest at the time he acquired the policy, whether the policy be issued to him directly from the insurer, or whether he acquire the policy by purchase and assignment from another." But this is distinguished and limited in Davis v. Brown, 159 Ind. 644, 65 N. E. 908. In Continental Life Ins. Co. v. Volger, 89 Ind. 572, 46 Am. Rep. 185, it was held that the interest must be a pecuniary one, and hence a daughter had not necessarily an insurable interest in the life of her mother.

[52] Souder v. Home Friendly Soc., 72 Md. 511, 20 Atl. 137. See Clogg v. McDaniel, 89 Md. 416, 43 Atl. 795; Fitzgerald v. Rawlings 114 Md. 470, 79 Atl. 915, Ann. Cas. 1912A, 650 and note.

[53] Dixon v. National Life Ins. Co., 168 Mass. 48, 46 N. E. 430; Mutual Life Ins. Co. v. Allen, 138 Mass. 24, 52 Am. Rep. 245.

[54] Dolan v. Supreme Council Catholic Mut. Ben. Assn., 152 Mich. 266, 116 N. W. 383, 16 L. R. A. (N. S.) 555n.

[55] Murphy v. Red, 64 Miss. 614, 1 So. 761, 60 Am. Rep. 68.

[56] Mechanics' Nat. Bank v. Comins, 72 N. H. 12, 55 Atl. 191, 101 Am. St. 650.

[57] Olmsted v. Keyes, 85 N. Y. 593; Valton v. National F. L. Assn., 20 N. Y. 32; Rawls v. American Mut. Life Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280; St. John v. American Mut. Life Ins. Co., 13 N. Y. 31, 64 Am. Dec. 529; Sabin v. Phinney, 134 N. Y. 423, 31 N. E. 1087, 30 Am. St. 681 (mutual benefit society certificate).

[58] Eckel v. Renner, 41 Ohio St. 232.

[59] Clark v. Allen, 11 R. I. 439, 23 Am. Rep. 496; Cronin v. Vermont Life Ins. Co., 20 R. I. 570, 40 Atl. 497.

[60] Fairchild v. Northeastern Mut. Life Assn., 51 Vt. 613; Harrison's Admr. v. Northwestern Mut. Life Ins. Co., 78 Vt. 473, 63 Atl. 321, 112 Am. St. 932.

[61] Strike v. Wisconsin &c. Ins. Co., 95 Wis. 583, 70 N. W. 819; Bursinger v. Bank of Watertown, 67 Wis. 75, 30 N. W. 290, 58 Am. Rep. 848; Hurd v. Doty, 86 Wis. 1, 56 N. W. 371, 21 L. R. A. 746.

[62] Crosswell v. Connecticut Indemnity Assn., 51 S. Car. 103, 28 S. E. 200.

[63] See Fitzgerald v. Hartford Life Ins. Co., 56 Conn. 116, 13 Atl. 673, 17 Atl. 411, 7 Am. St. 288; Farmer's & Traders' Bank v. Johnson, 118 Iowa 282, 91 N. W. 1074; Prudential Ins. Co. v. Liersch, 122 Mich. 436, 81 N. W. 258; Chamberlain v. Butler, 61 Nebr. 730, 86 N. W. 481, 54 L. R. A. 338, 87 Am. St. 478.

[64] Ashley v. Ashley, 3 Sim. 149.

[65] North American Life Assur. Co. v. Craigen, 13 Can. Sup. Ct. 278.

This doctrine is supported by the weight of authority and seems to be more in consonance with the demands of modern business, but it must be noted that under either rule the essential fact is that the transaction must be bona fide, and not a mere cover for a wagering or speculative insurance or a device to evade the law. In fact, many of the cases which hold an assignment without interest void will, upon close examination, be found to rest upon the fact that the transaction in question was merely colorable and an attempt to obtain speculative insurance.[66]

§ 4074. Interest based upon relationship.—As a rule, at least where no ties of blood or marriage exist, a person has an insurable interest in a life only when he is a creditor of, or surety for such party, and where there are ties of blood or marriage there must be a reasonable expectation of advantage from the continuance of the life. Where the interest growing out of the relationship is pecuniary, and the amount of the insurance bears some reasonable proportion to it, the contract is, of course, not a wager policy. If the reason for requiring an interest be as stated in many cases, that it is against public policy to tempt one person to deprive another of his life, it is apparent that certain ties of relationship are an ample protection. Hence, we find some decisions, and, apparently, the better ones, holding that near relationship, without any element of dependence, creates an insurable interest. A father has no direct pecuniary interest in the continuance of the life of a demented or crippled son, but it surely cannot justly be said that public policy forbids such a father to insure the life of his child because of the danger that he will be tempted to take the life of the child. The sensible rule would seem to be that there is an insurable interest sufficient to prevent the policy being a speculative contract where there is either a pecuniary interest, the relation of dependency, or any relationship from which ordinary observation teaches that there is no real danger of placing temptation in the way of the beneficiary.[67] This, and

[66] See Clark v. Allen, 11 R. I. 439, 23 Am. Rep. 496. Compare also, Russell v. Grigsby, 168 Fed. 577, 94 C. C. A. 61. And see generally the note in Ann. Cas. 1912A, 653-655.

[67] See Woods v. Riner, 130 Ky. 162, 113 S. W. 79, 19 L. R. A. (N. S.) 233; Hess' Admr. v. Segenfelter, 127 Ky. 348, 105 S. W. 476, 14 L. R. A. (N. S.) 1172n, 128 Am. St. 343 and

similar statements must, however, be taken subject to the rule that where it is apparent that the transaction is merely a cover for a wager it will not be sustained by the courts.[68] And there is much conflict among the decisions.[69] In a comparatively recent case it was held that the mere relation of father and son is not enough to give an adult son an insurable interest in the life of his father, and in discussing the underlying principle the court went

note; Trenton Mut. Life & Fire Ins. Co. v. Johnson, 24 N. J. L. 576; Hilliard v. Sanford, 6 Ohio Dec. 449, 4 Ohio N. P. 363; Cronin v. Vermont Life Ins. Co., 20 R. I. 570, 40 Atl. 497; Crosswell v. Connecticut Indemnity Assn., 51 S. Car. 103, 28 S. E. 200; Valley Mut. L. Assn. v. Teewalt, 79 Va. 421. Compare also, Tucker v. Mut. Ben. Assn., 121 N. Y. 718, 24 N. E. 1102; Geoffroy v. Gilbert, 5 App. Div. (N. Y.) 98, 74 N. Y. St. 509, 38 N. Y. S. 643, affd. in 154 N. Y. 741, 49 N. E. 1097; Equitable Life Ins. Co. v. Hazlewood, 75 Tex. 338, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. 893; Ætna Life Ins. Co. v. France, 94 U. S. 561, 24 L. ed. 287, citing Loomis v. Eagle Life & Health Ins. Co., 6 Gray (Mass.) 396.

[68] That insurable interest is not confined to any particular class of persons or relationship, see Kentucky Life &c. Ins. Co. v. Hamilton, 63 Fed. 93, 11 C. C. A. 42.

[69] Phœnix Mut. Life Ins. Co. v. Bailey, 13 Wall. (U. S.) 616, 20 L. ed. 501. In one case the Supreme Court of the United States, although very strict in requiring an insurable interest, said: "The better opinion is that the decided cases which proceed upon the ground that the insured must necessarily have some pecuniary interest in the life of the cestui que vie are founded in an erroneous view of the nature of the contract; that the contract of life insurance is not necessarily one merely of indemnity for a pecuniary loss, as in marine and fire policies; that it is sufficient to show that the policy is not invalid as a wager policy, if it appear that the relation, whether of consanguinity or of affinity, was such, between the person whose life was insured and the beneficiary named in the policy, as warrants the conclusion that the beneficiary had an interest, whether pecuniary or arising from dependence or natural affection, in the life of the person insured." In Joyce on Insurance, § 899, Mr. Joyce says: "The general rule, as deduced from a majority of the decisions, would seem to be, however, that the interest may rest upon a purely pecuniary basis, or, in case of consanguinity or affinity, there is a sufficient interest where they involve a reasonable claim to support, or some benefit or advantage to be derived from the continuance of the life insured." See United Brethren, &c., Soc. v. McDonald, 122 Pa. St. 324, 1 L. R. A. 238 (1888). A much narrower view, however, is adopted in some cases. In North Carolina it was said: "Except in cases where there are ties of blood or marriage, the expectation of advantage from the continuance of the life insured, in order to be reasonable, as the law counts reasonableness, must be founded in the existence of some contract between the person whose life is insured and the beneficiary, the fulfilment of which the death will prevent; it must appear that by the death there may come damage which can be estimated under some rule of law, for which loss or damage the insurance company has undertaken to indemnify the beneficiary under its policy. When this contractual relation does not exist, and there are no ties of blood or marriage, an insurance policy becomes what the law denominates a 'wagering contract,' and under its rules, made and enforced in the interest of the best public policy, all such contracts must be declared illegal and void, no matter what good object the parties may really have had in view. The end will not, in the eye of the

very far toward requiring a pecuniary interest.[70] Many authorities are reviewed, and nearly all that can be found to sustain that view are cited in the opinion and note to the case as last reported; but, as already intimated, the better rule seems to be that near relationship without necessary dependence or direct pecuniary interest may be sufficient, and the doctrine of the federal case is expressly denied in a recent case in Kentucky in which it is held that an adult son has an insurable interest in the life of his mother, although he is not dependent upon her for support and has no direct pecuniary interest in her life.[71]

§ 4075. Illustrations of insurable interest in life.—As already stated a creditor has an insurable interest in the life of his

law, justify the means." Trinity College v. Travelers' Ins. Co., 113 N. Car. 244, 22 L. R. A. 291, 18 S. E. 175 (1893).

[70] Life Ins. Clearing Co. v. O'Neill, 106 Fed. 800, 45 C. C. A. 641, 54 L. R. A. 225. After reviewing the decisions, the court said: "The sum of the decisions and of text-book discussion, upon the subject of insurable interest may, we think, be fairly stated thus: No person has an insurable interest in the life of another unless he would in reasonable probability suffer a pecuniary loss, or fail to make a pecuniary gain, by the other's death; or (in some jurisdictions) unless, in the discharge of some undertaking, he has spent money, or is about to spend money, for the other's support or advantage. * * * What is often called 'relationship insurance' must be governed by this rule. It must rest upon the foundation of a pecuniary interest, although the interest may be contingent, and need not be capable of exact estimation in dollars and cents. Sentiment or affection is not sufficient of itself. * * * In one relation only—the relation of husband and wife—is the actual existence of such a pecuniary interest unimportant; the reason being that a real pecuniary interest is found in so great a majority of cases that the courts conclusively presume it to exist in every case, whatever the fact may be, and therefore will not inquire into the true state of a few exceptional instances. This, we think, is essentially what is meant by the declaration of courts and text-book writers that the mere relationship of husband and wife is sufficient to give an insurable interest. The Supreme Court of Vermont—alone, we think, among judicial tribunals—seems disposed to hold the presumption to be rebuttable. In Currier v. Continental L. Ins. Co., 57 Vt. 496. * * * In all other relationships there is no presumption of interest, and no insurable interest exists, unless the reasonable likelihood of pecuniary loss or gain is present in actual fact. * * * We think it cannot be doubted that the tendency of the recent decisions is to insist upon an actual or presumed pecuniary interest in every case (although such interest may no doubt be contingent, and to some extent undefined), and to give relationship its proper place by regarding it merely as an important factor in the inquiry, whether such an interest does in reality exist."

[71] Woods v. Riner, 130 Ky. 162, 113 S. W. 79, 19 L. R. A. (N. S.) 233. See also, Reserve Mut. Ins. Co. v. Kane, 81 Pa. St. 154, 22 Am. Rep. 741; In re Corson's Appeal, 113 Pa. St. 438, 6 Atl. 213, 57 Am. Rep. 479; Loomis v. Eagle Life & Health Ins. Co., 6 Gray (Mass.) 396.

debtor, at least for the amount of his debt.[72] In states which permit the assignment of a valid policy to an assignee without interest, the creditor is allowed to hold the entire insurance,[73] but where the stricter rule prevails, the creditor, whether named as the original beneficiary or one to whom the policy has been assigned, has no further interest after the payment of his debt, and the policy thus becomes one for the benefit of the insured, to be collected by his personal representatives.[74] This certainly is the rule where the policy is merely assigned to the creditor as a security for his debt. He should be permitted to retain out of the proceeds of the policy what is necessary to pay his debt, and be required to account for the balance to the representatives of the deceased.[75] A financial interest, however slight, will sustain a policy. But a creditor has no insurable interest in the life of his debtor's wife.[76] A corporation has no insurable interest in the life of one of its stockholders who is not indebted to it.[77] But it has been held that a woman has an insurable interest in the life of the man to whom she is engaged to be married, although he has at the time a wife living, when he represented himself to her as a single man and she believed he was legally competent to marry her;[78] and that a husband has an insurable interest in the life of his wife.[79] A religious society supported

[72] Walker v. Larkin, 127 Ind. 100, 26 N. E. 684; Rittler v. Smith, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844.

[73] In Wright v. Mutual Ben. Life Assn., 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. 749, it was held that the assignee of the creditor payee could recover the whole amount, although the debt was less. See also, Dixon v. National Life Ins. Co., 168 Mass. 48, 46 N. E. 430; Chamberlain v. Butler, 61 Nebr. 730, 86 N. W. 481, 54 L. R. A. 338, 87 Am. St. 478; Strike v. Wisconsin Odd Fellows Mut. L. Ins. Co., 95 Wis. 583, 70 N. W. 819.

[74] Ulrich v. Reinoehl, 143 Pa. St. 238, 22 Atl. 862, 13 L. R. A. 433, 24 Am. St. 534; Cooper v. Shæffer, 7 Sad. (Pa.) 405, 11 Atl. 548.

[75] Barbour's Admr. v. Larue's Assignee, 106 Ky. 546, 21 Ky. L. 94, 51 S. W. 5; Exchange Bank v. Loh, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372; Roller v. Moore's Admr., 86 Va. 512, 10 S. E. 241, 6 L. R. A. 136. See also, Widanan v. Hubbard, 88 Fed. 806; Coleman v. Anderson, 98 Tex. 570, 86 S. W. 730; Jones v. New York Life Ins. Co., 15 Utah 522, 50 Pac. 620.

[76] Wheeland v. Atwood, 192 Pa. St. 237, 43 Atl. 946, 73 Am. St. 803.

[77] Victor v. Louise Cotton Mills, 148 N. Car. 107, 61 S. E. 648, 16 L. R. A. (N. S.) 1020, and note; Tate v. Commercial Bldg. Assn., 97 Va. 74, 33 S. E. 382, 45 L. R. A. 243, 75 Am. St. 770.

[78] Bogart v. Thompson, 24 Misc. (N. Y.) 581, 53 N. Y. S. 622 (a benevolent society certificate payable "to his wife"); Taylor v. Travelers' Ins. Co., 15 Tex. Civ. App. 254, 39 S. W. 185.

[79] Currier v. Continental Life Ins. Co., 57 Vt. 496, 52 Am. Rep. 134.

largely through voluntary contributions has no insurable interest in the life of one of its members.[80] A man may take a policy on his own life and make it payable to one to whom he is engaged to be married.[81] This applies to the certificate of a benevolent society when not prohibited by the statutes or rules of the society.[82] One partner has an insurable interest in the life of the other partner,[83] but some cases hold that the interest ceases when the latter retires unindebted from the firm.[84] A woman to whom a man is engaged to be married does not come within the meaning of a rule permitting a mutual benefit certificate to be made payable to a person "dependent" upon the deceased. "Dependence for favor or for affection or for companionship, or as servants or retainers, is excluded."[85] A sister has an insurable interest in the life of her brother who stands in loco parentis.[86] A child has been presumed to have an insurable interest in the life of its parent,[87] a sister in the life of her brother,[88] and a father in the life of a minor son.[89] It is also said that where the relationship of brother and sister appears it is incumbent upon the company to show that notwithstanding such fact the policy is a wager contract.[90] A niece has an insurable interest in the life of an uncle who has reared her and continued to contribute to her support

[80] Trinity College v. Travelers' Ins. Co., 113 N. Car. 244, 18 S. E. 175, 22 L. R. A. 291.

[81] Lemon v. Phœnix Mut. Life Ins. Co., 38 Conn. 294; Chisholm v. National Capitol Life Ins. Co., 52 Mo. 213, 14 Am. Rep. 414.

[82] In the absence of anything to the contrary in the charter or by-laws or certificate, a mutual benefit society contract will be controlled by the ordinary principles governing other insurance. Union Fraternal League v. Walton, 109 Ga. 1, 34 S. E. 317, 46 L. R. A. 424, 77 Am. St. 350.

[83] Connecticut Mut. Life Ins. Co. v. Luchs, 108 U. S. 498, 27 L. ed. 800, 2 Sup. Ct. 949. See notes in 57 Am. Dec. 98, 52 Am. Rep. 140, 46 Am. Rep. 190. In Powell v. Dewey, 123 N. Car. 103, 31 S. E. 381, 68 Am. St. 818, it was held that where the partners have no money invested, and neither is indebted to the other, neither partner has an insurable interest in the life of his copartner.

[84] Cheeves v. Anders, 87 Tex. 287, 28 S. W. 274, 47 Am. St. 107.

[85] Alexander v. Parker, 144 Ill. 355, 33 N. E. 183, 19 L. R. A. 187, note. Contra, McCarthy v. Supreme Lodge, 153 Mass. 314, 26 N. E. 866, 11 L. R. A. 144, 25 Am. St. 637.

[86] Lord v. Dall, 12 Mass. 115, 7 Am. Dec. 38.

[87] Croswell v. Connecticut Indemnity Assn., 51 S. Car. 103, 28 S. E. 200.

[88] Hosmer v. Welch, 107 Mich. 470, 65 N. W. 280, 67 N. W. 504.

[89] Loomis v. Eagle Life & Health Ins. Co., 6 Gray (Mass.) 396.

[90] United Brethren Mut. Aid. Soc. v. McDonald, 122 Pa. St. 324, 15 Atl. 439, 1 L. R. A. 238, 9 Am. St. 111; Crosswell v. Connecticut Indemnity Assn., 51 S. Car. 103, 28 S. E. 200; Equitable Life Ins. Co. v. Hazlewood, 75 Tex. 338, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. 893; Ætna Life Ins. Co. v. France, 94 U. S. 561, 24 L. ed. 287.

after her marriage.[91] A grandson has an insurable interest in the life of his grandfather.[92] A son-in-law has no insurable interest in the life of his mother-in-law, who lives with him and is dependent upon him for support.[93] But a mother-in-law has been held to have an insurable interest in the life of her son-in-law.[94] A stepson has no insurable interest in the life of his stepfather,[95] but a stepfather is a "relative" who may be made the beneficiary of a benefit certificate.[96] A grandfather has an insurable interest in the life of his grandson.[97] But cousins, from the mere fact of such relationship, have no insurable interest in the life of each other.[98] A mere assumption of parental relations, without any legal obligation, by a man toward a girl whom he has educated will sustain a policy which he procures and assigns to her. The court stated that the test was whether the circumstances were such as to justify the belief that his death would result in a pecuniary loss to her.[99] In a recent case, where the rule was applied with much liberality, it was held that an aunt had an insurable interest in the life of her niece, who had lived with her from earliest childhood and had been supported by her.[1] A woman living with a man as his wife, although not such, may have an insurable interest in his life.[2] In many states the right of

[91] McGraw v. Metropolitan Life Ins. Co., 41 Wkly. N. Cas. (Pa.) 62.

[92] Elkhart Mut. Aid, Benevolent & Relief Assn. v. Houghton, 103 Ind. 286, 2 N. E. 763, 53 Am. Rep. 514.

[93] Stambaugh v. Blake, 1 Monag. (Pa.) 609, 15 Atl. 705.

[94] Adams' Admr. v. Reed, 18 Ky. L. 858, 38 S. W. 420, 35 L. R. A. 692.

[95] United Brethren Mut. Aid Soc. v. McDonald, 122 Pa. St. 324, 15 Atl. 439, 1 L. R. A. 238, 9 Am. St. 111.

[96] Simcoke v. Grand Lodge, 84 Iowa 383, 51 N. W. 8, 15 L. R. A. 114.

[97] Hilliard v. Sanford, 6 Ohio Dec. 449, 4 Ohio N. P. 363.

[98] Hess' Admr. v. Segenfelter, 127 Ky. 348, 105 S. W. 476, 14 L. R. A. (N. S.) 1172n, 128 Am. St. 343. See also, Whitmore v. Supreme Lodge Knights and Ladies of Honor, 100 Mo. 36, 13 S. W. 495; Brady v. Prudential Life Ins. Co., 5 Luz. Leg. Reg. (Pa.) 505; Price v. Supreme Lodge, 68 Tex. 361, 4 S. W. 633. But compare, Brett v. Warnick, 44 Ore. 511, 75 Pac. 1061, 102 Am. St. 639; Pacific Mut. Life Ins. Co. v. Williams, 79 Tex. 633, 15 S. W. 478.

[99] Carpenter v. United States Life Ins. Co., 161 Pa. St. 9, 28 Atl. 943, 23 L. R. A. 571, 41 Am. St. 880.

[1] Cronin v. Vermont Life Ins. Co., 20 R. I. 570, 40 Atl. 497. But it is generally held that an uncle of the insured has no insurable interest by virtue of the mere kinship. McRae v. Warmack, 98 Ark. 52, 135 S. W. 807, 33 L. R. A. (N. S.) 949n; Metropolitan Life Ins. Co. v. Elison, 72 Kans. 199, 83 Pac. 410, 3 L. R. A. (N. S.) 934, 115 Am. St. 189. And see to same effect, Prudential Ins. Co. v. Jenkins, 15 Ind. App. 297, 43 N. E. 1056, 57 Am. St. 228; Singleton v. St. Louis Mut. Life Ins. Co., 66 Mo. 63, 27 Am. Rep. 321.

[2] "A woman illegally married, because the husband had a lawful wife,

a wife to insure her husband's life and hold the proceeds free from the claims of his creditors is secured by statute.[3]

§ 4076. Right of assignee without interest to recover premiums paid.—Where the assignee of a policy has no insurable interest and is free from fraud, he will ordinarily be protected to the extent of the money actually paid out by him.[4] But he can retain only enough of the proceeds of the policy to reimburse him for his advances, as, for instance, for premiums paid and expenses incurred and interest thereon. It seems to be immaterial whether the policy is made payable directly to him or to the assured and afterward assigned.[5] In a recent case in Kentucky a benefit certificate, valid at its inception, was thereafter assigned in part to one who had no insurable interest, but who agreed to pay the future assessments in consideration of receiving one-half of the proceeds of the policy upon the death of the insured. The full amount of the policy was paid to the assignee, and it was held that the legal beneficiary could collect from him all the money so paid less the amount of the assessments actually paid.[6] It has also been held that where the rules of the policy provide that no policy shall be issued upon the life of a person without the consent of such person indorsed upon

or living unlawfully with a man as his wife, * * * has an insurable interest in the man's life." Lampkin v. Travelers' Ins. Co., 11 Colo. App. 249, 52 Pac. 1040.

[3] See note to Metropolitan Life Ins. Co. v. Smith, 22 Ky. L. 868, 59 S. W. 24, 53 L. R. A. 817, citing many cases.

[4] Helmetag's Admr. v. Miller, 76 Ala. 183, 52 Am. Rep. 316; McRae v. Warmack, 98 Ark. 52, 135 S. W. 807, 33 L. R. A. (N. S.) 949n.

[5] Stambaugh v. Blake, 1 Monag. (Pa.) 609, 15 Atl. 705; Riner v. Riner, 166 Pa. St. 617, 31 Atl. 347, 45 Am. St. 693; Tate v. Commercial Bldg. Assn., 97 Va. 74, 33 S. E. 382, 45 L. R. A. 243, 75 Am. St. 770; New York Life Ins. Co. v. Davis, 96 Va. 737, 32 S. E. 475, 44 L. R. A. 305. See also, McRae v. Warmack, 98 Ark. 52, 135 S. W. 807, 33 L. R. A. (N. S.) 949n, and note to Chamberlain v. Butler, 87 Am. St. 478, 484-519 upon the general subject.

[6] Beard v. Sharp, 100 Ky. 606, 18 Ky. L. 1029, 38 S. W. 1057. The court said: "It seems to us that the appellee in this case could have legally held the benefit certificate for no other purpose than as security to indemnify him for moneys advanced to pay the premium and to be so advanced, and to this extent his claim to said policy was just; but all overplus of said fund he holds as trustee for the benefit of the appellant in this action, and under an implied obligation to pay over same." See Manhattan Life Ins. Co. v. Hennessy, 99 Fed. 64, 39 C. C. A. 625; Caudell v. Woodward, 96 Ky. 646, 16 Ky. L. 742, 29 S. W. 614; Brown v. Equitable Life Assur. Soc., 75 Minn. 412, 78 N. W. 103, 671, 79 N. W. 968; Mutual Life Ins. Co. v. Blodgett, 8 Tex. Civ. App. 45, 27 S. W. 286; Lewy v. Gilliard, 76 Tex. 400, 13 S. W. 304. See note in 3 L. R. A. (N. S.) 935.

the application, and a policy is issued in violation of such rules, a beneficiary who was a party to the procurement of the contract which was a fraud upon the company cannot recover the premiums paid.[7] But where the plaintiff was induced to procure such a policy by the fraudulent statement of the agent of the company he was permitted to recover the money paid as premiums.[8]

§ 4077. Want of interest as a defense under incontestable clause.—A clause in a policy making it incontestable on any ground after the lapse of a specified time does not prevent the insured from defending an action to recover after loss upon the ground that the policy was a wager contract;[9] and where the assignee of a policy is required to have an insurable interest he is not enabled to recover by reason of the policy containing such a clause;[10] but this seems to be about the only defense not covered by such a clause.[11] By the weight of authority an incontestable clause prevents the company from interposing the defense of fraud after the expiration of the prescribed period. It is not an agreement to condone fraud, which would be void on the grounds of public policy, but is in the nature of a statute of limitations. There is no objection to an agreement upon the part of the company that after the expiration of a reasonable time in which to

[7] Fisher v. Metropolitan Life Ins. Co., 160 Mass. 386, 35 N. E. 849, 39 Am. St. 495.

[8] McCann v. Metropolitan Life Ins. Co., 177 Mass. 280, 58 N. E. 1026. In this case the plaintiff had taken out the insurance for the benefit of his daughter. The court said: "The plaintiff, therefore, would be entitled to recover unless he made a wagering contract, or was a party to the fraud of the defendant's agent. There is nothing in the case to show that the plaintiff derived any benefit, either direct or indirect, from the transaction, so that it could not be ruled as matter of law that the transaction was a wager, or was other than a gift for the benefit of Mary Sullivan [his daughter]."

[9] Manufacturers' Life Ins. Co. v. Anctil, 28 Can. Sup. Ct. 103, affd. (1899) A. C. 604; Brady v. Prudential Life Ins. Co., 5 Luz. Leg. Reg. (Pa.) 505.

[10] Clement v. New York Life Ins. Co., 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70 Am. St. 650. See also, Bromley's Admr. v. Washington Life Ins. Co., 122 Ky. 402, 28 Ky. L. 1300, 92 S. W. 17, 5 L. R. A. (N. S.) 747, and note, 121 Am. St. 467. But compare Wright v. Mut. Ben. Life Assn., 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. 749.

[11] See generally, Royal Circle v. Achterrath, 204 Ill. 549, 68 N. E. 492, 63 L. R. A. 452, 98 Am. St. 224; Reagan v. Union Mut. Life Ins. Co., 189 Mass. 555, 76 N. E. 217, 2 L. R. A. (N. S.) 821n, 109 Am. St. 659, and cases cited; Pac. Mut. Life Ins. Co. v. Galbraith, 115 Tenn. 471, 91 S. W. 204, 112 Am. St. 862, and cases cited, and note in 42 L. R. A. 247.

investigate the facts it will thereafter waive even the defense of fraud.[12]

§ 4078. Insurable interest must be pleaded and proved.— In an action on an insurance contract the burden of showing an insurable interest in the beneficiary is on the plaintiff. This rule applies in most jurisdictions both to pleading and proof.[13] Hence, a complaint which fails to allege such interest is bad on demurrer.[14] But it has been held that if the pleading states the facts from which the conclusion of an insurable interest should be drawn, it is sufficient.[15]

§ 4079. Description of interest in application or policy.— In closing this consideration of the general subject of insurable interest it may be well to make a few general statements in regard to the manner in which the interest should be described. Care should be taken to describe it correctly and not too indefinitely, but if the subject in which the interest exists is correctly described, it is not usually necessary that the particular interest of the insured be stated in the policy unless it is called for by the company. Thus, an applicant for insurance is not required to show the exact condition of his title unless requested so to do.[16]

[12] Massachusetts Ben. Life Assn. v. Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261, note; Wright v. Mutual Ben. Life Assn., 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. 749 (limiting time to sue); Brady v. Prudential Ins. Co., 168 Pa. St. 645, 32 Atl. 102; Murray v. Mutual Life Assur. Co., 22 R. I. 524, 48 Atl. 800, 53 L. R. A. 742; Clement v. New York Life Ins. Co., 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70 Am. St. 650; Patterson v. Natural Premium Mut. Life Ins. Co., 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. 899. See article in 45 Cent. L. J. 425. In Welch v. Union Cent. Life Ins. Co., 108 Iowa 224, 78 N. W. 852, 50 L. R. A. 774, it was held that an incontestable clause in a policy does not prevent the insurance company from availing itself of the defense of fraud even after the time limit has passed.

[13] 3 Elliott Ev., § 2371, where some exceptional cases are also cited.

[14] Western Assur. Co. v. McCarty, 18 Ind. App. 449, 48 N. E. 266, citing other cases.

[15] Prudential Ins. Co. v. Hunn, 21 Ind. App. 525, 52 N. E. 772, 69 Am. St. 380; Northwestern Nat. Ins. Co. v. Woodward, 18 Tex. Civ. App. 496, 45 S. W. 185.

[16] Mackenzie v. Whitworth, 1 Exch. Div. 36, 13 Eng. Rul. Cas. 322 and notes; Prudential Ins. Co. v. Hunn, 21 Ind. App. 525, 52 N. E. 772, 69 Am. St. 380, and cases cited; Kenton Ins. Co. v. Wigginton, 89 Ky. 330, 11 Ky. L. 539, 12 S. W. 668, 7 L. R. A. 81; Hall v. Niagara Fire Ins. Co., 93 Mich. 184, 53 N. W. 727, 18 L. R. A. 135, 32 Am. St. 497; Rochester Loan & Banking Co. v. Liberty Ins. Co., 44 Nebr. 537, 62 N. W. 877, 48 Am. St. 745; Riggs v. Commercial Mut. Ins. Co., 125 N. Y. 7, 25 N. E. 1058, 10 L. R. A. 684, 21

This is the general rule, but where the interest is of such a nature as to affect the character of the risk it should be fully disclosed. Thus, profits should be insured as such.[17] And in a case where the question was whether the applicant had correctly described his title, Chief Justice Marshall said:[18] "A precarious title depending for its continuance on events which might or might not happen is not such a title as is described in the offer for insurance, construing the words of that offer as they are fairly to be understood." This subject, however, will be considered in another place.

Am. St. 716. See also, Arkansas Ins. Co. v. Cox, 21 Okla. 873, 98 Pac. 552, 20 L. R. A. (N. S.) 775, and note, 129 Am. St. 808; Milison v. Mutual Cash &c. Ins. Co., 24 S. Dak. 285, 123 N. W. 839, 140 Am. St. 788.

[17] Niblo v. North American Fire Ins. Co., 3 N. Y. Super. Ct. 551.

[18] Morrison's Admr. v. Tennessee Marine and Fire Ins. Co., 18 Mo. 262, 59 Am. Dec. 299; Columbian Ins. Co. of Alexandria v. Lawrence, 2 Pet. (U. S.) 25, 7 L. ed. 335.

CHAPTER CXX.

NONDISCLOSURE OF MATERIAL FACTS.

§ 4085. In general—Application.
4086. Duty of applicant.
4087. Concealment—Definition.
4088. Rule as affected by character of the insurance.
4089. Modern rule in the United States.
4090. What must be communicated.
4091. Where specific inquiries are made.
4092. Where no written application is made.
§ 4093. Incomplete answers to inquiries.
4094. Answers calculated to mislead—Irresponsive answers.
4095. Time of concealment.
4096. Materiality.
4097. Concealment through inadvertence or negligence.
4098. Concealment or misrepresentation by agent.

§ 4085. **In general—Application.**—The application, which is the first step toward effecting a contract of insurance, may be oral; but it is usually made upon a printed form prepared and furnished by the insurance company. This application, which the applicant is required to sign, contains numerous inquiries calling for specific information with reference to matters deemed material by the company. When duly filled out and signed by the applicant, it is forwarded to the company, and contains the information upon which the company relies in accepting the risk and issuing its written policy.[1]

§ 4086. **Duty of applicant.**—The person applying for insurance owes in general a duty to the proposed insurer to put the latter in possession of all facts which are within the knowledge of the applicant or which it is his duty to know, and which it is material that the insurer should know. The concealment or misstatement of material matters may justify the insurer in repudiating the obligation of the contract, even after there has

[1] As to the requirement that the application must be signed by the applicant, see Somers v. Kansas Prot. Union, 42 Kans. 619, 22 Pac. 702. The statements may be adopted by an applicant who does not sign the application. Prudential Ins. Co. v. Fredericks, 41 Ill. App. 419.

been a loss. Statements which are warranted are inserted in the contract and constitute provisions or conditions of the printed policy.

§ 4087. Concealment—Definition.—The intentional withholding from the insurer of facts which are material and prejudicial to the risk, and which ought in good faith to be known to the insurer, is called concealment. It has been said that, "Every fact and circumstance, therefore, which can possibly influence the mind of the insurer, in determining whether he will underwrite the policy, or at what premium, is material to be disclosed, and concealment thereof will vitiate the policy."[2] But the modern rule can hardly be said to be so broad and unlimited, except, perhaps, in the case of marine insurance.

§ 4088. Rule as affected by the character of the insurance.—The English courts recognize but one rule and apply it to all insurance contracts. "I am not prepared," said Sir George Jessel,[3] "to lay down the law as making any difference in substance between one contract of assurance and another. Whether it is life, or fire, or marine assurance, I take it good faith is required in all cases, and though there may be certain circumstances from the peculiar nature of marine insurance which require to be disclosed, and which do not apply to other contracts of insurance, that is rather, in my opinion, an illustration of the application of the principle than a distinction in principle." This rule was recently applied in the House of Lords to a contract involving the solvency of a guarantor on a promissory note. It appeared that there were facts known to the applicant affecting the financial condition of the maker of the note and the guarantor, which were not known to the company; and it was held that the concealment of such facts prevented a recovery on the policy.[4]

[2] Ely v. Hallett, 2 Caines (N. Y.) 57, note.

[3] London Assurance Co. v. Mansel, L. R. 11 Ch. Div. 363; Lindenau v. Desborough, 8 Barn. & C. 586. See also, Blackburn v. Vigors, 55 L. J. Q. B. 347, L. R. 17 Q. B. D. 553. In the leading case of Carter v. Boehm, 3 Burr. 1905, the rule in marine insurance is stated as it now prevails in England and the United States. See Sun Mut. Ins. Co. v. Ocean Ins. Co., 107 U. S. 485, 27 L. ed. 337, 1 Sup. Ct. 582. See also, Scammell v. China Mut. Ins. Co., 164 Mass. 341, 41 N. E. 649, 49 Am. St. 462.

[4] Seaton v. Heath, 68 L. J. Q. B. (N. S.) 631, 1 Q. B. 782.

This strict rule of the English courts is generally applied to marine insurance in this country, but by the weight of authority it does not govern other kinds of insurance contracts. The unusual conditions which surround the contract of marine insurance are not present when an application is made for life or fire insurance, and much importance has been given to the general practice of insurance companies, which require applicants to sign written applications containing answers to a great number of specific inquiries. In such cases the inference is that the company has made inquiry for the purpose of eliciting information with reference to all the facts of which it desires information, and the applicant is thus excused from volunteering any statement with reference to other matters, unless of some extraordinary character, or the suppression of which is fraudulent.[5]

§ 4089. **Modern rule in the United States.**—The question was given elaborate consideration in the United States Circuit Court of Appeals for the Sixth Circuit, Judge Taft writing the opinion, and the conclusion was reached that, by the weight of authority in this country, the strict rules which govern the contract of marine insurance do not apply to other insurance contracts.[6] After noting the practice of making full inquiry by specific questions, and the different nature of the conditions and circumstances surrounding the parties and the risk, the court said

[5] Phenix L. Ins. Co. v. Raddin, 120 U. S. 183, 30 L. ed. 644, 7 Sup. Ct. 500; Wytheville Ins. &c. Co. v. Stultz, 87 Va. 629, 13 S. E. 77; Vankirk v. Citizens' Ins. Co., 79 Wis. 627, 48 N. W. 798. See also, Continental Ins. Co. v. Munn, 120 Ind. 30, 22 N. E. 78, 5 L. R. A. 430; Seal v. Farmers' & Merchants' Ins. Co., 59 Nebr. 253, 80 N. W. 807; Arthur v. Palatine Ins. Co., 35 Ore. 27, 57 Pac. 62, 76 Am. St. 450. Compare Carpenter v. American Ins. Co., 1 Story (U. S.) 57, Fed. Cas. No. 2428, and see contra, Orient Ins. Co. v. Peiser, 91 Ill. App. 278. In the case of In re Millers' & Manufacturers' Ins. Co., 97 Minn. 98, 106 N. W. 485, 4 L. R. A. (N. S.) 231, where there was no written application and the building insured stood on leased ground, the policy provided that it should be void "if the subject of the insurance be a building on ground not owned by the insured in fee simple." The court held that it was the duty of the applicant in such a case to disclose the nature of his title and that the company, having no knowledge of the fact, did not waive such condition. The authorities on both sides of this question are collected in the opinion and elaborately reviewed.

[6] Penn Mut. Life Ins. Co. v. Mechanics' Savings &c. Co., 72 Fed. 413, 19 C. C. A. 286, where the court also said: "Nor does this rule result in the practical hardship to the insurer, for in every case where the undisclosed fact is palpably material to the risk the mere nondisclosure is itself strong evidence of a fraudulent intent. Thus, if a man, about to fight a duel, should obtain life insurance

that the insured "can only be said to fail in his duty to the insurer when he withholds from him some fact which, though not made the subject of inquiry, he nevertheless believes to be material to the risk, and actually is so, for fear it would induce a rejection of the risk, or, what is the same thing, with fraudulent intent."

§ 4090. What must be communicated.—The recognized rule seems to be that each party to a contract of insurance must communicate to the other in good faith all facts within his knowledge which are, or believed by him to be, material to the risk, and which the other has not the means of ascertaining and as to which no warranty is made. If specific information is required by the insurer on any point he deems material it must be fully and correctly communicated.[7] On the other hand, in the absence of inquiry, or binding provision not waived, neither party is required to communicate information concerning (1) Matters which the other, or his duly authorized agent, knows. (2) Matters of which, in the exercise of ordinary care, the other, or his duly authorized agent, ought to know, and of which the applicant

without disclosing his intention, it would seem that no argument or additional evidence would be needed to show the fraudulent character of the nondisclosure. On the other hand, where men may reasonably differ as to the materiality of a fact concerning which the insurer might have elicited full information, and did not do so, the insurer occupies no such position of disadvantage in judging of the risk as to make it unjust to require that before the policy is avoided it shall appear, not only that the undisclosed fact was material, but also that it was withheld in bad faith. To hold that good faith is immaterial in such a case is to apply the harsh and rigorous rule of marine insurance to a class of insurance contracts differing so materially from marine policies in the circumstances under which the contracting parties agree that the reason for the rule ceases. The authorities are not uniform, and we are able to take that view which is more clearly founded in reason and justice." After referring to certain cases the court further said: "We think the modern tendency, even of Massachusetts decisions, is to require that a nondisclosure of a fact not inquired about shall be fraudulent, before vitiating the policy, and, as already stated, this view is founded on the better reason. The subject is by no means as clear, upon the authorities, as could be wished."

[7] Norwich Fire Ins. Co. v. Boomer, 52 Ill. 442, 4 Am. Rep. 618; Valton v. National Fund Life Assur. Co., 20 N. Y. 32. See also Roper v. National F. Ins. Co. (N. Car.), 76 S. E. 869. The applicant is not usually bound to disclose the nature of his interest, unless interrogated with reference thereto. In Tate v. Hyslop, L. R. 15 Q. B. D. 368, Lord Justice Bowen said: "It is established law that a person dealing with underwriters must disclose to them all the material facts which are known to himself and not to them, or, at all events, are facts which they are not bound to know. What are material facts, has been defined by authority. It is the duty of the

has no reason to believe he is ignorant.[8] (3) Matters of which information is waived. (4) Matters which prove or tend to prove the existence of a risk excluded by a warranty, and which are not otherwise material.[9] (5) Matters which relate to a risk excepted from the policy and not otherwise material. (6) Mere matters of opinion or belief.

§ 4091. **Where specific inquiries are made.**—It is generally held that where there is a written application containing answers to specific questions, an innocent failure by an applicant for fire insurance to communicate facts about which he is not asked, will not avoid the policy,[10] and the same rule undoubtedly applies to life insurance. But this must be taken in connection with the statement that actual fraud always vitiates the contract, and subject to the provision that when good faith requires it the insured must communicate the knowledge which he has, or is by law required to have, of unusual or extraordinary circumstances of peril to which the property is exposed, when the same could not with reasonable diligence be known by the insurer or reasonably antici-

assured to communicate all facts within his knowledge which would affect the mind of the underwriter at the time the policy is made, either as to taking the contract of insurance, or as to the premium on which he would take it. The materiality of the fact depends upon whether or no a prudent underwriter would take the fact into consideration in estimating the premium, or in underwriting the policy."

[8] Carter v. Boehm, 3 Burr. 1905; Green v. Merchants' Ins. Co., 10 Pick. (Mass.) 402; Richards v. Washington F. & M. Ins. Co., 60 Mich. 420, 27 N. W. 586. The innocent concealment of matters which may be discovered by an examination of the property has no effect. Continental Ins. Co. v. Kasey, 25 Grat. (Va.) 268, 18 Am. Rep. 681; Insurance Co. v. Leslie, 47 Ohio St. 409 (same rule under statute). As to constructive knowledge of facts where the insurance company is required by its charter or by-laws to make a survey, see Satterthwaite v. Mutual Ben. Ins. Assn., 14 Pa. St. 393.

[9] DeWolf v. New York &c. Ins. Co., 20 John. (N. Y.) 214, affd. 2 Cow. (N. Y.) 56 (marine case).

[10] Penn Mut. Life Ins. Co. v. Wiler, 100 Ind. 92, 50 Am. Rep. 769; Washington Mills Emery Mfg. Co. v. Weymouth &c. Ins. Co., 135 Mass. 503; Sibley v. Prescott Ins. Co., 57 Mich. 14, 23 N. W. 473; Boggs v. American Ins. Co., 31 Mo. 499; Carson v. Jersey City Ins. Co., 43 N. J. L. 300, 39 Am. Rep. 584, affd. 44 N. J. L. 210; Browning v. Home Ins. Co., 71 N. Y. 508, 27 Am. Rep. 86; Hosford v. Germania Fire Ins. Co., 127 U. S. 399, 32 L. ed. 196, 8 Sup. Ct. 1199; Campbell v. American Fire Ins. Co., 73 Wis. 100, 40 N. W. 661. See also, Hall v. Niagara Fire Ins. Co., 93 Mich. 184, 53 N. W. 727, 18 L. R. A. 135, 32 Am. St. 497; Hey v. Guarantors' Liability Indemnity Co., 181 Pa. St. 220, 37 Atl. 402, 59 Am. St. 644; Southern Ins. Co. v. Estes, 106 Tenn. 472, 62 S. W. 149, 52 L. R. A. 915, 82 Am. St. 892; Dooly v. Hanover Fire Ins. Co., 16 Wash. 155, 47 Pac. 507, 58 Am. St. 26.

pated by him as the foundation of suitable inquiries.[11] And this doctrine has been applied where the applicant knew that an attempt had been made to burn the building which was the subject-matter of the insurance.[12] The rule is not changed by a provision in the policy that full disclosure must be made concerning the matters to which the specific questions relate.[13]

§ 4092. Where no written application is made.—Where the insurer asks no questions and the applicant makes no representations, and there is no written application, there are cases which relieve the applicant from any duty to make a disclosure unless the concealment is fraudulent. Under this rule, where no inquiries are made, the intention of the party becomes very material. It is said that where there is no written application for fire insurance, and no representations are made "concerning the situation, value, and risk of the property insured, and there is no fraudulent suppression of material facts, or in case a printed slip is furnished describing the property only in the most general terms, and the insurers issue the policy upon their own examination, they cannot after a loss avail themselves of their own negligence in failing to make proper inquiries to defeat the policy."[14] And in a decided case by the Supreme Court of the United States it was said:[15] "But the relation of the parties seems entirely changed, if the insurer asks no information and the insured makes no representations. That is the chief novelty in this question, as hypothetically stated in the bill of exceptions. We think

[11] North American Fire Ins. Co. v. Throop, 22 Mich. 146, 7 Am. Rep. 638; Hartford Protective Ins. Co. v. Harmer, 2 Ohio St. 452, 59 Am. Dec. 684.

[12] Bebee v. Hartford County Mut. Fire Ins. Co., 25 Conn. 56, 65 Am. Dec. 553; Walden v. Louisiana Ins. Co., 12 La. 134, 32 Am. Dec. 116. But see German-American Ins. Co. v. Norris, 100 Ky. 29, 18 Ky. L. 537, 37 S. W. 267, 66 Am. St. 324.

[13] Dunbar v. Phenix Ins. Co., 72 Wis. 492, 40 N. W. 386; or by a refusal to answer a question. American Life Ins. Co. v. Mahone, 56 Miss. 180.

[14] Joyce Ins., § 1871; National Fire Ins. Co. v. Three States Lumber Co., 217 Ill. 115, 75 N. E. 450, 108 Am. St. 239, and note; Gristock v. Royal Ins. Co., 87 Mich. 428, 49 N. E. 634; Western &c. Pipe Lines v. Home Ins. Co., 145 Pa. St. 346, 22 Atl. 665, 27 Am. St. 703; Philadelphia Tool Co. v. British-American Assur. Co., 132 Pa. St. 236, 19 Atl. 77, 19 Am. St. 596; Pelzer Mfg. Co. v. Sun Fire Office, 36 S. Car. 213, 15 S. E. 562, Milison v. Mutual Cash &c. Ins. Co., 24 S. Dak. 285, 123 N. W. 839, 140 Am. St. 788, and note. See also, 3 Cooley's Briefs Ins., 2630, and see Morotock Ins. Co. v. Rodefer, 92 Va. 747, 24 S. E. 393, 53 Am. St. 846.

[15] Clark v. Manufacturers' Ins. Co., 8 How. (U. S.) 235, 12 L. ed. 1061.

that the governing test on it must be this,—it must be presumed that the insurer has in person or by agent in such a case obtained all the information desired as to the premises insured, or ventures to take the risk without it, and that the insured, being asked nothing, has a right to presume that nothing on the risk is desired from him." This doctrine is followed in many other cases.[16] But there is much conflict among the decisions, and it is held in almost an equal number that there is no such presumption, at least to such extent, and that a condition in the policy is not waived by issuing it without inquiry.[17]

§ 4093. **Incomplete answers to inquiries.**—It is the duty of the applicant to answer fully and fairly all inquiries made with reference to the risk, but if such questions are not answered, or are incompletely answered, and the insurer, without further inquiry, or investigation, issues the policy, he is generally held to have waived his right to a more complete answer and elected to accept the risk with the information actually given. As said by the Supreme Court of the United States:[18] "Where upon the face of

[16] Manchester Fire Ins. Co. v. Abrams, 89 Fed. 932, 32 C. C. A. 426; Glens Falls Ins. Co. v. Michael, 167 Ind. 659, 74 N. E. 964, 79 N. E. 905, 8 L. R. A. (N. S.) 708; Lancaster Ins. Co. v. Monroe, 101 Ky. 12, 19 Ky. L. 204, 39 S. W. 434; Farmers' & Merchants' Ins. Co. v. Mickel, 72 Nebr. 122, 100 N. W. 130; Allesina v. London Ins. Co., 45 Ore. 441, 78 Pac. 392; Peet v. Dakota Fire & Marine Ins. Co., 1 S. Dak. 462, 47 N. W. 532; Dooly v. Hanover Fire Ins. Co., 16 Wash. 155, 47 Pac. 507, 58 Am. St. 26, citing cases.

[17] Dumas v. Northwestern Nat. Ins. Co., 12 App. D. C. 240, 40 L. R. A. 358; Syndicate Ins. Co. v. Bohn, 65 Fed. 165, 12 C. C. A. 531, 27 L. R. A. 614; Orient Ins. Co. v. Williamson, 98 Ga. 464, 25 S. E. 560; In re Millers' & Manufacturers' Ins. Co., 97 Minn. 98, 106 N. W. 485, 4 L. R. A. (N. S.) 231 (citing and reviewing the decisions on both sides); Continental Ins. Co. v. Cummings, 98 Tex. 115, 81 S. W. 705. See also, Wyandotte Brew. Co. v. Hartford Fire Ins. Co., 144 Mich. 440, 108 N. W. 393, 6 L. R. A. (N. S.) 852, 115 Am. St. 458; Weed v. London &c. Ins. Co., 116 N. Y. 106, 22 N. E. 229, but compare Short v. Home Ins. Co., 90 N. E. 16, 43 Am. Rep. 138; Virginia Fire &c. Ins. Co. v. J. I. Case Threshing Machine Co., 107 Va. 588, 59 S. E. 369, 122 Am. St. 875.

[18] Phœnix Life Ins. Co. v. Raddin, 120 U. S. 183, 30 L. ed. 644, 7 Sup. Ct. 500; followed in Marston v. Kennebec Mut. Life Ins. Co., 89 Maine 266, 36 Atl. 389, 56 Am. St. 412. See also, to same effect, Connecticut Ins. Co. v. Luchs, 108 U. S. 498, 27 L. ed. 800, 2 Sup. Ct. 949; and Hall v. People's Mut. Fire Ins. Co., 6 Gray (Mass.) 185; American Ins. Co. v. Mahone, 56 Miss. 180; Higgins v. Phœnix Mut. Life Ins. Co., 74 N. Y. 6, and compare National Mut. Fire Ins. Co. v. Duncan, 44 Colo. 472, 98 Pac. 634, 20 L. R. A. (N. S.) 340n; Lorillard Fire Ins. Co. v. McCulloch, 21 Ohio St. 176, 8 Am. Rep. 52; Lebanon Mut. Ins. Co. v. Kepler, 106 Pa. St. 28. In Parker v. Otsego County Farmers' Co-operative Fire Ins. Co., 47 App. Div. (N. Y.) 204, 62 N. Y. S. 199, affd. 168 N. Y. 655,

the application a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer, and render the omission to answer more fully immaterial." The English courts apply a contrary rule, and in commenting upon one of the leading cases,[19] it is said in the case from which we have just quoted, that so much of the language as "implies that an insurance company is not bound to look with the greatest attention at the answers of an applicant, to the great number of questions framed by the company or its agents, and that the intentional omission of the insured to answer a question put to him is a concealment which will void the policy issued without further inquiry, can hardly be reconciled with the uniform current of American decisions."

§ 4094. Answers calculated to mislead—Irresponsive answers.—Where the matters in question are open to general observation the applicant need not go into details, but may usually make general statements and leave the insurer to inquire further if he desires further information.[20] But though a failure to answer a question or an apparently incomplete answer will not avoid a policy issued without further inquiry, it is the duty of the applicant to give answers which are clear and specific, and not evasive and calculated to mislead.[21] Where a disclosure is required

61 N. E. 1132, the court said: "The failure to answer the question implied in the paragraph referred to, or answering it to a certain point and not completing his answer, was notice to the company simply that he declined to divulge, and the company might not issue to him the policy as it pleased, on such facts as the company had." No breach of warranty, it seems, can be based upon such an answer, as a breach of warranty must be based upon the affirmation of something not true. Dilleber v. Home L. Ins. Co., 69 N. Y. 256, 25 Am. Rep. 182. See also, Penn Mut. Life Ins. Co. v. Wiler, 100 Ind. 92, 50 Am. Rep. 769.

[19] Phœnix Life Ins. Co. v. Raddin, 120 U. S. 183, 30 L. ed. 644, 7 Sup. Ct. 500; London Assur. Co. v. Mansel, L. R. 11 Ch. Div. 363.

[20] Fowler v. Aetna Fire Ins. Co., 6 Cow. (N. Y.) 673, 16 Am. Dec. 460.

[21] Phœnix Life Ins. Co. v. Raddin, 120 U. S. 183, 30 L. ed. 644, 7 Sup. Ct. 500; Moulor v. American Life Ins. Co., 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. 466. A mere checkmark placed after a question cannot be deemed a negative answer when the same kind of marks appear after other questions not answered and deemed immaterial. Manhattan L. Ins. Co. v. Willis, 60 Fed. 236, 8 C. C. A. 594. Intention as to checkmark was left to the jury in French v. Fidelity &c. Co., 135 Wis. 259, 115 N. W. 869, 17 L. R. A. (N. S.) 1011.

it should not be partial, evasive and calculated to deceive, omitting matters of importance or materiality which, if disclosed, would make the answer full.[22] But it is said that, "The answer to a material question may be in itself wholly immaterial, and of no effect. An answer so irresponsive as to leave the fact inquired of wholly undisclosed, the question unanswered, * * * will not avoid the contract, in the absence of fraud."[23]

§ 4095. **Time of concealment.**—The concealment which will invalidate a contract of insurance refers to the time of making the contract, and not to the event itself. It cannot be made to depend upon a subsequent event or upon facts learned by the insured after the risk has attached.[24] But it is generally the duty of the applicant to inform the company of a material change in the risk occurring after the application and before the policy is issued or the contract completed.[25]

§ 4096. **Materiality.**—A fact may be said to be material within the meaning of the rule when it would influence the mind of the insurer in determining whether he would accept the risk, or the amount of the premium charged.[26] It has been said that only such facts as are material to the risk may be availed of; but the better rule is that any fact, the knowledge or ignorance of which would reasonably and materially influence the judgment of the underwriter in making the contract or in determining the pre-

[22] American Life Ins. Co. v. Mahone, 56 Miss. 180. See Sladeen v. New York Life Ins. Co., 86 Fed. 102, 29 C. C. A. 596.

[23] Perine v. Grand Lodge, 51 Minn. 224, 53 N. W. 367.

[24] Lynch v. Dunsford, 14 East 494. See also, Lishman v. Northen Maritime Ins. Co., L. R. 10 C. P. 179; Southern Life Ins. Co. v. Kempton, 56 Ga. 339; Keim v. Home Mut. Fire & Marine Ins. Co., 42 Mo. 38, 97 Am. Dec. 291; Gordon v. United States Casualty Co. (Tenn. Ch. App.), 54 S. W. 98; Mut. Ben. Life Ins. Co. v. Higginbotham, 92 U. S. 380, 24 L. ed. 499.

[25] British Equitable Ins. Co. v. Great Western R. Co., 38 L. J. Ch. 314, 20 L. T. (N. S.) 422; Equitable Life Assur. Soc. v. McElroy, 83 Fed. 631, 28 C. C. A. 365; Whitley v. Piedmont & Arlington Life Ins. Co., 71 N. Car. 480; Thompson v. Travelers' Ins. Co., 13 N. Dak. 444, 101 N. W. 900. See also, Traill v. Baring, 4 DeG. J. & S. 318, 10 L. T. (N. S.) 215; Piedmont &c. Ins. Co. v. Ewing, 92 U. S. 377, 23 L. ed. 610. Contra, Merriman v. Grand Lodge (Nebr.), 110 N. W. 302, 8 L. R. A. (N. S.) 983.

[26] Daniels v. Hudson River F. Ins. Co., 12 Cush. (Mass.) 416, 59 Am. Dec. 192; Clerk v. Union Mut. Fire Ins. Co., 40 N. H. 333, 77 Am. Dec. 721; Waterbury v. Dakota Fire & Marine Ins. Co., 6 Dak. 468, 43 N. W. 697. Misrepresentation as to age is material. Logia Suprema &c. v. De Aguirre (Ariz.), 129 Pac. 503.

mium, is material, and, subject to the limitations already stated, should be disclosed.[27] Matters with reference to which inquiry has been made are nearly always treated as material.[28] In other cases the question of materiality is usually for the jury to determine.[29]

§ 4097. Concealment through inadvertence or negligence. —While the decisions are not uniform, there is high authority for the view that under modern conditions the concealment of a material fact through inadvertence or mistake, and without fraudulent intent, will not invalidate a contract of insurance.[30] This tendency also appears by the enactment of statutes providing that false representations shall not invalidate the contract unless they increase the risk or are fraudulently made; but there are many cases which hold that a false statement of a material fact is sufficient to avoid a policy written on the faith thereof, although it was made through inadvertence or mistake.[31]

[27] Boggs v. American Ins. Co., 31 Mo. 499.

[28] But see National Mut. F. Ins. Co. v. Duncan, 44 Colo. 472, 98 Pac. 634, 20 L. R. A. (N. S.) 340n; Vivar v. Supreme Lodge Knights of Pythias, 52 N. J. L. 455, 20 Atl. 36; with which compare Garrison v. Farmers' Mut. Fire Ins. Co., 56 N. J. L. 235, 28 Atl. 8, and Travelers' Ins. Co. v. Lampkin, 5 Colo. App. 177, 38 Pac. 335.

[29] Penn Mut. L. Ins. Co. v. Mechanics' Savings &c. Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33n (disapproving statement in Provident Sav. Life Assur. Soc. of N. Y. v. Llewellyn, 58 Fed. 940, 7 C. C. A. 579, to the effect that the materiality of insured's having had delirium tremens is a matter of law for the court in any case where injury is not foreclosed by express or implied stipulations); Fidelity & Cas. Co. v. Alpert, 67 Fed. 460, 14 C. C. A. 474. In Reynolds v. Atlas Acc. Ins. Co., 69 Minn. 93, 71 N. W. 831, the question of immateriality was taken from the jury and determined as a question of law. See also, Dolan v. Mutual Reserve Fund L. Assn., 173 Mass. 197, 53 N. E. 398.

[30] Penn Mut. Life Ins. Co. v. Mechanics' Savings &c. Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33n. See also, Rasicot v. Royal Neighbors &c., 18 Idaho 85, 108 Pac. 1048, 138 Am. St. 180, and note. And compare Independent Life Ins. Co. v. Rider, 150 Ky. 505, 150 S. W. 649. If the concealment of a material fact is intentional, it is a case of actual fraud and avoids the contract. Daniels v. Hudson River F. Ins. Co., 12 Cush. (Mass.) 416, 59 Am. Dec. 192.

[31] Carpenter v. American Ins. Co., 1 Story (U. S.) 57, Fed. Cas. No. 2428; Weigle v. Cascade Fife & Mut. Ins. Co., 12 Wash. 449, 41 Pac. 53. See also, note to Fidelity Mut. Life Assn. v. Jeffords, 53 L. R. A. 193; Supreme Lodge Knights and Ladies of Honor v. Payne (Tex.), 108 S. W. 1160, 15 L. R. A. (N. S.) 1277 and note (where the answers are warranties). See Seaton v. Heath, (1899), 1 Q. B. 782; Capital City Ins. Co. v. Autry, 105 Ala. 269, 17 So. 326, 53 Am. St. 121; Triple Link &c. Assn. v. Williams, 121 Ala. 138, 26 So. 19, 37 Am. St. 34; Carrollton Furniture Mfg. Co. v. Am. &c. Indemnity Co., 115 Fed. 77, 52 C. C. A.

§ 4098. **Concealment or misrepresentation by agent.**—An agent for effecting insurance must be held in a proper case to bind his principal by the consequences of his misrepresentation or concealment;[32] and the same principle requires that the knowledge of the agent acquired in the course of the transaction shall be treated as the knowledge of the principal.[33] This rule, with its limitations, is well illustrated by certain English cases dealing with marine insurance. In an early case[34] an agent of the insured was employed to ship a cargo of oats, and to communicate the fact of the shipment to another agent, who was to effect an insurance on the cargo. The former neglected to notify the latter of the loss of the ship, and the insurance was held invalidated. In another case[35] it appeared that the master did not notify the owner that the ship had been lost; and the owner, in ignorance of the fact, effected an insurance on the ship by a policy "lost or not lost." It was held that the captain was bound to communicate the fact to the owner and that there could be no recovery on the policy, although there was no fraud.[36] In a well-known

671; Malichi v. Chicago Guaranty Fund Life Soc., 119 Mich. 151, 77 N. W. 690.

[32] National Life Ins. Co. v. Minch, 53 N. Y. 144. See also, Brown v. Metropolitan L. Ins. Co., 65 Mich. 306, 32 N. W. 610, 8 Am. St. 894; Grattan v. Metropolitan Life Ins. Co., 80 N. Y. 281, 36 Am. Rep. 617. And compare Floyd v. Modern Woodmen, 166 Mo. App. 166, 148 S. W. 178; Gamble v. Metropolitan Life Ins. Co. (S. Car.), 75 S. E. 788.

[33] Clement v. Phœnix Ins. Co., 6 Blatchf. (U. S.) 481, Fed. Cas. No. 2881. See Triple Link Mut. Indemnity Assn. v. Williams, 121 Ala. 138, 26 So. 19, 77 Am. St. 34; Cue v. Connecticut F. Ins. Co. (Kans.), 130 Pac. 664.

[34] In Fitzherbert v. Mather, 1 Term R. 12, Ashhurst, J., said: "On general principles of policy, the act of the agent ought to bind the principal; because it must be taken for granted, that the principal knows whatever the agent knows. And there is no hardship on the plaintiff: for if the fact had been known, the policy could not have been effected."

[35] Gladstone v. King, 1 Maule & S. 35. The loss resulted from the fact thus concealed. The policy was not void, as the insured was allowed to recover back the premium. See comments on this case in Stribley v. Imperial Mar. Ins. Co., L. R. 1 Q. B. Div. 507. The case is criticized in Blackburn v. Vigors, L. R. 12 App. Cas. 531.

[36] In a case where it appeared that at the time of the insurance the agent of the owner knew that the ship had been lost, the court said: "The question arises whether the plaintiff, the assured, is so far affected by the knowledge of his agent of the loss of the vessel and damage to the cargo as that the fraud thus committed on the underwriter through the intentional concealment of the agent, though innocently committed so far as the plaintiff is concerned, will afford a defense to the underwriter on a claim to enforce the policy," and Chief Justice Cockburn said that "if an agent, whose duty it is, in the ordinary course of business, to communicate information to his principal as to the state of the ship or cargo, omits to discharge such duty, and the owner, in the

case[37] it appeared that the owner of an overdue vessel instructed A to procure insurance, but he was unable to do so and so informed the owner. The same instructions were then given to B, with the same results. Another agent then secured the insurance. The vessel had been already lost, and the fact was known to B while he was attempting to secure the insurance. He did not communicate the fact to the owner or to C, and both were ignorant of the loss when the insurance was effected. The Court of Appeals held that there could be no recovery upon the policy, as the knowledge of the agent B must be imputed to the owner. The court below had ordered judgment for the plaintiff on the theory that as B, who had acquired the knowledge, was not the agent through whom the insurance was effected, his knowledge could not be imputed to the owner. This view was adopted by the master of the rolls in the Court of Appeals, who said: "I am prepared to decide this case upon the old, simple, recognized and easily justified rule, that a contract of insurance is rendered abortive by an innocent misrepresentation or concealment of a material fact known to the assured, or to an agent of his by or through whom the contract is made, and which fact the underwriter neither knows or is bound to know, but is not rendered abortive by the misrepresentation or concealment of any other person or agent, whether innocent or fraudulent." The majority of the court, however, held that it was the duty of the agent who acquired the information to communicate it to his principal. Lord Justice Lindley said: "It appears to me to be established * * * that in order to prevent fraud and wilful ignorance on the part of

absence of information as to any fact material to be communicated to the underwriter, effects an insurance, such insurance will be void, on the ground of concealment or misrepresentation. The insurer is entitled to assume, as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has, or, in the ordinary course of business, ought to have knowledge; and that the latter will take the necessary measures, by the employment of competent and honest agents, to obtain, through the ordinary channels of intelligence in use in the mercantile world, all due information as to the subject-matter of the insurance. This condition is not complied with where, by the fraud or negligence of the agent, the party proposing the insurance is kept in ignorance of a material fact, which ought to have been made known to the underwriter and through such ignorance fails to disclose it." Proudfoot v. Montefiore, L. R. 2 Q. B. 511.

[37] Blackburn v. Vigors, L. R. 17 Q. B. D. 553, 55 L. J. Q. B. 347.

persons effecting insurances, no policy can be enforced by an assured who has been deliberately kept in ignorance of material facts by some one, whose moral if not legal duty it was to inform him of them, and who has been kept in such ignorance purposely in order that he might be able to effect insurance without disclosing those facts. * * * It is a condition of the contract that there is no misrepresentation or concealment either by the assured or by any one who ought as a matter of business or fair dealing to have stated or disclosed the facts to him or to the underwriter for him." But the House of Lords reversed this decision, and permitted the plaintiff to recover.[38] A distinction has also been made between an agent to insure and an agent as the master of a ship. Mr. Justice Story held that when the owner, at the time of procuring the insurance, had no knowledge of the loss, but acted with entire good faith, he was not precluded from recovering, and the policy was not rendered void by the omission of the master to communicate intelligence of the loss, although such omission was wilful and fraudulent.[39]

[38] Blackburn v. Vigors, L. R. 12 App. Cas. 531. Lord Watson said that "the responsibility of an innocent insured for the non-communication of facts which happen to be within the private knowledge of persons whom he merely employs to obtain an insurance upon a particular risk, ought not to be carried beyond the person who actually makes the contract on his behalf. There is no authority whatever for enlarging his responsibility beyond that limit, unless it is to be found in the decisions which relate to captains and ship-agents; and these do not appear to me to have any analogy to the case of agents employed to effect a policy. There is a material difference in the relations of these two classes of agents to their employer. The one class is especially employed for the purpose of communicating to him the very facts which the law requires him to divulge to his insurer; the other is employed, not to procure or furnish information concerning the ship, but to effect an insurance. * * * It cannot be reasonably suggested that the insurer relies, to any extent, upon the private information possessed by persons of whose existence he presumably knows nothing." Lord Macnaughton said that it would "be a dangerous extension of the doctrine of constructive notice to hold that persons who are themselves absolutely innocent of any concealment or misrepresentation, and who have not wilfully shut their eyes or closed their ears to any means of information, are to be affected with the knowledge of matters which other persons may be morally though not legally bound to communicate to them."

[39] Ruggles v. General Interest Ins. Co., 4 Mason (U. S.) 74, Fed. Cas. No. 12119, affd. 12 Wheat. (U. S.) 408, 6 L. ed. 674.

CHAPTER CXXI.

REPRESENTATIONS AND WARRANTIES.

§ 4105. Representations—Definition.
4106. Warranties distinguished from representations.
4107. Affirmative and promissory warranties.
4108. Effect of breach of warranty.
4109. Construction of statements in the application.
4110. Application made part of the policy.
4111. Construction.
4112. Oral representations.
4113. Mistake—Good-faith answer.
4114. Statement of expectation or belief.
4115. Effect of minor's false answer and warranty.
4116. Affirmative and promissory representations—Continuing warranties.
4117. Oral promissory representations.
4118. Effect of misrepresentation.
4119. Test of materiality.
4120. Materiality—Opinion of experts.
4121. Burden of proof.
4122. Statutory provisions.
4123. The Massachusetts and Pennsylvania statutes.
4124. Similar provisions in other states.
4125. Controlling force of such statutes.

§ 4105. Representations—Definition.—A statement made by the applicant for insurance pending the negotiations relative to some fact having reference thereto, and upon the faith of which the contract is entered into, is called a representation. It may be verbal or written, and is made before the issuance of the policy with reference to some fact which, by apparently diminishing the risk, may tend to induce the insurer to more readily assume the risk, or to assume it at a lower rate of premium. Such representations are not, strictly speaking, a part of the contract of insurance or of the essence of it, but are sometimes collateral or preliminary thereto or in the nature of an inducement.[1]

§ 4106. Warranties distinguished from representations.—When a representation is carried into the contract and made a

[1] Pawson v. Watson, 2 Cowp. 785, 13 Eng. Rul. Cas. 540; Alabama Gold D. Ins. Co. v. Johnson, 80 Ala. 467, 2 So. 125, 59 Am. Rep. 816; Missouri K. & T. Trust Co. v. German Nat. Bank, 77 Fed. 117, 23 C. C. A. 65. See also, 2 Duer (N. Y.) (1846 ed.), p. 644, claims that a positive representation is not collateral to but a part of the contract. In line with this view is Ellis Insurance 29; Chrisman v. State Ins. Co., 16 Ore. 283, 18 Pac. 466.

part thereof, it usually becomes a warranty, and the question of its materiality is thus settled by the contract of the parties. But the use of the word "warranty" does not always create a warranty in law.[2] A warranty at common law is defined as a stipulation or statement inserted or referred to in, and made a part of, the insurance contract, upon the truth or performance of which the validity of the contract depends.[3] A representation is never, in strictness, a part of the contract of insurance, while a warranty must be inserted in the written contract or at least referred to therein in such a manner as to make it a part thereof.[4] It may be written upon the margin of the policy,[5] but mere reference therein to another paper, unless such paper is referred to and made a part of the policy, is not sufficient.[6] The Supreme Court of Minnesota, in an early case, thus stated the distinction between warranties and representations:[7] "'An express warranty * * * in the law of insurance, is a stipulation inserted in writing on the face of the policy, on the literal truth or fulfilment of which the validity of the entire contract depends. The stipulation is considered to be on the face of the policy, although it may be written in the margin or transversely, or on a subjoined paper referred to in the policy.'[8] A representation as distinguished from a warranty in the law of insurance is 'a verbal or written statement made by the insured to the underwriter, before the subscription of the policy, as to the existence

[2] Continental Life Ins. Co. v. Rogers, 119 Ill. 474, 10 N. E. 242, 59 Am. Rep. 810; Aetna Ins. Co. v. Simmons, 49 Nebr. 811, 69 N. W. 125; Fitch v. American &c. Life Ins. Co., 59 N. Y. 557, 11 Alb. Law J. 91, 17 Am. Rep. 372; Thompson v. Family Protective Union, 66 S. Car. 459, 45 S. E. 19; Reppond v. Nat. Life Ins. Co., 100 Tex. 519, 101 S. W. 768, 11 L. R. A. (N. S.) 981, and note; First Nat. Bank v. Hartford Fire Ins. Co., 95 U. S. 673, 24 L. ed. 563. See also, post, §§ 4109, 4111.

[3] Ripley v. Aetna Ins. Co., 30 N. Y. 136, 86 Am. Dec. 362.

[4] Pawson v. Watson, 2 Cowp. 785, 13 Eng. Rul. Cas. 540; Wheaton v. North British &c. Ins. Co., 76 Cal. 415, 18 Pac. 758, 9 Am. St. 216; Standard Life & Accident Ins. Co. v. Martin, 133 Ind. 376, 33 N. E. 105. As to what language amounts to a warranty, see Daniels v. Hudson River Fire Ins. Co., 12 Cush. (Mass.) 416, 59 Am. Dec. 192.

[5] McLaughlin v. Atlantic Mut. Ins. Co., 57 Maine 170; Patch v. Phœnix Mut. Life Ins. Co., 44 Vt. 481.

[6] Houghton v. Manufacturers' Mut. Fire Ins. Co., 8 Metc. (Mass.) 114, 41 Am. Dec. 489; Aetna Ins. Co. v. Grube, 6 Gil. (Minn.) 32. But see for reference held sufficient, Mutual Ben. Life Ins. Co. v. Miller, 39 Ind. 475. As to meaning of "indorsed," etc., see Reynolds v. Atlas Acc. Ins. Co., 69 Minn. 93, 71 N. W. 831.

[7] Aetna Ins. Co. v. Grube, 6 Gil. (Minn.) 32.

[8] Quoting Angell Ins., § 140, note.

of some fact or state of facts tending to induce the underwriter more readily to assume the risk, by diminishing the estimate he would otherwise have formed of it.'[9] * * * The essential difference between a warranty and a representation is, that in the former it must be literally fulfilled, or there is no contract, the parties having stipulated that the subject of the warranty is material and closed all inquiry concerning it; while in the latter, if the representation prove to be untrue, still if it is not material to the risk, the contract is not avoided."[10] In other words, "the difference between a warranty and a representation is, that a warranty must be true, while a representation must be true only so far as the representation is material to the risk; and it is material when a knowledge of the truth would have induced the insurer to have refused the risk or have charged a higher rate of premium."[11]

§ 4107. **Affirmative and promissory warranties.**—Warranties may be either affirmative or promissory, the former affirming the existence of certain facts at the time of the insurance, and the latter requiring the performance or the omission of certain things after the taking out of the insurance.[12] This is illustrated by a recent case in the Circuit Court of Appeals.[13] A policy insuring

[9] Quoting Angell Ins., § 147.

[10] See Mutual Ben. Life Ins. Co. v. Robison, 58 Fed. 723, 7 C. C. A. 444, 22 L. R. A. 325; Cobb v. Covenant Mut. Ben. Assn., 153 Mass. 176, 26 N. E. 230, 10 L. R. A. 666, 25 Am. St. 619. In Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19, 54 Am. Dec. 309, it was said: "The former precedes and is no part of the contract of insurance, and needs to be only materially true; the latter is a part of the contract and policy, and must be exactly and literally fulfilled, or else the contract is broken and the policy becomes void." And almost the same language is used in Rice v. Fidelity &c. Co., 103 Fed. 427, 43 C. C. A. 270. So, in Wheaton v. North British &c. Ins. Co., 76 Cal. 415, 18 Pac. 758, 9 Am. St. 216, "A representation is clearly distinguishable from a warranty; the former being a part of the proceedings which propose a contract, and the latter a part of the contract when completed."

[11] Mutual Ben. Life Ins. Co. v. Miller, 39 Ind. 475; Chrisman v. State Ins. Co., 16 Ore. 283, 18 Pac. 466. See also, United States Fidelity & Guaranty Co. v. Citizens' Nat. Bank, 147 Ky. 285, 143 S. W. 997; Poultry Producers' Union v. Williams, 58 Wash. 64, 107 Pac. 1040, 137 Am. St. 1041.

[12] Blumer v. Phœnix Ins. Co., 45 Wis. 622. But see Alston v. Mechanics' &c. Ins. Co., 4 Hill (N. Y.) 329.

[13] Hunt v. Fidelity &c. Co., 99 Fed. 242, 30 C. C. A. 496. In this case Judge Wallace says: "It is, at all events, a promise that either at the New York office, or at its general office, or at some other place, the assured would attempt to make a monthly examination, in order to ascertain whether cash in its agent's hands corresponded with the balance which

against loss through the embezzlement of an agent was issued upon an application signed by the applicant which contained answers to questions relative to the subject-matter of the policy. These statements were, by the terms of the policy, "to constitute an essential part and form a basis of the contract," and it was also stated that monthly comparisons were made of the money in the hands of the agent, with the accounts and vouchers. It was held that this was a warranty which the insured was bound to fulfil.[14] So, where, in a marine insurance policy, the insured warranted that his boat should "at all times have a competent watchman on board," it was held that the company was relieved from loss by fire in the absence of the watchman even though he left without the owner's knowledge.[15] But mere promises in regard to the future are not necessarily warranties, and should not be construed and given effect strictly as such unless clearly made warranties.[16]

§ 4108. **Effect of breach of warranty.**—At common law the effect of a warranty is to make void the policy if the statements are not literally true, or if the stipulations are not fully observed without reference to their materiality or the wilfulness of the nonobservance or cause of the loss.[17] The rule was thus stated by Chief Justice Shaw:[18] "If any statement of fact, how-

should be there, according to his accounts. The promissory statement, having been made part of the contract between the parties, by the terms both of the policy and the declaration, was, in effect, a warranty, which the assured was bound to fulfil in substance and according to its meaning. * * * It is quite immaterial that the statement is not called a warranty. It is a stipulation embodied in the contract, by the words of the policy, for the performance of future acts, and, as such, is an express warranty."

[14] See also, Brady v. United L. Ins. Assn., 60 Fed. 727, 9 C. C. A. 252; Missouri, K. & T. Trust Co. v. German Nat. Bank, 77 Fed. 117, 23 C. C. A. 65; Jeffries v. Economical Mut. Life Ins. Co., 22 Wall. (U. S.) 47, 22 L. ed. 833.

[15] Whealton Packing Co. v. Aetna Ins. Co., 185 Fed. 108, 107 C. C. A. 113, 34 L. R. A. (N. S.) 563n. But see McGannon v. Michigan Millers' Mut. Fire Ins. Co., 127 Mich. 636, 87 N. W. 61, 54 L. R. A. 739, 89 Am. St. 501.

[16] King Brick Mfg. Co. v. Phœnix Ins. Co., 164 Mass. 291, 41 N. E. 277. See also, Garcelon v. Hampden Fire Ins. Co., 50 Maine 580; National Bank v. Hartford Fire Ins. Co., 95 U. S. 673, 24 L. ed. 563.

[17] Campbell v. New England &c. Ins. Co., 98 Mass. 381; Cobb v. Covenant Mut. Ben. Assn., 153 Mass. 176, 26 N. E. 230, 10 L. R. A. 666, 25 Am. St. 619; Elder v. Federal Ins. Co. (Mass.), 100 N. E. 655; Price v. Phœnix Mut. Life Ins. Co., 17 Gil. (Minn.) 473, 10 Am. Rep. 166; Ætna L. Ins. Co. v. France, 91 U. S. 510, 23 L. ed. 401.

[18] Daniels v. Hudson River Fire

ever unimportant it may have been regarded by both parties to the contract, is a warranty, and it happens to be untrue, it avoids the policy; if it be construed a representation, and is untrue, it does not avoid the contract if not wilful, or if not material. To illustrate this; the application, in answer to an interrogatory, is this: 'Ashes are taken up and removed in iron hods;' whereas it should turn out in evidence, that ashes were taken up and removed in copper hods; perhaps a set recently obtained, and unknown to the owner. If this was a warranty, the policy is gone; but if a representation, it would not, we presume, affect the policy, because not wilful or designed to deceive; but more especially, because it would be utterly immaterial, and would not have influenced the mind of either party in making the contract, or fixing its terms." But the tendency of most of the more recent authorities is somewhat more liberal and a reasonable construction and effect are given to such promissory provisions so that a substantial performance has often been held sufficient.[19]

§ 4109. Construction of statements in the application.—As a general rule, the statements contained in the application for insurance will be regarded as representations unless they are made a part of the contract of insurance and warranted to be true. Where the application contains certain statements which are certified to be true, but are not referred to in the contract, they are considered as representations, and invalidate the contract only when false and material.[20]

Ins. Co., 12 Cush. (Mass.) 416, 59 Am. Dec. 192.

[19] Liverpool &c. Ins. Co. v. Kearney, 94 Fed. 314, 36 C. C. A. 265, affd. 180 U. S. 132, 45 L. ed. 460, 21 Sup. Ct. 326; McGannon v. Michigan Millers' Mut Fire Ins. Co., 127 Mich. 636, 87 N. W. 61, 54 L. R. A. 739, 89 Am. St. 501; McGannon v. Millers' Nat. Ins. Co., 171 Mo. 143, 71 S. W. 160, 94 Am. St. 778; Hanover Fire Ins. Co. v. Gustin, 40 Nebr. 828, 59 N. W. 375, and cases cited; East Texas Fire Ins. Co. v. Harris. 7 Tex. Civ. App. 647, 25 S. W. 720. See also, Queen Ins. Co. of America v. Vines (Ala.), 57 So. 444; Day v. Home Ins. Co., (Ala.), 58 So. 549; Port Blakely Mill Co. v. Springfield F. &c. Ins. Co., 56 Wash. 681, 106 Pac. 194, 28 L. R. A. (N. S.) 593n. See also, notes in 5 L. R. A. (N. S.) 283; 15 L. R. A. (N. S.) 206; 24 L. R. A. (N. S.) 1174; 25 L. R. A. (N. S.) 1241; 28 L. R. A. (N. S.) 337. But see Snyder v. Home Ins. Co., 133 Fed. 848, affd. 148 Fed. 1021, 79 C. C. A. 536; Norwayz v. Thuringia Ins. Co., 204 Ill. 334, 68 N. E. 551; Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. 379.

[20] Fidelity & Casualty Co. v. Alpert, 67 Fed. 460, 14 C. C. A. 474; McVey v. Grand Lodge, 53 N. J. L. 17. 20 Atl. 873. See also, Title Guaranty &

§ 4110. Application made part of the policy.—An insurance company has, in general, the right to determine the conditions upon which it will issue a policy and to insist upon their fulfilment. When these conditions are expressed in, and made a part of the written contract, their materiality is not open to question. In such cases the intention of the parties is to be gathered from the terms of the contract. The statements of the insured may be thus incorporated as the conditions on which the insurance is undertaken, and when thus made the basis of the contract, if untrue, will render it invalid.[21] But statements made in the application are primarily representations unless made warranties by being incorporated into the contract. The modern practice, made compulsory by statute in some states,[22] is to attach a copy of the application to the policy and to refer thereto by appropriate language in the policy. The two papers thereupon constitute the written agreement of insurance, and must be construed together as containing the conditions, clauses and stipulations upon which the insurance is made. This rule was applied where the application provided that the answers and statements in the application were warranted to be "full, complete and true," and if they are not so, the policy issued thereon shall be "null and void," and that the answers are a part of the policy. In this case the application was not attached to the policy, but the policy contained a clause to the effect that, it was issued in consideration of the answers, statements and agreements contained in the application for this policy of insurance, which are hereby made a part of this contract.[23] But it has been held that a mere general refer-

Surety Co. v. Bank of Fulton, 89 Ark. 471, 117 S. W. 537, 33 L. R. A. (N. S.) 676; Spence v. Central Acc. Ins. Co., 236 Ill. 444, 86 N. E. 104, 19 L. R. A. (N. S.) 88, and note.

[21] Standard Life & Accident Ins. Co. v. Martin, 133 Ind. 376, 33 N. E. 105. See also, Travelers' Ins. Co. v. Lampkin, 5 Colo. App. 177, 38 Pac. 335; Eminent Household of Columbian Woodmen v. Prater, 24 Okla. 214, 103 Pac. 558, 23 L. R. A. (N. S.) 917, and cases cited in note in 19 L. R. A. (N. S.) 88.

[22] See Corson v. Anchor &c. Ins. Co., 113 Iowa 641, 85 N. W. 806; New York L. Ins. Co. v. Hamburger (Mich.), 140 N. W. 510. As to what is sufficient under such a statute see Langdeau v. John Hancock Mut. Life Ins. Co., 194 Mass. 56, 80 N. E. 452, 18 L. R. A. (N. S.) 1190, and note.

[23] Alabama Gold L. Ins. Co. v. Garner, 77 Ala. 210; Fidelity & Cas. Co. v. Alpert, 67 Fed. 460, 14 C. C. A. 474; National Bank v. Hartford Fire Ins. Co., 95 U. S. 673, 24 L. ed. 563. See generally as to what is sufficient and as to whether the medical examination must be attached, the note in 18 L. R. A. (N. S.) 1190, citing the cases on both sides.

ence in a policy to the application will not give its statements the effect of warranties.[24] Warranties will not be created by implication, and if it is the intention that statements shall be warranties, there must be no ambiguity or uncertainty in the language used to express such intention.[25]

§ 4111. **Construction.**—Courts are inclined against forfeitures and do not look with favor upon a strict technical warranty; so, while recognizing the right of the parties to say that matters immaterial in fact shall be regarded as material for the purpose of a particular contract, it will not be assumed that such was their intention unless it is made clearly to appear by the terms of the contract.[26] Even stipulations in the policy in the form of a warranty are often given no greater effect than representations. There is no rule of law which will prevent the parties from inserting statements in the contract which shall be given the force and effect only of a representation;[27] and the mere use of the word warranty with reference to the statements made by the insured is not conclusive that such statements are to be treated as warranties in the strict legal sense.[28] The language must be given a reasonable construction in view of the purposes of the provision

[24] Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567; Supreme Council Royal Arcanum v. Brashears, 89 Md. 624, 43 Atl. 866, 73 Am. St. 244. In the latter case the court said that the question of materiality as well as truth would be for the jury to determine, although specific inquiries had been made.

[25] Supreme Council Royal Arcanum v. Brashears, 89 Md. 624, 43 Atl. 866, 73 Am. St. 244; Moulor v. American Life Ins. Co., 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. 466. See also, Title Guaranty & Surety Co. v. Bank of Fulton, 89 Ark. 471, 117 S. W. 537, 33 L. R. A. (N. S.) 676; Supreme Council Catholic Knights v. Fidelity & Casualty Co., 63 Fed. 48, 11 C. C. A. 96; American Pop. Ins. Co. v. Day, 39 N. J. L. 89, 23 Am. Rep. 198.

[26] Daniels v. Hudson River Fire Ins. Co., 12 Cush. (Mass.) 416, 59 Am. Dec. 192; Fitch v. American &c. Life Ins. Co., 59 N. Y. 557, 11 Alb. Law. J. 91, 17 Am. Rep. 372; Commonwealth Mut. Fire Ins. Co. v. Huntzinger, 98 Pa. St. 41; National Bank v. Hartford Fire Ins. Co., 95 U. S. 673, 24 L. ed. 563. For a statement of the rules of construction of insurance contracts, see Alabama Gold L. Ins. Co. v. Johnson, 80 Ala. 467, 2 So. 125, 59 Am. Rep. 816.

[27] National Bank v. Union Ins. Co., 88 Cal. 497, 26 Pac. 509, 22 Am. St. 324.

[28] See § 4106, note 2. See also, Globe Mut. Life Ins. Assn. v. Wagner, 188 Ill. 133, 58 N. E. 970, 52 L. R. A. 649, 80 Am. St. 169; Kettenbach v. Omaha Life Assn., 49 Nebr. 842, 69 N. W. 135; Royal Neighbors v. Wallace, 64 Nebr. 330, 89 N. W. 758. Compare also, Hoose v. Prescott Ins. Co., 84 Mich. 309, 47 N. W. 587, 11 L. R. A. 340. Warranties are never created by construction: Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567; Duncan v. Sun Fire Ins. Co., 6 Wend. (N.

under consideration.[29] A statement by the applicant, in answer to a question that he understands that untrue answers will render the contract void, will not control the construction. "The statements expressing his understanding of what will be the effect of the insurance are statements not of fact, but of law, and cannot control the legal construction of the policy afterward issued and accepted."[30]

§ 4112. **Oral representations.**—A representation may be either verbal or written, but where a written application is made, it will usually be presumed to contain all representations which were made as an inducement to the contract.[31] In a recent case, however, in which there was no written application but a policy was issued containing the condition that it should be void if there was any concealment or misrepresentation or if the interest of the insured was not truly stated, it was held that an oral representation by the applicant to the agent that he owned the property, when in fact he did not own the land on which the insured build-

Y.) 488, 22 Am. Dec. 539. In McGannon v. Michigan &c. Ins. Co., 127 Mich. 636, 87 N. W. 61, 54 L. R. A. 739, 89 Am. St. 501, it was said: "On the part of the plaintiff it is said the agreement to keep a watchman is a promissory agreement, and not a warranty, the literal observance of which is necessary to keep the policy in force, inasmuch as there is no express provision in the policy that a failure to keep a watchman at all times shall make the policy void. The authorities upon these several propositions are very conflicting. The old rule as to warranties fully sustains the contention of counsel for defendant, but there has been a tendency of late years to hold that the substantial fulfilment of an agreement like that contained in the application is sufficient. In May Ins. § 156, it is said, after the language before quoted: 'A learned judge and author declares it to be unfortunate that so strict a rule has been established, and intimates—what is no doubt entirely true—that courts are not at all inclined to go beyond the precedents to support a warranty. There are even authorities to the effect that in dealing with warranties common sense is not to be lost sight of, and that the fair, practical intent of the parties is to be sought, not the hair-splitting of a college of wit crackers, and that substantial fulfilment of a warranty is enough.'"

[29] See note to Fowler v. Ætna Fire Ins. Co., 6 Cow. (N. Y.) 673, 16 Am. Dec. 460.

[30] Accident Ins. Co. v. Crandal, 120 U. S. 527, 30 L. ed. 740, 7 Sup. Ct. 685. See also, Life Ins. Co. v. Hairston, 108 Va. 832, 62 S. E. 1057, 128 Am. St. 989.

[31] Where a written application is made the company has no right to rely upon a verbal representation made to its agent. Dolliver v. St. Joseph Fire &c. Ins. Co., 131 Mass. 39. Previous verbal statements were merged in the policy in Union Mut. Life Ins. Co. v. Mowry, 96 U. S. 544, 24 L. ed. 674. Executory verbal contract made at the time written policy is issued with reference to the future cannot be shown. Hartford Fire Ins. Co. v. Davenport, 37 Mich. 609. But see McMaster v. New York Life Ins. Co., 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. 10.

ing was situated, was a misrepresentation sufficient to avoid the insurance upon the building.[32]

§ 4113. **Mistake—Good-faith answer.**—As already intimated, there is considerable conflict among the decisions as to the effect of innocent failure to make full disclosure and incorrect answers made in good faith. The strict rule in regard to warranties is almost universally recognized, in the absence of statutory change, but, as we have shown, it is not everything purporting in some way to be a warranty that is considered such within the rule, and there are many cases which hold that the element of good faith enters so far into the construction of some statements made in the form of warranties that it is enough if they are substantially true. In a leading case in the Supreme Court of the United States the insured had warranted "that the above are fair and true answers." In fact, the application contained the untrue statement that the applicant had not been afflicted with a certain disease. The court said:[33] "The entire argument in behalf of the company proceeds upon a too literal interpretation of those clauses in the policy and application which declare the contract null and void if the answers of the insured to the questions propounded to him were, in any respect, untrue. What was meant by 'true' and 'untrue' answers? In one sense, that only is true which is conformable to the actual state of things. In that sense a statement is untrue which does not express things exactly as they are. But in another and broader sense the word 'true' is often used as a synonym of honest, sincere, not fraudulent. Looking at all the clauses in the application, in connection with the policy, it is reasonably clear—certainly the contrary cannot be confidently asserted—that what the company required of the applicant, as a condition precedent to any binding contract, was that he would observe the utmost good faith toward it, and to make full, direct and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation or concealment of facts with which the company ought to be

[32] Milison v. Mut. Cash &c. Ins. Co., 24 S. Dak. 285, 123 N. W. 839, 140 Am. St. 788.

[33] Moulor v. American Life Ins. Co., 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. 466.

made acquainted; and that by so doing, and only by so doing, would he be deemed to have made 'fair and true' answers." So, it has been held in a number of recent cases that answers of this kind in regard to health may be considered as merely in the nature of representations or, at the most, of warranties of honesty and good faith which will not invalidate the policy when made in good faith or not material.[34] But there are many decisions directly to the contrary on this very question, and it is said that such is the weight of authority.[35] In a recent Illinois case[36] it was held that a statement by an applicant for insurance that none of his brothers were dead will not, although false, avoid the policy unless he knew it to be false, under a policy warranting the statements to be true, and that they shall form the basis of any contract entered into. And in a recent case in Iowa it was held that the policy was not avoided by untrue answers which were so written by the agent of the insurance company, without fault of the applicant, and did not influence the taking of the risk.[37]

§ 4114. Statement of expectation or belief.—A statement of expectation or belief, unless fraudulently made, will not avoid a policy.[38] But there is a clear distinction between a case of this

[34] Rasicot v. Royal Neighbors, 18 Idaho 85, 108 Pac. 1048, 138 Am. St. 180, and note; Ranta v. Supreme Tent Knights of Maccabees, 97 Minn. 454, 107 N. W. 156; Blackman v. United States Casualty Co., 117 Tenn. 578, 103 S. W. 784. See also, Franklin Life Ins. Co. v. Galligan, 71 Ark. 295, 73 S. W. 102, 100 Am. St. 73.

[35] Standard Life & Accident Ins. Co. v. Sale, 121 Fed. 664, 57 C. C. A. 418, 61 L. R. A. 337; Metropolitan Life Ins. Co. v. Brubaker, 78 Kans. 146, 96 Pac. 62, 18 L. R. A. (N. S.) 362n, 130 Am. St. 356; note to Supreme Lodge, Knights & Ladies of Honor v. Payne, 101 Tex. 449, 108 S. W. 1160, in 15 L. R. A. (N. S.) 1277n; Mutual Life Ins. Co. v. Simpson, 88 Tex. 333, 31 S. W. 501, 28 L. R. A. 765, 53 Am. St. 757; Schofield's Admx. v. Metropolitan Life Ins. Co., 79 Vt. 161, 64 Atl. 1107; Fraser v. Ætna Life Ins. Co., 114 Wis. 510, 90 N. W. 476.

[36] Globe Mut. Life Ins. Assn. v. Wagner, 188 Ill. 133, 58 N. E. 970, 52 L. R. A. 649, 80 Am. St. 169. To the same effect, see Fidelity &c. Life Assn. v. Jeffords, 107 Fed. 402, 46 C. C. A. 377, 53 L. R. A. 193.

[37] Roe v. Nat. L. Assn,, 137 Iowa 696, 115 N. W. 500, 17 L. R. A. (N. S.) 1144 (with note on effect of stipulation requiring delivery while in good health). Compare also Fidelity &c. Co. v. Meyer (Ark.), 152 S. W. 995. But see Mudge v. Supreme Court I. O. F., 149 Mich. 467, 112 N. W. 1130, 14 L. R. A. (N. S.) 279n, 119 Am. St. 686; Supreme Lodge, Knights & Ladies of Honor v. Payne, 101 Tex. 449, 108 S. W. 1160, 15 L. R. A. (N. S.) 1277n, and see note in 4 L. R. A. (N. S.) 607.

[38] "The mere statement of belief or expectation, which is not borne out

character and one where the insured intentionally and fraudulently states, as a matter of expectation or belief, that which he then knows to be actually untrue,[39] or where the facts within his knowledge show to him that it is impossible that the matter stated by him as one of belief or expectation can exist or happen.[40] Here the intent to deceive the insurer is apparent, and there is actual fraud, which vitiates the contract where the insurer is misled or deceived in acting to his injury when he otherwise would not have so acted.[41] And a positive statement may bind the applicant, although it was based upon information obtained from other parties. If he does not wish to vouch for the truth of a statement it is his duty to make it in a qualified form, and disclose the fact that the information is derived from others, and that he does not vouch for its accuracy.[42]

§ 4115. Effect of minor's false answer and warranty.—It has been held that a minor is not bound by his warranty in a contract for life insurance and that the policy may be enforced where he has died before reaching his majority.[43] But a different view was taken by the Supreme Court of Kansas in a recent case[44] and

by the event, is not, unless made mala fide by a person who entertains no such belief or expectation, a representation such as to avoid the policy; and a statement as to a future event made by a person who has obviously no control over the event, is regarded as a mere statement of an expectation." Rule as stated in 13 Eng. Rul. Cas. 531. See also, Fisher v. Crescent Ins. Co., 33 Fed. 549; Rasicot v. Royal Neighbors, 18 Idaho 85, 108 Pac. 1048, 138 Am. St. 180, and note; Clapp v. Massachusetts Ben. Assn., 146 Mass. 519, 16 N. E. 433; Rupert v. Supreme Court, 94 Minn. 293, 102 N. W. 715; Owen v. Metropolitan Life Ins. Co., 74 N. J. L. 770, 67 Atl. 25, 122 Am. St. 413; Blackman v. U. S. Casualty Co., 117 Tenn. 578, 103 S. W. 784.

[39] Hunt v. Fidelity & Casualty Co., 99 Fed. 242, 39 C. C. A. 496; Bryant v. Ocean Ins. Co., 22 Pick. (Mass.) 200.

[40] Barber v. Fletcher, 1 Doug. 305, 13 Eng. Rul. Cas. 532; Bowden v. Vaughan, 10 East 415, 10 Rev. Rep. 340, 13 Eng. Rul. Cas. 533; Anderson v. Pacific F. & M. Ins. Co., L. R. 7 C. P. 65.

[41] Joyce Ins., § 1904; Herrick v. Union Mut. Fire Ins. Co., 48 Maine 558, 77 Am. Dec. 244.

[42] Williams v. Delafield, 2 Caines (N. Y.) 329; Tidmarsh v. Washington Fire & Marine Ins. Co., 4 Mason (U. S.) 439 Fed. Cas. No. 14024. See also, Metropolitan L. Ins. Co. v. Brubaker, 78 Kans. 146, 96 Pac. 62, 18 L. R. A. (N. S.) 362n, 130 Am. St. 356; Cobb v. Covenant Mut. Ben. Assn., 153 Mass. 176, 26 N. E. 230, 10 L. R. A. 666, 25 Am. St. 619; Supreme Lodge, Knights & Ladies of Honor v. Payne, 101 Tex. 449, 108 S. W. 1160, 15 L. R. A. (N. S.) 1277n.

[43] O'Rourke v. John Hancock Mut. Life Ins. Co., 23 R. I. 457, 50 Atl. 834, 57 L. R. A. 496, 91 Am. St. 643 (also holding the company charged with knowledge as to what its records showed in regard to a previous application).

[44] Metropolitan Life Ins. Co. v. Brubaker, 78 Kans. 146, 96 Pac. 62, 18

the decision in case first referred to was expressly disapproved. The court in the Kansas case held that the beneficiary could not disaffirm the warranty on the ground that the applicant was a minor and at the same time enforce the policy which was regarded as an entirety.

§ 4116. Affirmative and promissory representations—Continuing warranties.—A representation is ordinarily of an existing fact. If an existing condition is required by the insurer to be continued during the life of the contract he should insert it in the contract and make it a condition in the nature of a warranty. A mere statement that a certain condition exists at the time a representation is made—as that smoking is not allowed on the premises—is not a stipulation that it will continue to exist.[45] So a representation by an applicant for accident insurance that he is a switchman does not require him to remain in that occupation when the policy contains no provision against a change of occupation.[46] A representation that a force pump and an abundance of water exist for the extinguishing of fire is not an agreement that the pump shall be kept in good condition for such use.[47] So, a statement in an application that a house is occupied is descriptive only and is not a warranty that it will be occupied during the existence of the risk.[48] A representation that the property insured is a private dwelling-house is not a promise that it will not be used for other purposes.[49] A statement that a building would be occupied by a tenant is a mere statement of expectation.[50] The words, "no stoves used," do not create a continuing warranty that stoves will not be used in the future.[51] So, "ashes are thrown out," is not a continuing warranty.[52] But a statement that a watchman is kept on the premises when a mill is not in operation

L. R. A. (N. S.) 362n, 130 Am. St. 356.

[45] Hosford v. Germania Fire Ins. Co., 127 U. S. 399, 32 L. ed. 196, 8 Sup. Ct. 1199.

[46] Provident Life Ins. Co. v. Fennell, 49 Ill. 180.

[47] Gilliat v. Pawtucket Mut. Fire Ins. Co., 8 R. I. 282, 91 Am. Dec. 229.

[48] Cumberland Valley Mutual Protection Co. v. Douglas, 58 Pa. St. 419, 98 Am. Dec. 298.

[49] Rafferty v. New Brunswick Fire Ins. Co., 18 N. J. L. 480, 38 Am. Dec. 525.

[50] Herrick v. Union Mut. Fire Ins. Co., 48 Maine 558, 77 Am. Dec. 244.

[51] Aurora Fire Ins. Co. v. Eddy, 55 Ill. 213.

[52] Hartford Protection Ins. Co. v. Harmer, 2 Ohio St. 452, 59 Am. Dec. 684.

has been construed as a promise that the practice will be continued.[53] And a policy may contain an express covenant as to the future, the breach of which will invalidate the contract.[54] Where an applicant for life insurance stated that he had not or would not practice any pernicious habits tending to shorten life, but there was no stipulation that a violation of this statement would void the policy, it was held to apply only to an existing state of facts, and that the statement as to the future was a mere expression of intention.[55] But, as shown in the note, a contrary decision was reached by the federal court in considering the same contract.

§ 4117. **Oral promissory representations.**—The distinction between affirmative and promissory representations is generally recognized by the courts and text writers, although the authorities are somewhat conflicting. As already shown, however, an ordinary representation is not a part of the contract between the insurer and the insured, and if a statement with reference to a future fact is to have force it should be inserted in the policy, or in the application, and referred to in the policy in such a manner as to make it a part thereof. Chancellor Walworth, indeed, after an exhaustive review of the authorities, arrived at the conclusion that there could be no such thing as a promissory warranty.[56] In a federal case[57] it is said that "an actual promise, if oral, cannot be

[53] Blumer v. Phœnix Ins. Co., 45 Wis. 622. But compare King Brick Mfg. Co. v. Phœnix Ins. Co., 164 Mass. 291, 41 N. E. 277; McGannon v. Michigan Millers' Mut. Fire &c. Ins. Co., 127 Mich. 636, 87 N. W. 61, 54 L. R. A. 739, 89 Am. St. 501; Hart v. Niagara Fire Ins. Co., 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86.

[54] Houghton v. Manufacturers' Mut. Fire Ins. Co., 8 Metc. (Mass.) 114, 41 Am. Dec. 489. See §§ 4107, 4108.

[55] Knecht v. Mutual Life Ins. Co., 90 Pa. St. 118, 35 Am. Rep. 641. The policy contained a provision to the effect that it should be void if any of the statements and declarations made in the application, upon the faith of which the policy was issued, should be found in any respect untrue. But see contra, on the same policy, Schultz v. Mutual Life Ins. Co., 6 Fed. 672. Compare, however, United States Fidelity & Guaranty Co. v. Citizens' Nat. Bank, 147 Ky. 285, 142 S. W. 997.

[56] Alston v. Mechanics' &c. Ins. Co., 4 Hill (N. Y.) 329. See note to Bowden v. Vaughan, 13 Eng. Rul. Cas. 533.

[57] In Albion Lead Works v. Williamsburg City Fire Ins. Co., 2 Fed. 479, the court said: "It is impossible to reconcile the decisions upon this question of a continuing warranty. When an underwriter asks about the particulars of a risk he probably takes for granted that things will continue as they are; but when the courts are asked to convert this impression into a covenant, and make words in the present tense operate as a stipulation for the future, there is difficulty, and the authorities are doubtful and divided. The result, as

given in evidence to defeat a policy which has once attached. * * * I have seen no case which holds that an oral statement of a fact could be construed into a continuing warranty or promise when the contract is in writing." A leading Massachusetts case,[58] makes a clear distinction between oral and written promises, and holds that the latter are binding, but that a breach of an oral promise will not avoid the policy unless fraud is shown. The rule deducible from the authorities is that while promissory repre-

far as I can gather it, is that when the fact appears to the court to be a very important one, such as the employment of a watchman, a majority of them have said that this ought to be considered a part of a continuing engagement. When the fact does not appear to be so important, as that a dwelling-house is occupied, or that a clerk sleeps in the store, it is not of that character." As said by May (May on Insurance (3d. ed.), § 250): "It is obvious that the test here given—the greater or less importance of the fact—is practically no test at all; and it is to be regretted that there has been any departure from the salutary rule that the courts will not find warranties where the parties have not clearly made them. It would have been fortunate if they had found more difficulty in converting 'impressions' or expectations into covenants."

[58] Kimball v. Aetna Ins. Co., 9 Allen (Mass.) 540, 85 Am. Dec. 786, where it is said: "The word 'representations' has not always been confined in use to representations of facts existing at the time of making the policy, but has been sometimes extended to statements made by the assured concerning what is to happen during the term of the insurance; in other words, not to the present, but to the future; not to facts which any human being knows or can know, but to matters of expectation or belief, or of promise and contract. Such statements (when not expressed in the form of a distinct and explicit warranty which must be strictly complied with) are sometimes called 'promissory representations' to distinguish them from those relating to facts or 'affirmative representations.' And these words express the distinction: the one is an affirmation of a fact existing when the contract begins; the other is a promise, to be performed after the contract has come into existence. Falsehood in the affirmation prevents the contract from ever having any life; breach of the promise could only bring it to a premature end. A promissory representation may be inserted in the policy itself; or it may be in the form of a written application for the insurance, referred to in the policy in such a manner as to make it in law a part thereof; and in either case the whole instrument must be construed together. But this written instrument is the expression and the only evidence, of the duties, obligations, and promises to be performed by each party while the insurance continues. To make the continuance or termination of a written contract, which has once taken effect, dependent upon the performance or breach of an earlier oral agreement would be to violate a fundamental rule of evidence. A representation that a fact now exists may be either oral or written; for, if it does not exist, there is nothing to which the contract can apply. But an oral representation as to a future fact, honestly made, can have no effect; for, if it is a mere statement of an expectation, subsequent disappointment will not prove that it was untrue; and if it is a promise that a certain state of facts shall exist, or continue during the term of the policy, it ought to be embodied in the written contract." As to promissory representations, see further, Prudential Assur. Co. v. Aetna Life Ins. Co., 52 Conn. 576; Houghton v. Manufacturers' Mut. Fire Ins. Co., 8 Metc. (Mass.) 114, 41 Am. Dec. 489; Prudential

sentations are recognized and enforced,[59] it is only those that are reduced to writing and made a part of the contract in the nature of a warranty that are available.[60] An oral promissory representation made in good faith, without an intention to mislead or deceive, cannot be shown for the purpose of destroying a written contract which has already attached. But when such a promise is made in bad faith, with the intent to deceive and mislead the insurer, it may be given the same effect as an affirmative representation.

§ 4118. **Effect of misrepresentation.**—A representation, if false and material, avoids the policy, and this is generally true whether it was fraudulently or innocently made.[61] But there are cases in which innocent misrepresentations, without gross negligence, have been held not to avoid the policy,[62] and a representation, to avoid the contract, must usually be both false and mate-

Assur. Co. v. Aetna Life Ins. Co., 23 Blatchf. (U. S.) 223, 23 Fed. 438; Wytheville Ins. & Banking Co. v. Stultz, 87 Va. 629, 13 S. E. 77.

[59] Phillips Ins. (3d ed.), § 553; Duer Mar. Ins. (ed. 1845) 647, 749; Joyce Ins., § 1917, note; Straker v. Phœnix Ins. Co., 101 Wis. 413, 77 N. W. 752.

[60] "While a material falsity of an affirmative representation will be a complete defense to an action on a policy of insurance, the material falsity of an oral promissory representation without fraud is no defense whatever. And the reason of the distinction is this. The falsehood of the representation of a material fact misleads the insured into a contract which he does not intend to make. * * * He may, therefore, set up the fact that he was misled or deceived, as proof that no agreement was ever made, since there was no concurrence of consent upon the same facts. But an oral promissory representation, being an agreement prior in date to the actual contract of insurance, and in its nature such that it cannot be performed until after the contract of insurance had taken effect, cannot be set up to defeat the latter contract; for this would be to violate a fundamental rule of evidence, and make the continuance or maintenance of a written contract dependent upon the performance or breach of an earlier oral agreement. If the oral promise be made mala fide, and with the intention to mislead and deceive, the fraud will have the same effect as the material falsity of an affirmative representation. But if made bona fide and without the intention to mislead or deceive, it cannot be set up to avoid the contract. Only those promissory representations are available for such a purpose which are deduced to writing and made a part of the contract,—thus becoming substantially, if not formally, warranties." May on Insurance, § 182.

[61] Provident Sav. Life Assur. Soc. v. Llewellyn, 58 Fed. 940, 7 C. C. A. 579; Armour v. Transatlantic F. Ins. Co. of Germany, 90 N. Y. 450. See also, Lewis v. Eagle Ins. Co., 10 Gray (Mass.) 508, and see Wood v. Fireman's Fire Ins. Co., 126 Mass. 316.

[62] See Penn Mut. Life Ins. Co. v. Mechanics' Savings &c. Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33; Seal v. Farmers' & Merchants' Ins. Co., 59 Nebr. 253, 80 N. W. 807; Columbia Ins. Co. v. Cooper, 50 Pa. St. 331.

rial.[63] Yet where actual fraud exists—that is, where it clearly appears that the insurer was induced to issue the policy by the intentionally false statements of the insured—it has been held that the materiality is conclusively presumed and need not be proved.[64] Thus, where the applicant fraudulently represented that he was the moneyed man of the firm, and thereby induced the insurer to take the risk, the policy was held avoided, although the fact was immaterial to the risk.[65] Representations as to material facts must be substantially true, but in this respect representations are generally construed less strictly than warranties.[66]

§ 4119. **Test of materiality.**—The materiality of a representation is determined, in general, by the same rules already found applicable in the case of concealment.[67] If the representation is of such a nature as would probably induce the insurer, being governed by the rules which ordinarily control intelligent, prudent underwriters, to take the risk, or to accept it at a lower premium than he otherwise would, it is material. The test is the probable effect which the statement might naturally and reasonably be expected to produce on the mind of the insurer,[68] and not necessarily the fact that it actually increased the risk.[69] But the

[63] Vivar v. Supreme Lodge, 52 N. J. L. 455, 20 Atl. 36; Clason v. Smith, 3 Wash. (U. S.) 156, Fed. Cas. No. 2868. Designating the beneficiary as "bearing to me the relationship of cousin" has been held to be a mere direction as to whom the insurance should be paid upon death of the insured and not a warranty or false representation and not to avoid the benefit certificate, though the beneficiary was not a cousin. Cunat v. Supreme Tribe of Ben Hur, 249 Ill. 448, 94 N. E. 925, 34 L. R. A. (N. S.) 1192; Minnesota Mut. L. Ins. Co. v. Link, 230 Ill. 273, 82 N. E. 637. See also, Standard Life & Accident Ins. Co. v. Martin, 133 Ind. 376, 33 N. E. 105; Supreme Lodge A. O. U. W. v. Hutchinson, 6 Ind. App. 399, 33 N. E. 816.

[64] Pawson v. Watson, 2 Cowp. 785, 13 Eng. Rul. Cas. 540.

[65] Valton v. National Fund Life Assur. Co., 20 N. Y. 32.

[66] Missouri, K. & T. Trust Co. v. German Nat. Bank, 77 Fed. 117, 23 C. C. A. 65; Phœnix Life Ins. Co. v. Raddin, 120 U. S. 183, 30 L. ed. 644, 7 Sup. Ct. 500; Poultry Producers' Union v. Williams, 58 Wash. 64, 107 Pac. 1040, 137 Am. St. 1041.

[67] See § 4096.

[68] Waterbury v. Dakota Fire & Marine Ins. Co., 6 Dak. 468, 43 N. W. 697; Perine v. Grand Lodge, 51 Minn. 224, 53 N. W. 367; Columbia Ins. Co. v. Lawrence, 10 Pet. (U. S.) 507, 9 L. ed. 512. If the circumstances show that the insurer did not rely upon the misrepresentation, and that it did not induce him to make the contract, it is immaterial. Flinn v. Headlam, 9 Barn. & C. 693.

[69] Valton v. National Fund Life Assur. Co., 20 N. Y. 32. See also, to "moral risk," Connecticut Fire Ins. Co. v. Manning, 160 Fed. 382, 87 C. C. A. 334, 15 Am. & Eng. Ann. Cas. 338; Madsen v. Farmers' &c. Ins. Co., 87 Nebr. 107, 126 N. W. 1086, 29 L. R. A. (N. S.) 97.

parties may by express stipulation preclude inquiry into the question of materiality,[70] as is usually the case where a representation is made in the form of an answer to a specific question. The parties may thus, unless restrained by statute, make material a fact which otherwise would be immaterial.[71] The question of materiality, when not thus determined, is usually for the jury.[72]

§ 4120. **Materiality—Opinion of experts.**—Decisions dealing with the question of the right of an expert to testify as to whether a certain fact is material or not are in a state of confusion. In a federal case, after an elaborate review of the authorities, the court held that the question of the materiality is always for the jury, unless the answers in the application are expressly made the basis of the contract; and even then, where the statute provides that innocent misrepresentations in matters not material to the risk shall constitute no defense; that by the weight of authority in this country an insurance expert cannot be asked his opinion whether an undisclosed or misrepresented fact is or is not material to the risk; but he may be asked concerning the usages of insurance companies generally in respect to rejecting risks or charging a higher rate of premium when made aware of the fact in question.[73]

§ 4121. **Burden of proof.**—The burden of proof to establish the materiality of the concealment or misrepresentation, as well as the fraudulent intent, where that is necessary, is upon the

[70] Stensgaard v. St. Paul Real Estate Title Ins. Co., 50 Minn. 429, 52 N. W. 910, 17 L. R. A. 575; Cerys v. State Ins. Co. of Des Moines, 71 Minn. 338, 73 N. W. 849. See language of Lord Chancellor Cranworth in Anderson v. Fitzgerald, 4 H. L. Cas. 484.

[71] Miller v. Mut. Ben. Life Ins. Co., 31 Iowa 216, 7 Am. Rep. 122; Phœnix Life Ins. Co. v. Raddin, 120 U. S. 183, 30 L. ed. 644, 7 Sup. Ct. 500. Under such circumstances the court must rule whether the matter is material, and the jury then determines its truth. Of course, the answer may be so irresponsive as to leave the question unanswered. In the absence of fraud, such an answer is immaterial. Perine v. Grand Lodge, 51 Minn. 224, 53 N. W. 367.

[72] Manufacturers' &c. Ins. Co. v. Zeitinger, 168 Ill. 286, 48 N. E. 179, 61 Am. St. 105; Caplis v. American Fire Ins. Co., 60 Minn. 376, 62 N. W. 440, 51 Am. St. 535. Whether true or not is for the jury. National Council of Knights & Ladies of Security v. Wilson, 147 Ky. 293, 143 S. W. 1000.

[73] Penn Mut. Life Ins. Co. v. Mechanics' Savings &c. Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33.

defendant.[74] This burden is not shifted where it is admitted that the insured made an untrue answer concerning other insurance, for if there is a presumption that his failure to mention it was intentional, there is also a presumption that a person does not make a fraudulent misstatement, and the question is for the jury upon all the evidence.[75] But in case of a warranty, which is in the nature of a condition precedent, it has been held that the plaintiff must aver and prove the strict performance of such conditions.[76] This, however, is said not to be applicable to "representations amounting to warranties, which are contained in the application only." A defendant who relies upon such a warranty must allege it and assume the burden of proof.[77] A condition subsequent in

[74] Penn Mut. Life Ins. Co. v. Mechanics' Savings &c. Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33; Grangers' Life Ins. Co. v. Brown, 57 Miss. 308, 34 Am. Rep. 446; Jones v. Brooklyn Life Ins. Co., 61 N. Y. 79; Piedmont &c. Ins. Co. v. Ewing, 92 U. S. 377, 23 L. ed. 610. See also, 3 Elliott Ev., § 2301; Life Ins. Co. v. Hairston, 108 Va. 832, 62 S. E. 1057, 128 Am. St. 989. But in the case of warranties it has been held that no evidence is admissible as to immateriality. Aloe v. Mutual &c. Assn., 147 Mo. 561, 49 S. W. 553; Hartman v. Keystone Ins. Co., 21 Pa. St. 466; Columbian Ins. Co. of Alexandria v. Lawrence, 2 Pet. (U. S.) 25, 7 L. ed 335.

[75] Penn Mut. Life Ins. Co. v. Mechanics' Savings &c. Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33. See also, 3 Elliott Ev., §§ 2293, 2302, 2374 and numerous cases cited; Phœnix Ins. Co. v. Stocks, 149 Ill. 319, 36 N. E. 408; Penn Mut. Life Ins. Co. v. Wiler, 100 Ind. 92, 50 Am. Rep. 769; Sweeney v. Metropolitan &c. Ins. Co., 19 R. I. 171, 36 Atl. 9, 39 L. R. A. 297, 61 Am. St. 751.

[76] American Credit &c. Co. v. Wood, 73 Fed. 81, 19 C. C. A. 264; McLoon v. Commercial Mut. Ins. Co., 100 Mass. 472, 1 Am. Rep. 129, 97 Am. Dec. 116. As to manner of pleading performance, see Hart v. National Masonic Acc. Assn., 105 Iowa 717, 75 N. W. 508. A waiver or estoppel cannot be shown unless pleaded. McCoy v. Iowa State Ins. Co., 107 Iowa 80, 77 N. W. 529.

[77] American Credit &c. Co. v. Wood, 73 Fed. 81, 19 C. C. A. 264, where the court said: "The rule requiring the performance of warranties to be averred and proved was engrafted into the law of insurance before it was customary for underwriters to inquire of the insured the full and detailed applications which are a feature of so much prominence in the modern contract,—especially in the contract of life insurance. The policy is the evidence delivered to the insured of the contract of the insurer, and ordinarily, of itself constitutes complete evidence of the contract, while the application, although it may modify the contract, is in the nature of defensive evidence entrusted to the insurer for his protection. As a matter of pleading, if the policy is set forth, and compliance with all the conditions precedent recited in it is averred, there is no necessity for referring to the application, and the complaint or declaration is sufficient upon its face. Nothing is required to be proved which does not go to support some necessary allegation in the complaint, and there seems to be no good reason which requires the plaintiff to assume the burden of proving affirmatively the truth of the statements in an application not challenged by the defendant." See also, the remarks of Mitchell, J., in Coburn v. Travelers' Ins.

the policy, as an agreement to use diligence and care for the preservation of the property, need not be pleaded by the plaintiff as it is a matter of defense.[78]

§ 4122. **Statutory provisions.**—The manifest unfairness and injustice resulting from considering statements, even though otherwise immaterial, as strict warranties, has led to the enactment of statutes in a number of states which provide a rule of construction for such provisions in insurance contracts. These statutes are remedial and are sustained as proper regulations of the business of insurance. The Ohio statute was recently before the Supreme Court of the United States, and the court said:[79] "It was for the legislature of Ohio to define the public policy of that state in respect of life insurance, and to impose such conditions on the transaction of business by life insurance companies within the State as was deemed best. We do not perceive any arbitrary classification or unlawful discrimination in the legislation, but, at all events, we cannot say that the Federal Constitution has been violated in the exercise in this regard by the State of its undoubted power over corporations."

§ 4123. **The Massachusetts and Pennsylvania statutes.**—The Massachusetts statute providing that "no oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance, by the assured or in his behalf, shall be deemed material or defeat or avoid the policy, or prevent its attaching, unless such misrepresentation or warranty is made with actual intent to deceive, or unless the matter misrepresented or made a warranty increased the risk of the loss,"[80] was held to

Co., 145 Mass. 226, 13 N. E. 604; Malicki v. Chicago Guaranty Fund Life Soc., 119 Mich. 151, 77 N. W. 690; Chambers v. Northwestern &c. Ins. Co., 64 Minn. 495, 67 N. W. 367, 58 Am. St. 549, and Hale v. Life Indemnity &c. Co., 65 Minn. 548, 68 N. W. 182, overruling Price v. Phœnix Mut. Life Ins. Co., 17 Gil. (Minn.) 473, 10 Am. Rep. 166. And see as to the effect of the presumption of truth, Hennessy v. Metropolitan Life Ins. Co., 74 Conn. 699, 52 Atl. 490; Sweeney v. Metropolitan &c. Ins. Co., 19 R. I. 171, 36 Atl. 9, 39 L. R. A. 297, 61 Am. St. 751.

[78] Johnston v. Northwestern Live Stock Ins. Co., 94 Wis. 117, 68 N. W. 868. See also, Kline v. Royal Ins. Co., 192 Fed. 378.

[79] John Hancock Mut. Life Ins. Co. v. Warren, 181 U. S. 73, 45 L. ed. 755, 21 Sup. Ct. 535, referring to § 3625. Ohio Rev. Stat.

[80] Mass. Acts (1895) ch. 271, amending Pub. Stat. ch. 119, § 181. The Minnesota statute (Laws 1895, ch. 175, § 20) is a copy of the Mas-

apply to all contracts of insurance and affect strict warranties as well as representations. In a case decided before the words "or made a warranty" in the last line were inserted, the court said:[81] "As to mere representations the statute may well be held to be only declaratory, but as to warranties it made a new rule. In the opinion of a majority of the court, it speaks in terms neither of warranties nor of representations technically so called, but deals with all representations made in negotiating the contract or policy. Misstatements of fact, whether the statement is said to be by the parties a warranty or a representation, are equally misrepresentations, and are placed in each case upon the same footing by the statute which applies to them if the statements are called warranties by the parties no less than if they are mere representations."

The Pennsylvania statute[82] of 1885 was intended to strike down literal warranties so far as they might be resorted to for the purpose of enforcing a forfeiture based on matters actually immaterial. It provides a rule of construction for the purpose of preventing injustice, and "it is as much the duty of courts to enforce such rules as it is to administer the Statute of Frauds and perjuries."[83] The effect is to leave open to judicial investigation in the ordinary way the question of whether any fact concerning which inquiry was made, and an untrue answer given, was material to the risk. If found to be material, the policy will be avoided, whether the untrue answer was made in good faith or not. If not material, the breach of warranty will work no prejudice to the insured if the answer was given in good faith, but if in bad faith, and for the purpose of misleading the company, the

sachusetts act omitting the words "or made a warranty," which were added in Massachusetts in 1895.

[81] Whenever the application for a policy of insurance contains a warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application, made in good faith by the applicant, shall effect a forfeiture or be a ground of defense in any suit brought upon any policy issued upon the faith of such application, unless such misrepresentation or untrue statement relates to some matter material to the risk. White v. Provident Sav. Life Assur. Soc., 163 Mass. 108, 39 N. E. 771, 27 L. R. A. 398. See further, Ring v. Phœnix Assur. Co., 145 Mass. 426, 14 N. E. 525; Durkee v. India Mut. Ins. Co., 159 Mass. 514, 34 N. E. 1133; LeVie v. Metropolitan Life Ins. Co., 163 Mass. 117, 39 N. E. 702.

[82] Pa. Laws 1885, p. 134, § 1.

[83] Hermany v. Fidelity Mut. Life Assn., 151 Pa. St. 17, 24 Atl. 1064.

policy will be avoided, notwithstanding the immateriality of the fact. Bad faith in this connection means with an actual intent to mislead or deceive, and does not include a misstatement honestly made through inadvertence, or even gross forgetfulness or carelessness.[84]

§ 4124. Similar provisions in other states.—Similar statutes are found in other states. Thus, in Michigan, a breach of a condition in a fire policy will not render it void if the company has not been injured by such breach or a loss has not occurred during such breach or by reason thereof. The standard form of policy is required to contain a provision that "provided a loss shall occur on the property insured while such a breach of condition continues or such breach of condition is the primary or continuing cause of the loss."[85] Decisions under a number of statutes of the same general nature are cited below.[86] Such statutes enter into and form a part of every contract of insurance made while they are in force.[87]

[84] Penn Mut. Life Ins. Co. v. Mechanics' Savings &c. Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33; Penn Mut. Life Ins. Co. v. Mechanics' Savings &c. Co., 73 Fed. 653, 19 C. C. A. 316, 38 L. R. A. 33. As to what is material, see March v. Metropolitan Life Ins. Co., 186 Pa. St. 629, 40 Atl. 1100, 65 Am. St. 887.

[85] 2 Comp. Laws, 1897, § 5180, applies to all policies issued after its passage, whether Michigan standard policies or not. McGannon v. Michigan Millers' Mut. Fire Ins. Co., 127 Mich. 636, 87 N. W. 61, 54 L. R. A. 739, 89 Am. St. 501.

[86] Maryland Laws, 1894, ch. 662; Carroll Ky. Stat. (1909), ch. 32, § 639. See Maine Rev. Stat. (1883), ch. 49, § 20. See Germania Ins. Co. v. Rudwig, 80 Ky. 223, 3 Ky. L. 712, overruling Farmers' & Drovers' Ins. Co. v. Curry, 13 Bush. (Ky.) 312, 26 Am. Rep. 194; Imperial Fire Ins. Co. v. Kiernan, 83 Ky. 468, 7 Ky. L. 542; Kenton Ins. Co. v. Wigginton, 89 Ky. 330, 11 Ky. L. 539, 12 S. W. 668, 7 L. R. A. 81. See also, Georgia Code (1911), §§ 2479-83; Mo. Rev. Stat. (1909), § 6937: New Hampshire Laws (1901), ch. 170, § 4; Ohio Rev. Stat. (1905), § 5778; Va. Laws (1900), ch. 515, p. 550; Code (1904), § 3344a; provision in Maine standard form of policy, construed in Linscott v. Orient Ins. Co., 88 Maine 497, 34 Atl. 405, 51 Am. St. 435; Bigelow v. Granite State &c. Ins. Co., 94 Maine 39, 46 Atl. 808; Life Ins. Co. v. Hairston, 108 Va. 832, 62 S. E. 1057, 128 Am. St. 989; Modern Woodmen v. Lawson, 110 Va. 81, 65 S. E. 509, 135 Am. St. 927. See Southern L. Ins. Co. v. Wilkinson, 53 Ga. 535; Mobile Fire Department Ins. Co. v. Coleman, 58 Ga. 251. See, for construction of a somewhat different, South Carolina Statute on the same general subject which was held to become part of the contract and to govern though insurer was a foreign corporation, Owen v. Bankers' Life Ins., 84 S. Car. 253, 66 S. E. 290, 137 Am. St. 845.

[87] Klostermann v. Germania Life Ins. Co., 6 Mo. App. 582.

§ 4125. **Controlling force of such statutes.**—Where such statutes are in force it is generally held that the parties cannot contract as to what statements are material, and that the question is to be judicially determined in each case by the court, if the materiality is obvious, or by the jury, if it depends upon disputed facts.[88] In Kentucky it was at first held that the parties could waive the benefits of the statute and by express contract determine the question of materiality,[89] but this decision was reversed, and it has since been held, in Kentucky as well as elsewhere, that only such statements as are material or fraudulent will avoid the policy.[90]

[88] Fidelity Mut. Life Assn. v. Miller, 92 Fed. 63, 34 C. C. A. 211; Hermany v. Fidelity Mut. Life Assn., 151 Pa. St. 17, 24 Atl. 1064; Lutz v. Metropolitan Life Ins. Co., 186 Pa. St. 527, 40 Atl. 1104.

[89] Farmers' & Drovers' Ins. Co. v. Curry, 13 Bush (Ky.) 312, 26 Am. Rep. 194.

[90] Germania Ins. Co. v. Rudwig, 80 Ky. 223, 3 Ky. L. 712. For construction of such statutes, see also, National Bank v. Union Ins. Co., 88 Cal. 497, 26 Pac. 509, 22 Am. St. 324; United States &c. Co. v. Foster Deposit Bank, 148 Ky. 776, 147 S. W. 406; Fidelity &c. Life Assn. v. Ficklin, 74 Md. 172, 21 Atl. 680, 23 Atl. 197. As to conflict of laws on this subject see Miller v. Maryland Casualty Co., 193 Fed. 343, 113 C. C. A. 267.

CHAPTER CXXII.

THE PREMIUM.

§ 4130. Generally.
4131. Nature of premium.
4132. Obligation to pay premium.
4133. Payment — Condition Precedent—Forfeiture.
4134. Manner, time and place of payment.
4135. The giving of a promissory note.
4136. Payment after loss or death.
4137. Paid-up policies.
4138. Premium notes.
4139. Notice of time when premium is due.
§ 4140. Right to recover premiums paid.
4141. Dues and assessments.
4142. Liability to assessment.
4143. Effect of nonpayment of assessment.
4144. Withdrawal of member.
4145. Insolvency of company.
4146. Death during period of suspension.
4147. Reinstatement.
4148. Waiver—Estoppel.

§ 4130. **Generally.**—The amount to be paid by the insured, as a consideration for the undertaking on the part of the insurer, is called the premium in ordinary insurance, and dues or assessments in mutual insurance and benevolent societies. It is payable according to stipulation which determines the amount and time of such payment. In the case of fire insurance, the premium is a stipulated sum for an insurance for a certain specified period, at the end of which the contract terminates. Life insurance contracts may be for fixed periods, as for one year, or for life, with a provision for payment of premiums at stated annual or semiannual intervals, under conditions which provide for forfeiture or termination of the contract if such premiums are not paid in advance upon a stipulated date.[1] Life insurance policies are also issued for a certain number of years, with a provision for termination at that time by payment to the insured of a certain amount in cash or the issuance to him of a paid-up policy. The

[1] As to the distinction between a policy for a short term and one for life, see McDougall v. Provident &c. Soc., 135 N. Y. 551, 32 N. E. 251; McMaster v. New York Life Ins. Co., 183 U. S. 25, 46 L. ed 64, 22 Sup. Ct. 10.

consideration in what is known as mutual insurance and mutual benefit associations is payable at short intervals, and in the form of assessments and dues. These amounts may be definitely fixed, or they may be left to be determined by the necessities of the case and subject to increase as the insured increases in age.

§ 4131. **Nature of premium.**—The agreed consideration for assuming and carrying the risk is called the premium.[2] It is a stipulated sum in consideration of which the underwriter agrees to take upon himself the risk of loss and to indemnify the assured against it.[3] The amount or rate is generally agreed upon and inserted in the policy, but it may be determined by custom and usage.[4] The contract may provide for an increase or reduction in the rate of premium as certain risks are added to or eliminated from the contract. The payment of the premium and the assumption of the risk are correlative; hence, as a general rule, if the premium is not paid the insurance does not attach, and if the risk does not attach the premium paid may be recovered.[5] But it is not meant by this that actual payment of the premium before the risk attaches is necessary unless made so by the contract in question. A clause in the policy of an assessment company providing that the rate of assessment may be changed each five years to correspond with the actual mortality experience of the company authorizes it to change the rates at different ages as required by the results of its experience.[6] In some states there are statutes which forbid discriminating against colored persons

[2] Emerigon Ins. (Meredith's ed.), ch. 3, § 1. See also, Physicians' Defense Co. v. Cooper, 199 Fed. 576.

[3] As to the nature of the premium in tontine insurance, see Uhlman v. New York Life Ins. Co., 109 N. Y. 421, 17 N. E. 363, 4 Am. St. 482, and Thompson v. Thorne, 83 Mo. App. 241.

[4] Pollock v. Donaldson, Fed. Cas. No. 11254, 3 Dall. (U. S.) 510, 1 L. ed. 699.

[5] Waller v. Northern Assur. Co., 64 Iowa 101, 19 N. W. 865.

[6] Mutual Reserve Fund Life Assn. v. Taylor, 99 Va. 208, 37 S. E. 854. An insurance policy contained a table of ages from twenty-five to sixty years, showing a gradual increase in the premium from the first age named to the last. It also contained a provision that the company agreed to renew insurance during each successive year of the life of the insured, "from date hereof," on payment on or before a certain date in each successive year of the annual premium rate for the age attained, in accordance with the table mentioned. No figures were given beyond the age of sixty, but the premiums thereafter, the court decides, are to be determined by calculation on the rule of progression shown by the table, and do not continue the same as that provided for the age of sixty.

in the rates of premiums, and which require uniform rates for all persons of the same class and equal expectancy of life.[7] These statutes, which make it a criminal offense for an agent to rebate a premium, do not unduly interfere with the right to contract, and are constitutional.[8]

§ 4132. Obligation to pay premium.—Whether the amount of the stipulated premium becomes a debt due from the insured to the insurer depends upon the contract and the circumstances. Where the payment is made a condition precedent to the attaching of the risk, and no payment is made, the insured assumes no further liability; but if the contract goes into effect and the insured has had the benefit of the insurance, the premium becomes a debt, which may be collected in an action at law. A premium which is to become due annually or semiannually, and is payable in advance on a contract which contains a stipulation that the policy shall lapse if the premium is not paid when due, is not a debt. So, an insurance contract with a benevolent association which provides for a forfeiture of all benefits if a member fails to pay his assessment at a specified time does not create an obligation which is enforcible by the association or by its receiver.[9] The payment in such case is optional with the insured, but if the policy attaches and the premium is earned under an agreement of credit, as where a note is given for the premium, a debt is created which may be recovered even after the policy has been forfeited.[10]

Nall v. Provident Sav. Life Assur. Soc., (Tenn.), 54 S. W. 109.

[7] See note to Joyce Ins., § 1091, where the statutes are collected. In Key v. National Life Ins. Co., 107 Iowa 446, 78 N. W. 68, it was held that the statute would not prevent a person who consented to take out a policy of insurance, on the representation that the company could make her a loan, from recovering the premium after the loan was refused. The court said: "As a matter of fact, the taking out of the insurance was but an incident; the making of the loan was the principal subject-matter of the agreement. The contract, as already said, was entire, and it was distinctly understood and agreed that plaintiff was not to accept the policy unless she could secure the loan. She received the policy into her possession upon a condition that the company refused to perform, and because of this failure she declined to accept it. This she had a right to do. Upon this proposition the case of Harnickell v. Ins. Co., 111 N. Y. 390, 18 N. E. 362, is directly in point, and supports our holding." As to the right of an insurance agent under such a statute to contribute his commission, see Quigg v. Coffy, 18 R. I. 757, 30 Atl. 794.

[8] People v. Formosa, 131 N. Y. 478, 30 N. E. 492, *27* Am. St. 612.

[9] Vick v. Clark, 77 Ill. App. 599.

[10] Goodwin v. Massachusetts &c. Ins. Co., 73 N. Y. 480. A mortgagee

§ 4133. **Payment—Condition precedent—Forfeiture.**—The actual payment of the premium before the risk attaches is not necessary unless such payment is made a condition precedent by the terms of the contract.[11] This is not ordinarily done in cases of marine and fire insurance, but is customary in cases of life insurance.[12] When it is expressly provided that the premium on a life insurance policy shall be paid on or before a certain date, and in default thereof the policy shall be void, the nonpayment of the premium on the date named works a forfeiture of the contract.[13] In such cases time is of the essence of the contract, and payment on the following day will not do. Where the policy so provides, the prompt payment of the note which has been given for the premium is necessary to save the contract.[14] Equity will not release from such a forfeiture.[15] But a condition for the prepayment in cash of the first premium may be waived,[16] and the com-

may, by the terms of the policy, become liable for the premium. See St. Paul Fire &c. Ins. Co. v. Upton, 2 N. Dak. 229, 50 N. W. 702. Sending a policy to the assured on his promise to remit the premium does not estop the company from denying its validity for nonpayment of the premium as against a mortgagee, "to whom loss, if any, is payable," although such mortgagees received the policy which acknowledged the receipt of the premium from the assured with notice that the premium was not paid. Such a policy is not an insurance upon the interest of the mortgagee. Union Bldg. Assn. v. Rockford Ins. Co., 83 Iowa 647, 49 N. W. 1032, 14 L. R. A. 248, 32 Am. St. 323. See Continental Ins. Co. v. Hulman, 92 Ill. 145, 34 Am. Rep. 122.

[11] Newark Mach. Co. v. Kenton Ins. Co., 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768; Campbell v. American Fire Ins. Co., 73 Wis. 100, 40 N. W. 661. Where an application for a life insurance policy states on its face that payment of its premium is a condition precedent to the issuing of the policy, the policy is not in force until it is actually paid. Ormond Fidelity Life Assn., 96 N. Car. 158, 1 S. E. 796. See Tomsecek v. Travelers' Ins. Co., 113 Wis. 114, 88 N. W. 1013, 57 L. R. A. 455, 90 Am. St. 846.

[12] Howell v. Knickerbocker Life Ins. Co., 44 N. Y. 276, 4 Am. Rep. 675. Where payment of the premium on or before a certain date is made a condition precedent to the contract remaining in force, nonpayment is not excused by the fact that payment is prevented by conditions over which the insured has no control, as by an act of God.

[13] Bosworth v. Western Mut. Aid Soc., 75 Iowa 582, 39 N. W. 903; Fowler v. Metropolitan Life Ins. Co., 116 N. Y. 389, 22 N. E. 576, 5 L. R. A. 805, and note. See also, Pitts v. Hartford Life & Annuity Ins. Co., 66 Conn. 376, 34 Atl. 95, 50 Am. St. 96 (even though at the time it is due the insured is incapable of doing business); Iowa Life Ins. Co. v. Lewis, 187 U. S. 335, 47 L. ed. 204, 23 Sup. Ct. 126.

[14] Reed v. Bankers' Reserve Life Ins. Co., 192 Fed. 408; Robert v. New England Mut. Ins. Co., 1 Disn. (Ohio) 355, 12 Ohio Dec. 668, affd. 2 Disn. (Ohio) 106, 13 Ohio Dec. 66. But see Galvin v. Union Cent. Life Ins. Co., 115 Ky. 547, 24 Ky. L. 2452, 74 S. W. 275, 103 Am. St. 336.

[15] Attorney-General v. Continental Life Ins. Co., 93 N. Y. 70; Klein v. New York Life Ins. Co., 104 U. S. 88, 26 L. ed. 662.

[16] Griffith v. New York Life Ins. Co., 101 Cal. 627, 36 Pac. 113, 40

pany may extend the time of payment by an agreement express or implied, or it may be estopped by its conduct from asserting a forfeiture, or the contract may be suspended, as by the operation of war.[17] A fraternal society doing a life insurance business may waive the provisions of the law in regard to the forfeiture of the insurance by failure to require payment of premiums as required by its by-laws.[18] It is not necessary that the insurance company expressly waive its right to insist upon a forfeiture, as a waiver may be implied from the circumstances.[19] Part payment of a premium will not prevent a forfeiture.[20] The contract sometimes provides that it shall be merely suspended during the period of nonpayment of the premium, and subject to revival when the payment is actually made.[21] In such cases the contract ordinarily contemplates that payment must be made before a loss occurs.[22] In some states, as will hereafter be shown, it is provided that there can be no forfeiture of a policy until after the company has notified the insured of the time when his premium is due.[23]

§ 4134. Manner, time and place of payment.—The premium may be paid to the company or its duly authorized agent,[24] and may be in cash or in any other commodity which the insurer

Am. St. 96; Farnun v. Phœnix Ins. Co., 83 Cal. 246, 23 Pac. 869, 17 Am. St. 233; Life Ins. Co. of Va. v. Hairston, 108 Va. 832, 62 S. E. 1057, 128 Am. St. 989; note to New York Life Ins. Co. v. Babcock, 69 Am. St. 150. Compare Russell v. Prudential Ins. Co., 176 N. Y. 178, 68 N. E. 252, 98 Am. St. 656; Tomsecek v. Travelers' Ins. Co., 113 Wis. 114, 88 N. W. 1013, 57 L. R. A. 455, 90 Am. St. 846; Summers v. Mut. Life Ins. Co., 12 Wyo. 369, 75 Pac. 937, 66 L. R. A. 812, 109 Am. St. 992.

[17] Mutual Benev. Life Ins. Co. v. Hillyard, 37 N. J. L. 444, 18 Am. Rep. 741. See also, Reed v. Bankers Reserve Life Ins. Co., 192 Fed. 408; Drury's Admx. v. New York Life Ins. Co., 115 Ky. 681, 25 Ky. L. 68, 74 S. W. 663, 61 L. R. A. 714, 103 Am. St. 351; Union Life Ins. Co. v. Parker, 66 Nebr. 395, 92 N. W. 604, 62 L. R. A. 390, 103 Am. St. 714.

[18] McMahon v. Supreme Tent, Knights of Maccabees, 151 Mo. 522, 52 S. W. 384. See also, note in 38 L. R. A. (N. S.) 571-576.

[19] Jones v. Preferred Bankers Life Assur. Co., 120 Mich. 211, 79 N. W. 204.

[20] Willcuts v. Northwestern Mut. Life Ins. Co., 81 Ind. 300. See also, Beeman v. Farmers' &c. Ins. Co., 104 Iowa 83, 73 N. W. 597, 65 Am. St. 424, and note in 38 L. R. A. (N. S.) 571-576.

[21] Joliffe v. Madison Mut. Ins. Co., 39 Wis. 111, 20 Am. Rep. 35.

[22] Miller v. Union Cent. Life Ins. Co., 110 Ill. 102; Matthews v. Ins. Co., 40 Ohio St. 135.

[23] See Mutual L. Ins. Co. v. Hathaway, 106 Fed. 815, 45 C. C. A. 655; Mutual Life Ins. Co. v. Cohen, 179 U. S. 262, 45 L. ed. 181, 21 Sup. Ct. 106.

[24] Pennsylvania Ins. Co. v. Carter, 8 Sad. (Pa.) 191, 11 Atl. 102. See also, note in 38 L. R. A. (N. S.) 616.

is willing to accept.[25] Presumably it is payable in cash, but if credit is given it is equally as effective as cash. If there is no provision making the prepayment of the premium a condition precedent, it seems that the agent who negotiated the insurance may give credit for the premiums,[26] and even where a provision in the policy calls for the actual payment of the premium as a condition precedent to its going into effect, such provision may be waived by a general agent of the company. Upon this the authorities are in substantial accord.[27] Where a policy recites that it is issued in consideration of an annual premium, "to be paid in advance to the company," it is not sufficient to show merely the execution of a promissory note for the amount, which recites that it is accepted on condition that if it is not paid at maturity the policy shall be void.[28] But the acceptance of an order on a third person is a payment if such was the intention of the parties.[29] So, payment may be by check when the custom and course of dealing have been such as to justify the insured in believing that it would be accepted as cash.[30] The payment of the premium with misappropriated funds is good as against the insurer, although the fund arising from the payment of the policy may belong to the person whose money was illegally

[25] See Anchor Life Ins. Co. v. Pease, 66 Barb. (N. Y.) 360, 44 How. Pr. (N. Y.) 385. An agent cannot, without express authority, accept payment in personal property. Hoffman v. Hancock &c. Ins. Co., 92 U. S. 164, 23 L. ed. 541.

[26] See, generally, the note in 38 L. R. A. (N. S.) 616, et seq. But an agent without authority to issue a policy cannot bind the company by an agreement to extend the time of payment. Critchett v. American Ins. Co., 53 Iowa 404, 5 N. W. 543, 36 Am. Rep. 230. It is not essential to the validity of a fire insurance policy, issued in renewal of a previous one, that the insured should pay the renewal premium in cash, provided the insurance agent, with the express or implied assent of the company, pays or undertakes to become responsible to the company for the premium, in order that credit may be extended to the insured. Fireman's Fund Ins. Co. v. Pekor, 106 Ga. 1, 31 S. E. 779.

[27] McDonald v. Provident &c. Life Assur. Soc., 108 Wis. 213, 84 N. W. 154, 81 Am. St. 885. See Tomsecek v. Travelers' Ins. Co., 113 Wis. 114, 88 N. W. 1013, 57 L. R. A. 455, 90 Am. St. 846. See also, note to New York Life Ins. Co. v. Babcock, 69 Am. St. 150; Life Ins. Co. of Va. v. Hairston, 108 Va. 832, 62 S. E. 1057, 128 Am. St. 989, and note.

[28] Manhattan Life Ins. Co. v. Myers, 109 Ky. 372, 59 S. W. 30, 22 Ky. L. 875. See also, Batson v. Fidelity Mut. Life Ins. Co., 155 Ala. 265, 46 So. 578, 130 Am. St. 21.

[29] National Ben. Assn. v. Jackson, 114 Ill. 533, 2 N. E. 414; McMahon v. Travelers' Ins. Co., 77 Iowa 229, 42 N. W. 179; Lyon v. Travelers' Ins. Co., 55 Mich, 141, 20 N. W. 829, 54 Am. Rep. 354.

[30] Kenyon v. Knights Templars &c. Assn., 122 N. Y. 247, 25 N. E. 299.

used.[31] Payment may be made by any one[32] to the company or its authorized agent[33] at the time[34] and place provided by the policy, or determined by special agreement or custom.[35] The date when the premium is paid, rather than that written in the policy for the payment of the premium, may be the time from which to reckon the period when further premiums are due. It has also been held that when a policy allows "thirty days of grace," and the premium falls due on Sunday the time begins to run at midnight of that day.[36] The mere acceptance of an insurance policy will not imply assent by the insured to a clause interpolated in the policy making future premiums payable in less time than is provided in the original contract between the parties, unless the attention of the insured was called to such provision.[37] Where the course of dealing has been such as to warrant it, payment of the premium may be made by mail, and it may be sufficient if the check was mailed on the last day of payment.[38] When the insured is directed to send the money by express, delivery to the express agent is payment, although the money is embezzled by such agent.[39] Premiums may be paid in part or in whole by dividends accruing according to the terms of the policy,[40] and it is generally the duty of the insurer to so apply funds in its hands due the assured when

[31] Holmes v. Gilman, 138 N. Y. 369, 34 N. E. 205, 20 L. R. A. 566, 34 Am. St. 463.

[32] Leslie v. French, L. R. 23 Ch. Div. 552.

[33] Critchett v. American Ins. Co., 53 Iowa 404, 5 N. W. 543, 36 Am. Rep. 230.

[34] In determining the time of the notice that a premium will fall due under the New York statute providing for a notice of at least thirty days, and not more than sixty days, prior to the day when the premium is payable, the premium is to be deemed payable on the day of its maturity, and not the date to which an extension of the time of payment is allowed by the policy. Trimble v. New York Life Ins. Co., 20 Wash. 386, 55 Pac. 429.

[35] Williams v. Washington Life Ins. Co., 31 Iowa 541; Blackerby v. Continental Ins. Co., 83 Ky. 574, 7 Ky. L. 653.

[36] Aetna Life Ins. Co. v. Winberley, 102 Tex. 46, 112 S. W. 1038, 23 L. R. A. (N. S.) 759n, 132 Am. St. 852.

[37] McMaster v. New York Life Ins. Co., 99 Fed. 856, 40 C. C. A. 119, revd. 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. 10. See also, Summers v. Alexander, 30 Okla. 198, 120 Pac. 601, 38 L. R. A. (N. S.) 787, and note.

[38] Tayloe v. Merchants' Fire Ins. Co., 9 How. (U. S.) 390, 13 L. ed. 187.

[39] Whitley v. Piedmont &c. Life Ins. Co., 71 N. Car. 480.

[40] Hull v. Northwestern &c. Ins. Co., 39 Wis. 397. Equity will compel the application of dividends earned to prevent a forfeiture. Franklin Life Ins. Co. v. Wallace, 93

the premium or assessment becomes due,[41] but undeclared dividends cannot be treated as funds applicable to such use,[42] and there are cases in which it is held that the insurer is under no duty to so apply the particular funds.[43]

§ 4135. The giving of a promissory note.—The insurance company may accept a promissory note in payment of the premium, although the contract expressly provides for the payment in cash,[44] but as shown in the last preceding section, a promissory note of the insured, not paid at maturity is not cash and a particular agent may have no authority to accept the same. A provision in a policy that it shall not be in force until the first payment is made in cash during the lifetime and good health of the insured is complied with by the execution of a note to the insurance company's agent for an amount greater than the premium, where the agent indorsed and discounted the note, gave the insured the company's receipt for the amount of the premium, reported it to the company as paid, and received from the company and delivered to the insured the policy, which recited that it was given in consideration of the application and "of the first premium paid on or before the delivery hereof."[45] The delivery of the policy is a sufficient consideration for the note.[46] Such a note may be

Ind. 7, and cases cited. See also, Union Cent. Life Ins. Co. v. Caldwell, 68 Ark. 505, 58 S. W. 355; Girard Life Ins. Annuity & Trust Co. v. Mutual Life Ins. Co., 97 Pa. St. 15; notes in 55 L. R. A. 605, and in 23 L. R. A. (N. S.) 304.

[41] Supreme Lodge Order of Mutual Protection v. Meister, 204 Ill. 527, 68 N. E. 454; Younghoe v. Grain Shippers' Mut. Fife Ins. Assn., 126 Iowa 374, 102 N. W. 137; Supreme Lodge Patriarchs of America v. Welsch, 60 Kans. 358, 57 Pac. 115; North American Acc. Ins. Co. v. Bowen (Tex. Civ. App.), 102 S. W. 163; McNaughton v. Des Moines Life Ins. Co., 140 Wis. 214, 122 N. W. 764.

[42] Mutual Life Ins. Co. v. Girard Life Ins., Annuity & Trust Co., 100 Pa. St. 172. See also, Bryant v. Mutual Ben. Life Assn., 109 Fed. 748; Petrie v. Mut. Ben. Life Ins. Co., 92 Minn. 489, 100 N. W. 236. And compare Jefferson v. New York L. Ins. Co., (Ky.) 152 S. W. 780.

[43] Caywood v. Supreme Lodge, 171 Ind. 410, 86 N. E. 482, 23 L. R. A. (N. S.) 304, and note, 131 Am. St. 253. See also, Straube v. Pacific Mut. Life Ins. Co., 123 Cal. 677, 56 Pac. 546.

[44] Pitt v. Berkshire Life Ins. Co., 100 Mass. 500; Krause v. Equitable Life Assur. Co., 99 Mich. 461, 58 N. W. 496.

[45] Jacobs v. Omaha Life Assn., 146 Mo. 523, 48 S. W. 462. See also, Union Life Ins. Co. v. Parker, 66 Nebr. 395, 92 N. W. 604, 62 L. R. A. 390, 103 Am. St. 714.

[46] Marskey v. Turner, 81 Mich. 62, 45 N. W. 644. But see, where no offer was made to deliver the policy, although the maker of the note refused to take medical examination, Alligood v. Daniel (Ga. App.), 76 S. E. 1083.

taken as payment,[47] or as an extension of the time of payment, under the provision that the insurance shall terminate if the note is not paid at maturity, or it may be accepted as a conditional payment;[48] and it is held that if neither the policy nor the note contains a provision for the forfeiture or suspension of the risk upon the nonpayment of the note, the policy continues in force although the note is not paid at maturity.[49] It is common to provide that the policy shall be merely suspended while the note is overdue and that the company shall not be liable for loss occurring during such suspension.[50] There is a conflict of authority as to whether a note given for the premium, and containing a provision to the effect that the policy shall be forfeited if the note is not paid at maturity, must be presented for payment and demand made before the policy can be declared void.[51] It is said that when the condition as to forfeiture for the nonpayment at maturity of a note given for the premium is contained only in the note, the mere fact that the note is not paid at maturity does not of itself avoid the policy. Such a provision is a condition subsequent of which the company must avail itself by clear and unequivocal acts. It must demand payment at the proper time, and if no payment is made must declare the

[47] Michigan Mut. Life Ins. Co. v. Bowes, 42 Mich. 19, 51 N. W. 962.

[48] Knickerbocker Life Ins. Co. v. Pendleton, 112 U. S. 696, 28 L. ed. 866, 5 Sup. Ct. 314.

[49] McAllister v. New England &c. Ins. Co., 101 Mass. 558, 3 Am. Rep. 404; Arkansas Ins. Co. v. Cox, 21 Okla. 873, 98 Pac. 552, 129 Am. St. 808. The forfeiture clause in the Massachusetts case was construed to apply to future premium payments only. And such provisions have been held to refer to notes executed by the insured and not to a note executed by a third person, the result being that the policy was held not forfeited by failure to pay such note of the third person. Galvin v. Union Cent. Life Ins. Co., 115 Ky. 547, 24 Ky. L. 2452, 74 S. W. 275, 103 Am. St. 336. See also, Franklin Life Ins. Co. v. Wallace, 93 Ind. 7. But compare Tomsecek v. Travelers' Ins. Co., 113 Wis. 114, 88 N. W. 1013, 57 L. R. A. 455, 90 Am. St. 846. And see as to when failure to pay works a forfeiture, Thompson v. Fidelity Mut. Life Ins. Co., 116 Tenn. 557, 92 S. W. 1098, 6 L. R. A. (N. S.) 1039, 115 Am. St. 823; Iles v. Mut. Reserve Life Ins. Co., 50 Wash. 49, 96 Pac. 522, 18 L. R. A. (N. S.) 902n, 126 Am. St. 886. See as to waiver, Galliher v. State Mut. Life Ins. Co., 150 Ala. 543, 43 So. 833, 124 Am. St. 83; Stewart v. Union Mut. Life Ins. Co., 155 N. Y. 257, 49 N. E. 876, 42 L. R. A. 147.

[50] Robinson v. Continental Ins. Co., 76 Mich. 641, 43 N. W. 647, 6 L. R. A. 95; Phenix Ins. Co. v. Bachelder, 32 Nebr. 490, 49 N. W. 217, 29 Am. St. 443, affd. 39 Nebr. 95, 57 N. W. 996.

[51] That notice and demand are necessary see Pendleton v. Knickerbocker Life Ins. Co., 5 Fed. 238, revd. 112 U. S. 696, 28 L. ed. 866, 5 Sup. Ct. 314; Travelers' Ins. Co. v.

policy forfeited or void.[52] But in some cases such a provision in a note has been held of no effect whatever.[53]

§ 4136. **Payment after loss or death.**—If credit is given or the time to pay the premium is extended by an agreement under which the policy remains in force, there can be a recovery if the loss or death occurs within such period of extension.[54] The company is under no obligation to accept a premium tendered after the time fixed for its payment, but it may by a course of dealing, which will justify the insured in relying thereon, deprive itself of the right to refuse to accept payment and insist upon the strict adherence to the terms of the original contract.[55] It is held, however, that in order to establish authority in an agent to receive an overdue premium after the death of the insured, an express authority to do so conferred upon him by the company must be shown.[56] The death or loss for which there can be a recovery must have occurred before the premium was due by the express terms of the contract, or within the period of extension created by the conduct of the insurer and while the policy was in force and not suspended.[57] It is not uncommon for insurance companies to provide for a certain period known as days of grace within which they will accept premiums,[58] and the contract usually provides that during such days of grace the premium will be accepted upon a certificate that the insured is in good health at that time. Be-

Pulling, 159 Ill. 603, 43 N. E. 762. Contra, Roehner v. Knickerbocker Life Ins. Co., 63 N. Y. 160. See also, McIntyre v. Michigan &c. Ins. Co., 52 Mich. 188, 17 N. W. 781. Protest of the note is not necessary. Knickerbocker Life Ins. Co. v. Pendleton, 112 U. S. 696, 28 L. ed. 866, 5 Sup. Ct. 314.

[52] See Mutual Life Ins. Co. v. French, 30 Ohio St. 240, 27 Am. Rep. 443, and cases there cited.

[53] Dwelling House Ins. Co. v. Hardie, 37 Kans. 674, 16 Pac. 92; Hastings v. Brooklyn Life Ins. Co., 138 N. Y. 473, 34 N. E. 289; Union Cent. Life Ins. Co. v. Buxer, 62 Ohio St. 385, 57 N. E. 66.

[54] Miller v. Union Cent. Life Ins. Co., 110 Ill. 102. A premium sent after a loss is presumed to be too late, and the burden of proving its acceptance is on the insured. Moore v. Rockford Ins. Co., 90 Iowa 636, 57 N. W. 597.

[55] See Industrial Mut. Indemnity Co. v. Thompson, 83 Ark. 575, 104 S. W. 200, 10 L. R. A. (N. S.) 1064, and note, 119 Am. St. 149; also Workingmen's &c. Assn. v. Leverton (Ind.), 98 N. E. 871.

[56] Lantz v. Vermont Life Ins. Co., 139 Pa. St. 546, 21 Atl. 80, 10 L. R. A. 577, 23 Am. St. 202, and cases therein cited.

[57] Farnum v. Phœnix Ins. Co., 83 Cal. 246, 23 Pac. 869, 17 Am. St. 233.

[58] For computation of time under such a provision see Aetna Life Ins. Co. v. Wimberly, 102 Tex. 46, 112 S. W. 1038, 23 L. R. A. (N. S.) 759n, 132 Am. St. 852.

fore the company can be required to accept payment after the death of the insured it must appear that such was the intention of the parties.[59] It is not to be presumed that an insurer intended to accept an overdue premium after the death of the insured, unless such intention clearly appears from the terms of the contract.[60]

§ 4137. Paid-up policies.—Many life insurance contracts provide that upon the payment of a specified number of premiums the insured shall, upon certain conditions, be entitled to a paid-up policy. The rights of the parties under such a policy are determined by the provisions of the contract and the statutes in force when the policy is issued.[61] It is generally provided that the insured shall surrender the old policy within a specified time and receive a new policy, although this is sometimes effected by a mere indorsement upon the old policy.[62] By the weight of authority the right must be exercised within the time specified,[63] although it has been held with much reason that it is sufficient if this is done within a reasonable time.[64]

§ 4138. Premium notes.—Under some statutes premium or "stock" notes are given as a part of the capital stock of the corporation. In some mutual companies premiums are paid partly

[59] Pritchard v. Merchants' Mut. Life Assur. Soc., 3 C. B. (N. S.) 622; Mutual Ben. Life Ins. Co. v. Ruse, 8 Ga. 534; Howell v. Knickerbocker Life Ins. Co., 44 N. Y. 276, 4 Am. Rep. 675; Trustees of the First Baptist Church v. Brooklyn Fire Ins. Co., 19 N. Y. 305.

[60] Mobile Life Ins. Co. v. Pruett, 74 Ala. 487.

[61] Mound City Mut. Life Ins. Co. v. Twining, 12 Kans. 475; Hanley v. Life Assn. of America, 69 Mo. 380.

[62] Holman v. Continental Life Ins. Co., 54 Conn. 195, 6 Atl. 405, 1 Am. St. 97; McQuitty v. Continental Life Ins. Co., 15 R. I. 573, 10 Atl. 635.

[63] Wells v. Vermont Life Ins. Co., 28 Ind. App. 620, 62 N. E. 501, 63 N. E. 578; Universal Life Ins. Co. v. Whitehead, 58 Miss. 226, 38 Am. Rep. 322; Cravens v. New York Life Ins. Co., 148 Mo. 583, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. 628, affd. 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. 962; Knapp v. Homeopathic &c. Ins. Co., 117 U. S. 411, 29 L. ed. 960, 6 Sup. Ct. 807.

[64] Lenon v. Mut. Life Ins. Co., 80 Ark. 563, 98 S. W. 117, 8 L. R. A. (N. S.) 193n; Mutual Life Ins. Co. v. Jarboe, 102 Ky. 80, 19 Ky. L. 1501, 42 S. W. 1097, 39 L. R. A. 504, 80 Am. St. 343; Bruce v. Continental Life Ins. Co., 58 Vt. 253, 2 Atl. 710. As to the right to a paid-up policy without paying outstanding premium note, see VanNorman v. Northwestern &c. Ins. Co., 51 Minn. 57, 52 N. W. 988; Holman v. Continental Life Ins. Co., 54 Conn. 195, 6 Atl. 405, 1 Am. St. 97. See also, Wilcox v. Equitable Life Assur. Soc., 173 N. Y. 50, 65 N. E. 857, 93 Am. St. 579.

in cash and partly in notes upon which dividends earned by the company are credited and assessments made from time to time as losses occur. It has been held that notes given as part of the capital stock of a mutual company, in the absence of a statutory provision to the contrary, are payable absolutely without reference to losses, and may be transferred and negotiated so as to pass a good title to the transferee free from equities existing between the original makers:[65] but it is generally held that they are not like ordinary notes payable "on demand" and that a call or demand is necessary to start the Statute of Limitations.[66] The ordinary premium notes, which are payable only upon a contingency, are not negotiable.[67] Where the contract so provides, the maker of a premium note may terminate his liability thereon for future losses by rescinding his insurance contract. After his policy is canceled no liability exists except for losses which had already occurred.[68]

§ 4139. Notice of time when premium is due.—In the absence of a statute or contract provision requiring notice to the insured that a premium will become due at a certain time, it seems that the company is under no obligation to give such notice, unless it has by a course of dealing established a custom upon which the insured is entitled to rely.[69] But such a usage usually enters into

[65] White v. Haight, 16 N. Y. 310.

[66] Cooke v. Pomeroy, 65 Conn. 466, 32 Atl. 935; Peake v. Fuller, 123 Mich. 684, 82 N. W. 847; Langworthy v. Garding, 74 Minn. 325, 77 N. W. 207; Kilbreath v. Gaylord, 34 Ohio St. 305; Eichman v. Hersker, 170 Pa. St. 402, 33 Atl. 229; Crofoot v. Thatcher, 19 Utah 212, 57 Pac. 171, 75 Am. St. 725; New England Fire Ins. Co. v. Haynes, 71 Vt. 306, 45 Atl. 221, 76 Am. St. 771.

[67] Hope Mut. Life Ins. Co. v. Weed, 28 Conn. 31.

[68] American Ins. Co. v. Garrett, 71 Iowa 243, 32 N. W. 356; Langworthy v. Washburn Flouring-Mills Co., 77 Minn. 256, 79 N. W. 974. The assessment should be made upon the balance of the premium note remaining unpaid. Davis v. Oshkosh Upholstery Co., 82 Wis. 488, 52 N. W. 771. An assessment by a mutual insurance company may be based on the balance due on the premium notes after the payment of previous assessments, where the different classes of notes constituting the assets of the company have previously paid assessments varying in amount, and another assessment upon the face value would subject some of them to more than the extreme limit of liability, which is fixed by N. H. Laws 1847, ch. 501, at the amount of the deposit note. New Boston Fire Ins. Co. v. Saunders, 67 N. H. 249, 34 Atl. 670.

[69] But see as to assessments where no definite time is otherwise fixed, Federal Life Ins. Co. v. Arnold, 46 Ind. App. 114, 90 N. E. 493, 91 N. E. 857. See also, Hall v. Supreme Lodge, 24 Fed. 450; Wright v. Su-

and forms a part of the contract between the parties,[70] and it is generally held that the company cannot suddenly cease its established practice and claim a forfeiture of the policy. In some states, however, it is held that the company may discontinue the practice of sending notice, and that a failure to give the usual notice will not prevent a forfeiture unless it is done for the purpose of misleading the insured and avoiding the policy.[71] Where a statute requires notice to be given, the burden is on the company to show that it has complied with the statute.[72] Such a requirement must be strictly complied with. Thus, in New York, where the statute provides that the notice shall contain a statement that "prompt payment is necessary to keep the policy in force," it is not sufficient to give a notice to the effect that in default of payment the policy will "become forfeited and void."[73] The day upon which the notice was mailed should be excluded in the computation of the thirty days for which notice must be given under the New York statute.[74] Where the requisite notice was not given, and the policy contained a provision for forfeiture, the court said: "The notice given before the premium fell due was insufficient, and no notice whatever was given after the nonpayment of that premium. * * * The only way in which the policy could be ter-

preme Commandery of the Golden Rule, 87 Ga. 426, 13 S. E. 564, 14 L. R. A. 283.

[70] Grant v. Alabama Gold Life Ins. Co., 76 Ga. 575; Attorney-General v. Continental Life Ins. Co., 33 Hun (N. Y.) 138; Manhattan Life Ins. Co. v. Smith, 44 Ohio St. 156, 5 N. E. 417, 58 Am. Rep. 806. See also, Kavanaugh v. Security Trust & Life Ins. Co., 117 Tenn. 33, 96 S. W. 499, 7 L. R. A. (N. S.) 253, and note; New York Life Ins. Co. v. Eggleston, 96 U. S. 572, 24 L. ed. 841; Knoebel v. North American Acc. Ins. Co., 135 Wis. 424, 115 N. W. 1094, 20 L. R. A. (N. S.) 1037n.

[71] Smith v. National Life Ins. Co., 103 Pa. St. 177, 49 Am. Rep. 121; Girard Life Ins. &c. Co. v. Mutual Life Ins. Co., 97 Pa. St. 15. See also, Mutual Endowment Assessment Assn. v. Essender, 59 Md. 463; Thompson v. Knickerbocker Life Ins. Co., 104 U. S. 252, 26 L. ed. 765.

[72] Baxter v. Brooklyn Life Ins. Co., 44 Hun (N. Y.) 184, 8 N. Y. St. 246, affd. 119 N. Y. 450, 23 N. E. 1048, 7 L. R. A. 293. See also, Duffy v. Fidelity Mut. Life Ins. Co., 142 N. Car. 103, 55 S. E. 79, 7 L. R. A. (N. S.) 238.

[73] Phelan v. Northwestern Mut. Life Ins. Co., 113 N. Y. 147, 20 N. E. 827, 10 Am. St. 441.

[74] Rosenplanter v. Provident Sav. Life Assur. Soc., 96 Fed. 721, 37 C. C. A. 566, 46 L. R. A. 473. The notice is complete under some statutes or contracts on mailing a registered letter properly addressed to the insured. McKenna v. State Ins. Co., 73 Iowa 453, 35 N. W. 519. But see in other cases Kavanaugh v. Security Trust & Life Ins. Co., 117 Tenn. 33, 96 S. W. 499, 7 L. R. A. (N. S.) 253, and note. The "date" of a notice, served by mail, of an assessment in a mutual insurance association, when the amount of assessment is, by the rules of the association, to be paid within a cer-

minated under the statute was by the failure of the insured to pay his premium upon notice 'mailed' thirty days before the premium was due, or by a notice of default and demand for payment within thirty days after mailing such notice."[75] And it has been held in North Carolina that a by-law that the mailing of notice of an assessment may be conclusively shown by the certificate of an officer of the company though not personally cognizant of the fact, is unreasonable and void.[76] Where the statute requires certain notice before the maturity of a life insurance premium as a condition of forfeiting the policy for nonpayment, notwithstanding stipulations to the contrary in the contract, it does not become a part of a policy issued while the statute is in force so as to be operative after the statute is repealed. The repeal simply permits the enforcement of the conditions of the contract according to its own terms and conditions.[77]

§ 4140. **Right to recover premiums paid.**—Where the risk has attached, and the contract is subsequently forfeited by the breach of a condition, the premiums which have been paid cannot be recovered back.[78] If the policy was void ab initio, the premiums paid may be recovered, and a premium note is not enforcible.[79] Assessments paid for a series of years to a mutual in-

tain number of days from the "date of the notice," is not the printed date itself, but is the day on which the notice is mailed, or is or should be received by the member in due and regular course of mail. Bridges v. National Union, 73 Minn. 486, 76 N. W. 270, 77 N. W. 411. That the notice must be actually received see Purycar v. Farmers' Mut. Ins. Assn. (Ga.), 73 S. E. 851; Castner v. Farmers' Mut. Fire Ins. Co., 50 Mich. 273, 15 N. W. 452; McCorkle v. Texas Benev. Assn., 71 Tex. 149, 8 S. W. 516. See also, Preferred Acc. Ins. Co. v. Fielding, 35 Colo. 19, 83 Pac. 1013, 9 Am. & Eng. Ann. Cas. 916.

[75] Rosenplanter v. Provident Sav. Life Assur. Soc., 96 Fed. 721, 37 C. C. A. 566, 46 L. R. A. 473; Baxter v. Brooklyn Life Ins. Co., 119 N. Y. 450, 23 N. E. 1048, 7 L. R. A. 293.

[76] Duffy v. Fidelity Mut. Life Ins. Co., 142 N. Car. 103, 55 S. E. 79, 7 L. R. A. (N. S.) 238.

[77] Rosenplanter v. Provident Sav. Life Assur. Soc., 96 Fed. 721, 37 C. C. A. 566, 46 L. R. A. 473, and cases cited.

[78] United States Life Ins. Co. v. Smith, 92 Fed. 503, 34 C. C. A. 506; Home Fire Ins. Co. v. Kuhlman, 58 Nebr. 488, 78 N. W. 936, 76 Am. St. 111, and cases cited. Breach by the insurer of its contract to lend money on a policy has been held not to justify the insured in treating it as rescinded and suing for a return of the premiums paid. Lewis v. New York Life Ins. Co., 181 Fed. 433, 104 C. C. A. 181, 30 L. R. A. (N. S.) 1202n, distinguishing Key v. Nat. Life Ins. Co., 107 Iowa 446, 78 N. W. 68, and other cases. See also, New York Life Ins. Co. v. Pope, 24 Ky. L. 485, 68 S. W. 851; Elder v. Federal Ins. Co. (Mass.) 100 N. E. 655.

[79] Home Ins. Co. v. Daubenspeck, 115 Ind. 306, 17 N. E. 601; Ford v. Buckeye State Ins. Co., 6 Bush (Ky.)

surance association by a member cannot be recovered back simply because he failed to inform himself of the provisions of the contract.[80] A provision in an application for a policy of life insurance that the statements and promises of the agent shall not affect the rights of the company, unless reduced to writing and presented with the application, has been held not to entitle the company to retain money received in consequence of fraud of the agent after its knowledge of the fraud, and, as the agent had practiced fraud on both parties, the contract was held voidable at the instance of either party.[81] Premiums paid upon a void policy may be recovered, unless the insured has been guilty of fraud.[82] Where a daughter paid the premiums on the life of her father, with his knowledge, with the understanding that she had an insurable interest in his life, she was permitted to recover the premiums as money paid under a mistake of law;[83] and, where a wife, without the consent of her husband, procured insurance upon his life, and paid the premiums out of money furnished by him for household expenses, the husband was permitted to recover the premiums, although the company did not know that the money belonged to him.[84] The insured may usually recover the premiums paid where the insurer wrongfully rescinds the policy, but, in many jurisdictions at least, the beneficiary has no such right.[85]

133, 99 Am. Dec. 663; York County Mut. Fire Ins. Co. v. Turner, 53 Maine 225.

[80] Condon v. Mutual Reserve Fund Life Assn., 89 Md. 99, 42 Atl. 944, 44 L. R. A. 149, 73 Am. St. 169.

[81] McKay v. New York Life Ins. Co., 124 Cal. 270, 56 Pac. 1112.

[82] Jones v. Insurance Co., 90 Tenn. 604, 18 S. W. 260, 25 Am. St. 706.

[83] Metropolitan Life Ins. Co. v. Blesch, 22 Ky. L. 530, 58 S. W. 436. See also, Stilwell v. Covenant &c. Ins. Co., 83 Mo. App. 215; Mutual Life Ins. Co. v. Elliott, 93 Tex. 144, 53 S. W. 1014.

[84] Metropolitan Life Ins. Co. v. Smith, 22 Ky. L. 868, 59 S. W. 24, 53 L. R. A. 817.

[85] That the insured has such right, see Hogben v. Metropolitan Life Ins. Co., 69 Conn. 503, 38 Atl. 214, 61 Am, St. 53; Van Werden v. Equitable Life Assur. Soc., 99 Iowa 621, 68 N. W. 892; Mailhoit v. Metropolitan Life Ins. Co., 87 Maine 374, 32 Atl. 989, 47 Am. St. 336; American Life Ins. Co. v. McAden, 109 Pa. St. 399, 1 Atl. 256; Summers v. Mut. L. Ins. Co., 12 Wyo. 369, 75 Pac. 937, 66 L. R. A. 812, 109 Am. St. 992. See also, Supreme Council v. Black, 123 Fed. 650, 59 C. C. A. 414; Lovell v. St. Louis Mut. Life Ins. Co., 111 U. S. 264, 28 L. ed. 423, 4 Sup. Ct. 390. In Slocum v. Northwestern Nat. Life Ins. Co., 135 Wis. 288, 115 N. W. 796, 14 L. R. A. (N. S.) 1110n, 128 Am. St. 1028, it is held that this is the rule and that the beneficiary has no such right, nor any right to recover damages, at least where the insured has the right to dispose of the policy without consent of the beneficiary; and to the same effect are most of the cases first cited, and also Price v. Mut. Reserve Life Ins. Co., 102 Md. 683, 62 Atl. 1040, 4 L.

§ 4141. **Dues and assessments.**—Mutual insurance companies and benevolent societies are generally organized under special statutes, which provide in detail for their methods of doing business, and these statutes, in connection with their by-laws and certificates, govern the rights of the parties. The insured becomes a member of the organization, and, as a consideration for the insurance and other benefits, he agrees to pay certain dues and assessments, to be levied and collected in accordance with the terms of his contract. In mutual companies upon the assessment plan the insured is required to pay from time to time to the proper authorities such sum as shall be assessed under the by-laws for the purpose of paying losses and expenses.[86] If a premium note is given, it has been held that the assessment should be made upon the note, and cannot exceed the maximum liability as expressed thereby.[87] The rate of assessment may be determined by the proper authorities according to the losses and expenses, or it may be previously determined and inserted in the contract. It may be subject to increase by vote of the stockholders, and a member who assents to an increase in his assessment by voting therefor in a stockholders' meeting cannot thereafter complain that it is unreasonable.[88] So, although there is some conflict among the authorities, it is generally held that at least where the contract of insurance is such that it is clearly conditioned upon the by-laws, rules and regulations that may afterward be adopted as well as those in force at the time, the insured cannot, ordinarily at least, complain of an increase in the amount of the assessments.[89] But where

R. A. (N. S.) 870. Sullivan v. Metropolitan Life Ins. Co., 174 Mass. 467, 54 N. E. 879, 75 Am. St. 365; McDonald v. Metropolitan Life Ins. Co., 68 N. H. 4, 38 Atl. 500, 73 Am. St. 548. See, as to right to return portion of premium on insolvency and cancelation of policy, State v. Minnesota Title Ins. Co., 104 Minn. 447, 116 N. W. 944, 19 L. R. A. (N. S.) 639, and note, 124 Am. St. 633.

[86] Ellerbe v. Barney, 119 Mo. 632, 25 S. W. 384, 23 L. R. A. 435. As to the various plans, see Crossman v. Massachusetts Ben. Assn., 143 Mass. 435, 9 N. E. 753. See also, In re LaSolidarite &c. Assn., 68 Cal. 392, 9 Pac. 453. As to the distinction between a premium and an assessment, see State v. Monitor Fire Assn., 42 Ohio St. 555.

[87] Davis v. Oshkosh Upholstery Co., 82 Wis. 488, 52 N. W. 771.

[88] Mutual Reserve Fund Life Assn. v. Taylor, 99 Va. 208, 37 S. E. 854.

[89] Gaut v. Mut. Reserve Fund Life Assn., 121 Fed. 403; Fullenwider v. Supreme Council of Royal League, 180 Ill. 621, 54 N. E. 485, 72 Am. St. 239; Miller v. National Council, Knights and Ladies of Security, 69 Kans. 234, 76 Pac. 830; Reynolds v.

the amount of each assessment is expressly fixed and stipulated in the contract, it seems that it cannot be increased without the consent of the insured.[90]

§ 4142. **Liability to assessment.**—The liability for assessments rests upon those who, by becoming members of the company, assume the contractual obligation imposed by its by-laws.[91] Such liability must grow out of the contract or statute,[92] and where the statute fixes it at a certain amount it cannot be limited to a less amount by a special agreement. If the liability is absolute and certain, an action may be maintained against a member for its enforcement, but the rule is otherwise if the liability terminates with the forfeiture of the rights of the member.[93]

§ 4143. **Effect of nonpayment of assessment.**—The nonpayment of an assessment may result, ipso facto, in the forfeiture of the rights of the member as a beneficiary, or merely in his suspension from the rights and privileges of membership. Where it is expressly provided that such nonpayment shall result in suspension or forfeiture, no affirmative action on the part of the association or lodge is necessary.[94] But, ordinarily, it would seem

Supreme Council Royal Arcanum, 192 Mass. 150, 78 N. E. 129, 7 L. R. A. (N. S.) 1154, and note, where other authorities on both sides are cited; and see Wright v. Minnesota Mut. Life Ins. Co., 193 U. S. 657, 48 L. ed. 832, 24 Sup. Ct. 549, and Supreme Lodge v. Knight, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409, and the following more recent cases: Williams v. Supreme Council, 152 Mich. 1, 115 N. W. 1060; Supreme Ruling v. Ericson (Tex. Civ. App.), 131 S. W. 92. But compare Green v. Supreme Council, 124 N. Y. S. 398, 100 N. E. 411 (on appeal).

[90] Dowdall v. Supreme Council, 196 N. Y. 405, 89 N. E. 1075, 31 L. R. A. (N. S.) 417.

[91] Commonwealth v. Massachusetts Mut. Fire Ins. Co., 112 Mass. 116; Tolford v. Church, 66 Mich. 431, 33 N. W. 913. See also, notes in 19 Am. St. 786, and 52 Am. St. 552.

[92] Commonwealth v. Massachusetts Mut. Fire Ins. Co., 112 Mass. 116.

[93] Tolford v. Church, 66 Mich. 431, 33 N. W. 913; Ellerbe v. Barney, 119 Mo. 632, 25 S. W. 384, 23 L. R. A. 435. One to whom a certificate of fire insurance is issued is not liable for assessments theretofore made against a person in control of the property, who held a separate certificate of membership in the company and under whom the insured does not claim any right, title or interest in the property where the liability for assessments is purely personal. Monger v. Rockingham Home Mut. Fire Ins. Co., 96 Va. 442, 31 S. E. 609. It is no defense to an action on a premium note given by the insured, that an agent of the company, who had no authority to bind it to pay the cash surrender value of an old policy, told the insured that there would be "no trouble" about getting such cash surrender value, as it was the mere expression of an opinion. Garber v. Bresee, 96 Va. 644, 32 S. E. 39.

[94] Hansen v. Supreme Lodge, 140 Ill. 301, 29 N. E. 1121; Mandego v.

that mere nonpayment of an assessment on time does not of itself result in a forfeiture without action on the part of the association,[95] and where the fundamental law provides that upon nonpayment a member shall be suspended by the proper authorities, his membership is not affected until the power thus conferred is exercised.[96] When the annual assessment is required to be paid on a day certain, but the assured does not know the exact amount because of dividends which he is entitled to have applied, there cannot be a forfeiture until notice has been given him,[97] and the failure of the company to make an assessment should not be allowed to defeat a recovery.[98]

§ 4144. **Withdrawal of member.**—A member of a mutual or benevolent insurance company may generally withdraw at pleasure, and thus relieve himself from liability for assessments for further losses, but he generally remains liable for assessments thereafter made for the purpose of paying losses which had occurred while he was a member.[99]

§ 4145. **Insolvency of company.**—Upon the insolvency of the company, a receiver may levy assessments upon such as under the contract are absolutely liable for losses of the company, but

Centennial Mut. Life Assn., 64 Iowa 134, 17 N. W. 656, 19 N. W. 877; Goodman v. Jedidjah Lodge, 67 Md. 117, 9 Atl. 13, 13 Atl. 127; Burdon v. Massachusetts &c. Assn., 147 Mass. 360, 17 N. E. 874, 1 L. R. A. 146; Mueller v. Grand Grove &c., 69 Minn. 236, 72 N. W. 48. See also, Pacific Mut. Life Ins. Co. v. Galbraith, 115 Tenn. 471, 91 S. W. 204, 112 Am. St. 862. Where a member of a mutual insurance company has obligated himself to pay such annual assessments as shall be made, not to exceed a specified sum, each year, and in anticipation of an annual assessment pays to the treasurer the amount of an annual assessment in advance, and such assessment is not in fact made, the sum so paid stands to his credit, and he has a right to apply the same on an assessment for a succeeding year. Montgomery v. Harker, 9 N. Dak. 527, 84 N. W. 369.

[95] Northwestern &c. Assn. v. Schauss, 148 Ill. 304, 35 N. E. 747.

[96] Scheufler v. Grand Lodge, 45 Minn. 256, 47 N. W. 799. For the effect of suspension of subordinate lodge, see Young v. Grand Lodge, 173 Pa. St. 302, 33 Atl. 1038.

[97] Phœnix Mut. Life Ins. Co. v. Doster, 106 U. S. 30, 27 L. ed. 65, 1 Sup. Ct. 18.

[98] Lake v. Minnesota Masonic Relief Assn., 61 Minn. 96, 63 N. W. 261, 52 Am. St. 538.

[99] Langworthy v. Washburn &c. Co., 77 Minn. 256, 79 N. W. 974; Ionia &c. Mut. Fire Ins. Co. v. Otto, 96 Mich. 558, 56 N. W. 88; Detroit Manufacturers' Mut. Fire Ins. Co. v. Merrill, 101 Mich. 393, 59 N. W. 661. Upon the termination of the contract for insurance the premium note becomes void. Mound City &c. Ins. Co. v. Curran, 42 Mo. 374.

not upon such as are relieved from further liability by forfeiture of their rights.[1] The obligation upon a premium note is not affected by the insolvency of the company, and the receiver may, under the authority of the court, within the terms of the contract, make such assessments as are necessary to meet the losses and expenses.[2] The facts necessary to authorize the assessment must be determined, and this must be made to appear affirmatively in an action brought by the receiver to enforce the assessment.[3] Such an assessment, it has been held, may include the amount necessary to cover the expenses of the receivership.[4]

§ 4146. **Death during period of suspension.**—There can be no recovery for a loss which occurs during a period of suspension from membership,[5] but a member is protected during the period allowed by the contract for the payment of the assessment.[6] A payment after the death of the insured, which is accepted by the association without knowledge of the death, is of no effect.[7] But if such payment is accepted with full knowledge of all facts, it may render the association liable.[8]

§ 4147. **Reinstatement.**—Contracts which provide for forfeiture or suspension for nonpayment of dues generally contain a condition for reinstatement upon making payment and complying with certain requirements,[9] such as producing a certificate of

[1] Bacon v. Clyne, 70 Mich. 183, 38 N. W. 207.

[2] Tolford v. Church, 66 Mich. 431, 33 N. W. 913; In re Minneapolis Mut. Fire Ins. Co., 49 Minn. 291, 51 N. W. 921. In this case the premium notes which constituted the "contingent fund" were a part of the capital of the company required by the act of 1885. See also, Hill v. Baker, 205 Mass. 303, 91 N. E. 380, 137 Am. St. 440.

[3] In re Equitable &c. Assn., 131 N. Y. 354, 30 N. E. 114; Seamans v. Millers' Mut. Ins. Co., 90 Wis. 490, 63 N. W. 1059.

[4] Davis v. Shearer, 90 Wis. 250, 62 N. W. 1050; Seamans v. Millers' Mut. Ins. Co., 90 Wis. 490, 63 N. W. 1059. For a statement of the general principle which must govern assessments on premium notes, see Swing v. H. C. Akeley Lumber Co., 62 Minn. 169, 64 N. W. 97.

[5] Brown v. Grand Council, 81 Iowa 400, 46 N. W. 1086; Blanchard v. Atlantic &c. Ins. Co., 33 N. H. 9. See also, National Masonic Acc. Assn. v. Burr, 44 Nebr. 256, 62 N. W. 466.

[6] Painter v. Industrial Life Assn., 131 Ind. 68, 30 N. E. 876 (ordinary life policy).

[7] Miller v. Union Cent. Life Ins. Co., 110 Ill. 102. See also, Garbutt v. Citizens' Life Endowment Assn., 84 Iowa 293, 51 N. W. 148.

[8] Erdmann v. Mutual Ins. Co., 44 Wis. 376.

[9] Manson v. Grand Lodge, 30 Minn. 509, 16 N. W. 395. As to whether it becomes a new contract, see and compare Goodwin v. Provident Sav. Life Assur. Soc., 97 Iowa 226, 66 N. W. 157, 32 L. R. A. 473,

good health.[10] The acceptance of an assessment during the period of suspension, with a full knowledge of all facts, has been held in itself to reinstate a member,[11] and it has also been held that where the clerk of a local camp has authority to collect arrearages and to report reinstatements to the sovereign camp, his action in collecting arrearages from a member suspended for nonpayment of assessments and restoring his name to the membership list, with full knowledge of the facts and without fraud, is binding upon the association even though he does not demand or receive a health certificate as required by the by-laws.[12]

§ 4148. **Waiver—Estoppel.**—The insurer may expressly or by implication waive strict compliance with the requirement that dues and assessments shall be paid within a specified time. The tendency of the courts is to protect the members of such associations from forfeiture of their rights.[13] But where the constitution and by-laws of a mutual benefit association limit and define the powers of the officers and forbid the alteration or amendment

59 Am. St. 411, and Lindsey v. Western Mut. Aid Soc., 84 Iowa 734, 50 N. W. 29, with Pac. Mut. Life Ins. Co. v. Galbraith, 115 Tenn. 471, 91 S. W. 204, 112 Am. St. 862, and Lantz v. Vermont Life Ins. Co., 139 Pa. St. 546, 21 Atl. 80, 10 L. R. A. 577, 23 Am. St. 202. A lapsed policy can only be revived, as far as the insured is concerned, by the actual payment and acceptance of the premium, or by a contract based upon a sufficient consideration. Lantz v. Vermont Life Ins. Co., 139 Pa. St. 546, 21 Atl. 80, 10 L. R. A. 577, 23 Am. St. 202, and cases therein cited.

[10] Jones v. Preferred &c. Assur. Co., 120 Mich. 211, 79 N. W. 204. See note, 3 Am. St. 634, and note in 52 Am. St. 754; French v. Mutual Reserve Fund Assn., 111 N. Car. 391, 16 S. E. 427, 32 Am. St. 803.

[11] Sweetser v. Odd Fellows &c. Assn., 117 Ind. 97, 19 N. E. 722.

[12] Henton v. Sovereign Camp, Woodmen of the World, 87 Nebr. 552, 127 N. W. 869, 138 Am. St. 500. See also, Frame v. Sovereign Camp, Woodmen of the World, 67 Mo. App. 127; Pringle v. Modern Woodmen, 76 Nebr. 384, 107 N. W. 756, 113 N. W. 231; Schuster v. Knight &c. Co., 60 Wash. 42, 110 Pac. 680, 140 Am. St. 105. But compare Modern Woodmen of America v. Tevis, 117 Fed. 369, 54 C. C. A. 293; Lane v. Fidelity Mut. Life Ins. Co., 142 N. Car. 55, 54 S. E. 854, 115 Am. St. 729.

[13] Mueller v. Grand Grove, 69 Minn. 236, 72 N. W. 48. In Sweetser v. Odd Fellows &c. Assn., 117 Ind. 97, 19 N. E. 722, the court said: "It is quite true that mere occasional voluntary indulgence on the part of an insurance company, in the absence of an express or implied agreement to waive payment of assessments according to the conditions of the contract, cannot justly be construed as a permanent waiver or as depriving the company of the right to insist upon a forfeiture or to cancel its policy on account of the failure to pay according to the stipulations therein written. Thompson v. Knickerbocker Life Ins. Co., 104 U. S. 252, 26 L. ed 765, but such a course of dealing may be pursued as will estop the company to say that there was no agreement, after it has permitted its policy to stand open and uncanceled, and after it has accepted payment

of such constitution except by the governing body, in the manner therein provided, and the by-laws provide that the member must pay the assessment within a specified time, and no further or other notice need be given, it has been held that the secretary could not waive such provisions;[14] and there are numerous cases which hold that the officers of such a concern cannot waive by-laws which relate to the substance of the contract;[15] but there are also many instances in which there has been held to be a waiver even by agents who are not general officers, and in some cases it has been so held even as to causes for forfeiture provided for in the by-laws.[16]

of overdue premiums or assessments in a specified manner, which has been conformed to during the life-time of the assured." See also, Jones v. Preferred &c. Assur. Co., 120 Mich. 211, 79 N. W. 204; Richwine v. LaCrosse Mut. Aid Assn., 76 Minn. 417, 79 N. W. 504; Appleton v. Phœnix Mut. L. Ins. Co., 59 N. H. 541, 47 Am. Rep. 220. See note to Lake v. Minnesota Masonic Relief Assn. (61 Minn. 96) in 52 Am. St. 538, 575.

[14] Kocher v. Supreme Council, 65 N. J. L. 649, 48 Atl. 544, 52 L. R. A. 861, 86 Am. St. 687. But see generally to the effect that notice is usually required, note in 52 Am. St. 573.

[15] Niblack Mut. Ben. Soc. (2d ed.) 195; McCoy v. Roman Cath. &c. Ins. Co., 152 Mass. 272, 25 N. E. 289. In Supreme Council v. Boyle, 10 Ind. App. 301, 37 N. E. 1105, it is said that "the authorities seem to support this proposition" but that such officers and agents may often waive other matters. See also, Supreme Lodge v. Jones, 35 Ind. App. 121, 69 N. E. 718; Royal Highlanders v. Scoville, 66 Nebr. 213, 92 N. W. 206, 4 L. R. A. (N. S.) 421, and note.

[16] Whiteside v. Supreme Conclave, 82 Fed. 275; Moore v. Order of Railway Conductors, 90 Iowa 721, 57 N. W. 623; Modern Woodmen of America v. Breckenridge, 75 Kans. 373, 89 Pac. 661, 10 L. R. A. (N. S.) 136, and note; Modern Woodmen v. Colman, 68 Nebr. 660, 94 N. W. 814, 96 N. W. 154; Burlington Voluntary Relief Dept. R. Co. v. White, 41 Nebr. 547, 59 N. W. 747, 43 Am. St. 701n; Henton v. Sovereign Camp Woodmen of the World, 87 Nebr. 552, 127 N. W. 869, 138 Am. St. 500. See note in 107 Am. St. 99. See also, to waiver generally, notes in 18 L. R. A. (N. S.) 902, and 1219; Johnson v. Modern Brotherhood of America, 109 Minn. 288, 123 N. W. 819, 27 L. R. A. (N. S.) 446, and note.

CHAPTER CXXIII.

INSURANCE AGENTS AND THE GENERAL RULES OF AGENCY.

§ 4155. In general.
4156. Statutory provisions relating to insurance agents.
4157. Construction of such statutes.
4158. Evidence of agency.
4159. Character of the agency.
4160. Various special agents.
4161. Liability of company for unreasonable delay of soliciting agent in forwarding application.
4162. Subagents and clerks.
4163. Insurance brokers.
4164. Powers of agents.
§ 4165. Restrictions in application or policy.
4166. Limitations on authority.
4167. Limitations contained in application — Preparation of application.
4168. Provisions restricting power of officers and general agent.
4169. Notice.
4170. Notice of loss to local agent.
4171. Rights and liabilities of agent.
4172. Statutes affecting agents and compensation.

§ 4155. **In general.**—An insurance agent, according to the common understanding and use of the term is a person employed by an insurance company to solicit risks and effect insurance, collect and transmit premiums, and in general to represent the insurer in the solicitation, consummation and adjustment of the contract.[1] But the term may have either a broader or a narrower meaning in particular instances and may even apply to one who represents the insured or to an insurance broker or middleman.[2]

[1] That the rule is the same in dealing with the agents of mutual and stock insurance companies, see Kausal v. Minnesota &c. Ins. Assn., 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776; Whitney v. National &c. Assn., 57 Minn. 472, 59 N. W. 943; Franklin F. Ins. Co. v. Martin, 40 N. J. L. 568, 29 Am. Rep. 271; Cumberland Valley &c. Co. v. Schell, 29 Pa. St. 31.

[2] As to when the question as to which party the agent is acting for is a question of law, see Sellers v. Commercial Fire Ins. Co., 105 Ala. 282, 16 So. 798; Indiana Ins. Co. v. Hartwell, 123 Ind. 177, 24 N. E. 100; Duluth Nat. Bank v. Knoxville Fire Ins. Co., 85 Tenn. 76, 1 S. W. 689, 4 Am. St. 744. But compare Lumbermans' Mut. Ins. Co. v. Horton, 166 Ill. 400, 45 N. E. 130, 57 Am. St.

§ 4156. Statutory provisions relating to insurance agents. —Statutes in some states provide that a local or traveling agent engaged in taking applications for insurance shall be deemed the agent of the insurer and as representing it, and not the insured, in connection with all statements made in the application.[3] It is also common to require insurance agents to procure a license, and in some instances it is made a criminal offense to solicit insurance without having such a license,[4] or to act as agent for an insurance company which has not procured a certificate of authority to do business within the state.[5] The business of insurance is of such a nature that the state may impose restrictions upon it, and may, it seems, if thought advisable, prohibit individuals from engaging in it.[6] But if individual citizens of other states are permitted to engage in the business of insurers it is held that they may only be subjected to such restrictions and conditions as are imposed upon citizens of the same state of equal standing and merit.[7] An insurance solicitor who places a risk through brokers in another state, without knowing by what company it was taken, is not relieved from liability under the statute authorizing the recovery of the loss from persons who act as agents of unlicensed foreign companies.[8]

140; Davis v. Aetna Fire Ins. Co., 67 N. H. 335, 39 Atl. 902. And see generally the note in 38 L. R. A. (N. S.) 614, et seq. as to agency of insurance brokers.

[3] Pub. Stat. Vt. (1906), § 4775; Iowa Rev. Stat. 1888, § 1732, quoted and commented on in McMaster v. New York Life Ins. Co., 78 Fed. 33, revd. 87 Fed. 63, 30 C. C. A. 532; Bankers' L. Ins. Co. v. Robbins, 55 Nebr. 117, 75 N. W. 585; Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304, 33 L. ed. 341, 10 Sup. Ct. 87. See also, Continental Ins. Co. v. Ruckman, 127 Ill. 364, 20 N. E. 77, 11 Am. St. 121.

[4] State v. Hosmer, 81 Maine 506, 17 Atl. 578.

[5] In re Hogan, 8 N. Dak. 301, 78 N. W. 1051, 45 L. R. A. 166, 73 Am. St. 759.

[6] Commonwealth v. Vrooman, 164 Pa. St. 306, 30 Atl. 217, 25 L. R. A. 250, 44 Am. St. 603. See also, as to right of the state to legislate as to such corporations, the recent case of Continental Life Ins. Inv. Co. v. Hattabaugh, 21 Idaho 285, 121 Pac. 81 and cases cited.

[7] State v. Stone, 118 Mo. 388, 24 S. W. 164, 40 Am. St. 388, 25 L. R. A. 243. As to restrictions upon insurance by unincorporated associations from another state, see note, 25 L. R. A. 238. And see, as to right to classify and regulate as to different kinds of insurance corporations, Fidelity Mut. L. Assn. v. Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. 622.

[8] Noble v. Mitchell, 100 Ala. 519, 14 So. 581, affd. 164 U. S. 367, 41 L. ed. 472, 25 L. R. A. 238, 17 Sup. Ct. 110.

§ 4157. **Construction of such statutes.**—The Iowa statute[9] has been held to apply to all kinds of insurance,[10] and to be intended to settle, as between the parties to the contract, the status of the party through whom negotiations are conducted. Its object is to cut out the class of defenses interposed under the provisions which many companies inserted in their applications and policies, to the effect that the agent by whom the application was procured should be regarded as the agent of the insured.[11] And it has been held by the Supreme Court of the United States[12] that under this statute a person procuring an application for life insurance is the agent of the company, and cannot be converted into the agent of the insured by any provision in the application.

§ 4158. **Evidence of agency.**—The fact and character of the agency may be shown by any competent evidence, such as an express contract between the agent and his principal, the holding out or recognition of the party as his agent,[13] the possession of papers such as policies executed in blank, which an insurance company would furnish ordinarily only to its agents;[14]

[9] Providing that "any person who shall hereafter solicit insurance or procure application therefor shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application or on a renewal thereof, anything in the application, policy or contract to the contrary notwithstanding." Code of Iowa (1897), § 1749. By Minn. Rev. Laws (1905), § 1716, such agent is made the agent of the company for the purpose of receiving the premium. Section 1642 provides that "every person who solicits insurance and procures an application therefor shall be held to be the agent of the party afterward issuing insurance thereon, or a renewal thereof." Similar provisions are found in other states.

[10] Cook v. Federal Life Assn., 74 Iowa 746, 35 N. W. 500.

[11] St. Paul &c. Ins. Co. v. Shaver, 76 Iowa 282, 41 N. W. 19.

[12] Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304, 33 L. ed. 341, 10 Sup. Ct. 87.

[13] Parker v. Citizens' Ins. Co., 129 Pa. St. 583, 18 Atl. 524 (affidavit of alleged agent used in litigation); List v. Commonwealth, 118 Pa. St. 322, 12 Atl. 277; Enos v. St. Paul &c. Ins. Co., 4 S. Dak. 639, 57 N. W. 919, 46 Am. St. 796. See Schrieber v. German-American &c. Ins. Co., 43 Minn. 367, 45 N. W. 708 (admission by president of company), 3 Elliott Ev., §§ 1627, 1628, 1633-1639. See also, ante, Title 1 Agency. A company which has ratified the acts of a person in writing an application for insurance, by accepting it and issuing a policy thereon, cannot thereafter repudiate such acts because the agent had not a written certificate of appointment. Landes v. Safety Mut. Fire Ins. Co., 190 Pa. St. 536, 42 Atl. 961. When the company issues a policy upon an application taken by a solicitor, it is estopped to deny his agency. London & L. Ins. Co. v. Gerteisen, 106 Ky. 815, 21 Ky. L. 471, 51 S. W. 617.

[14] Continental Ins. Co. v. Ruckman,

and generally by the existence of a state of facts from which agency would be inferred as a matter of law,[15] or as a mixed question of law and fact.[16] Thus, a person soliciting insurance and taking the application, in the absence of notice to the insured of limitations upon his authority, will be deemed the agent of the company which accepts the application, issues the policy and retains the premium.[17] But an agent's apparent authority to bind his principal must be based on something tangible; such, for instance, as the possession by the agent of blank policies signed by the officers of the company, or some other act of the company, such as permitting the party to continue business after it has notice that he is representing himself as its agent,[18] or the like.

§ 4159. **Character of the agency.**—The nature of the agency generally depends upon the terms of the employment and the character of the business to be transacted. As between the principal and the agent, or the principal and persons dealing with the agent, with knowledge of the terms of employment, such terms are conclusive. But an agent may exceed his actual authority under such circumstances as will justify persons dealing with him without knowledge of limitations on his authority in assuming that he has greater authority than is in fact the case as between him and his principal; and one who has no knowledge of limitations may ordinarily assume that an agent has power to bind his principal within the scope of his apparent authority. Insurance agents are known by various designations, but they may, in a rough way, be classified as general and special. Judge Story said that, "A special agency properly exists, when there is a delegation of authority to do a single act; a general agency where there is a delegation to do all acts connected with

127 Ill. 364, 20 N. E. 77, 11 Am. St. 121; Dickerman v. Quincy &c. Ins. Co., 67 Vt. 609, 32 Atl. 489.

[15] Sellers v. Commercial Fire Ins. Co., 105 Ala. 282, 16 So. 798; Indiana Ins. Co. v Hartwell, 123 Ind. 177, 24 N. E. 100; Duluth Nat. Bank v. Knoxville Fire Ins. Co., 85 Tenn. 76, 1 S. W. 689, 4 Am. St. 744; Allen v. German-Americen Ins. Co., 123 N. Y. 6, 25 N. E. 309.

[16] Lumbermen's Mut. Ins. Co. v. Bell, 166 Ill. 400, 45 N. E. 130, 57 Am. St. 140. See Davis v. Ætna &c. Ins. Co., 67 N. H. 335, 39 Atl. 902.

[17] London & L. Ins. Co. v. Gerteisen, 106 Ky. 815, 21 Ky. L. 471, 51 S. W. 617.

[18] Bell v. Peabody Ins. Co., 49 W. Va. 437, 38 S. E. 541.

a particular trade, business, or employment."[19] Hence, a general agent is one who is employed to transact all the business of his principal of a particular kind or in a particular place, while a special agent is one authorized to act only in a specific transaction. It is doubtful whether the distinction is of much practical value, however, as the relation of the agent to third parties is controlled ordinarily by what the person dealing with the agent has a right under the circumstances to assume from the nature and scope of the agent's employment,[20] and a special agent may even be in effect a general agent for some purpose. The distinction between general and special insurance agents has been abolished by the statutes of some states. Thus, in Wisconsin, the agents of insurance companies, without reference to attempted limitations, have power to do almost anything that their companies could do. The statute gives all insurance agents general powers; and it was held that an agent might make a valid oral agreement for immediate insurance, notwithstanding a stipulation in the application, which was subsequently signed by the applicant without actual knowledge of its contents, that the insurer should not be liable until the application and premium were received by the secretary.[21]

§ 4160. **Various special agents.**—A person who deals with a general agent may assume that he has authority coextensive with his apparent authority. But if the circumstances are such as to show that the authority is limited and special, the person dealing with him is usually under obligation to learn the extent of such limitations.[22] There is considerable conflict of author-

[19] Whitehead v. Tuckett, 15 East 400; Story Agency (9th ed.), § 17; Ewell's Evans Agency 2; Dunlop's Paley Agency 2. That the nature of the agency is not necessarily affected by the fact that it is restricted to a particular locality, see Continental &c. Ins. Co. v. Ruckman, 127 Ill. 364, 20 N. E. 77, 11 Am. St. 121, where the court said: "W. and S. though representing their principal in a particular locality, or within a limited territory, and therefore called 'local agents,' were in fact general agents of the defendant in the matter of issuing policies."

[20] Gore v. Canada Life Assur. Co., 119 Mich. 136, 77 N. W. 650.

[21] Wis. Rev. Stat. (1898), § 1977, note. The court said: "All insurance companies understand that all their agents doing business in this state are general agents, however restricted their powers may be by the rules of the companies, or by the stipulations or conditions of their policies, or the applications for insurance." Mathers v. Union Mut. Acc. Assn., 78 Wis. 588, 47 N. W. 1130, 11 L. R. A. 83.

[22] As to the circumstances under which the applicant must ascertain

ity as to the powers of a soliciting agent who has actual authority merely to receive applications and forward them to the company for approval. It has been held that such an agent cannot bind the company by an oral contract of insurance,[23] or for the renewal of a policy,[24] or for additional insurance,[25] or by his construction of the policy;[26] and that he has no authority to consent to the assignment of the policy,[27] or waive a condition therein.[28] A mere collecting agent cannot bind the company by an agreement to waive any of the terms of the policy.[29] So, it has been held that an agent with authority to adjust a loss cannot waive a forfeiture of the policy,[30] although he may waive the making of preliminary proofs of loss.[31] But, as will hereafter appear, there are other decisions holding the company

the agent's authority, see Sun Fire Office v. Wich, 6 Colo. App. 103, 39 Pac. 587; Harris v. North American Ins. Co., 190 Mass. 361, 77 N. E. 493, 4 L. R. A. (N. S.) 1137. The mere fact that a person is the representative of the insurer for a certain purpose, such as the making of a medical examination, does not justify the inference that he has authority to represent the company in other matters, such as the filling out of the application for insurance. Flynn v. Equitable L. Assur. Soc., 67 N. Y. 500, 23 Am. Rep. 134. The medical examiner is the agent of the company in making the examination, although the application recites that he shall be regarded as the agent of the applicant. Knights of Pythias v. Cogbill, 99 Tenn. 28. The local agent of a life insurance company is in the discharge of no duty which he owes his company when he is present at the medical examination of an applicant. He can not therefore bind the company by his advice as to the proper answer to a question as to whether the applicant has ever been rejected as an applicant for insurance in other companies. United States Life Ins. Co. v. Smith, 92 Fed. 503, 34 C. C. A. 506.

[23] O'Brien v. New Zealand Ins. Co., 108 Cal. 227, 41 Pac. 298; Fleming v. Hartford Fire Ins. Co., 42 Wis. 616. But proof that an agent has authority to make contracts of insurance has been held sufficient to show authority to make such oral contracts. New England Fire & Marine Ins. Co. v. Robinson, 25 Ind. 536; Commercial &c. Ins. Co. v. State, 113 Ind. 331, 15 N. E. 518; Packard v. Dorchester Mut. Fire Ins. Co., 77 Maine 144; Putnam v. Home Ins. Co., 123 Mass. 324, 25 Am. Rep. 93. And see Potter v. Phenix Ins. Co., 63 Fed. 382. See also, Amazon Ins. Co. v. Wall, 31 Ohio St. 628, 27 Am. Rep. 533. And compare Brotherhood v. Corder (Ind. App.), 97 N. E. 125.

[24] Shank v. Glens Falls Ins. Co., 4 App. Div. (N. Y.) 516, 74 N. Y. St. 623, 40 N. Y. S. 14. In this case the powers of the agent were clearly limited by the policy.

[25] Heath v. Springfield Fire Ins. Co., 58 N. H. 414.

[26] Dryer v. Security Fire Ins. Co., 94 Iowa 471, 62 N. W. 798.

[27] Strickland v. Council Bluffs Ins. Co., 66 Iowa 466, 23 N. W. 926.

[28] As to proof of loss, see Lohnes v. Insurance Co. of North America, 121 Mass. 439; Bowlin v. Hekla Fire Ins. Co., 36 Minn. 433, 31 N. W. 859.

[29] Bryan v. National Life Ins. Assn., 21 R. I. 149, 42 Atl. 513.

[30] Hollis v. State Ins. Co., 65 Iowa 454, 21 N. W. 774. See also, Barre v. Council Bluffs Ins. Co., 76 Iowa 609, 41 N. W. 373.

[31] Ætna Ins. Co. v. Shryer, 85 Ind. 362; Ohio Farmers' Ins. Co. v. Vogel, 166 Ind. 239, 76 N. E. 977, 3 L. R. A. (N. S.) 966, 117 Am. St. 382; Staats v. Pioneer Ins. Assn., 55 Wash.

bound by the acts of their soliciting agents and the like in many such cases, although, in many instances, much depended upon the course of dealing or circumstances of the particular case.

§ 4161. Liability of company for unreasonable delay of soliciting agent in forwarding application.—A somewhat peculiar case was recently decided by the Supreme Court of Kansas regarding the liability of a hail insurance company in damages for unreasonable delay of its soliciting agent in forwarding the application whereby the policy on a crop of corn was not issued until the day after the corn was destroyed by a hail storm. It appeared that the policy would have been issued and in force before the storm if the agent had not taken a note for the premium and delayed to forward the application for three or four days while attempting to sell and get the note discounted, and the court held that the delay of the agent was unreasonable and negligent and that such negligence was the negligence of the company and the latter was liable therefore in damages in the amount of the insurance.[32]

§ 4162. Subagents and clerks.—The rule now seems to be pretty well established that an insurance campany may be liable not only for the acts of its general agent, but also for the acts of the clerks and employés of such agent to whom he has delegated authority to discharge his functions within the scope of his agency.[33] Such an agent may, therefore, it has been held, employ

51, 104 Pac. 185. The contract of an agent sent to adjust a loss is binding upon the company in the absence of notice to the insured of any limitation upon the authority of such adjuster. Slater v. Capital Ins. Co., 89 Iowa 628, 57 N. W. 422, 23 L. R. A. 181. See also, Faust v. American Fire Ins. Co., 91 Wis. 158, 64 N. W. 883, 30 L. R. A. 783, 51 Am. St. 876; Dick v. Equitable Fire & M. Ins. Co., 92 Wis. 46, 65 N. W. 742.

[32] Boyer v. State Farmers' Mut. Hail Ins. Co., 86 Kans. 442, 121 Pac. 329. Compare also, Brotherhood v. Corder (Ind. App.), 97 N. E. 125.

[33] Indiana Ins. Co. v. Hartwell, 123 Ind. 177, 24 N. E. 100; Steele v. German Ins. Co., 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85; Swain v. Agricultural Ins. Co., 37 Minn. 390, 34 N. W. 738. In some cases it is said that the power of the principal cannot be delegated to a subagent without actual or implied authority. See Waldman v. North British &c. Ins. Co., 91 Ala. 170, 8 So. 666, 24 Am. St. 883; Phœnix Ins. Co. v. Spiers, 87 Ky. 285, 10 Ky. L. 254, 8 S. W. 453. But, as stated in the cases above cited, the authority may easily be implied from the circumstances. It was said in a recent case that "insurance companies know, or ought to know, when they appoint general agents, that, according to the ordinary course of business, they have clerks and other persons who assist

a clerk and authorize him to contract for risks, to deliver policies and make renewals, collect premiums and give credit therefor by waiving prepayment.[34] And even where a policy contained a provision that "only such persons as shall hold the commission of this company shall be considered as its agents in any transaction relating to this insurance," it was held that notice of other insurance given a clerk or employé of a commissioned agent was notice to the company.[35] So, notice to the clerk of an insurer's agent of the condition of the insured's title has been held notice to the company.[36]

§ 4163. **Insurance brokers.**—An insurance broker must be distinguished from an ordinary agent.[37] He is generally the agent of the insured, and may hence bind him by his concealments and representations made in the course of the negotiation.[38]

them, and that their agents, in many instances, could not transact the business intrusted to them if they were required to give their personal attention to all of its details. It being necessary, therefore, and according to the usual course of business, for their agents to employ others to aid them in doing the work, it is just and reasonable that insurance companies should be held responsible not only for the acts of the agents, but also for the acts of their agents' employés, within the scope of the agents' authority. It is no sufficient answer to this view to say that the insurers did not authorize their agents to delegate their authority to others. It may be that they did not do so expressly, but they appointed agents whom they knew, or ought to have known, would, according to the usage or the necessities of the business, engage the services of others in doing the work intrusted to them; and, having this knowledge, they will be held to have impliedly authorized their agents to do what was usual or necessary in the business." Goode v. Georgia Home Ins. Co., 92 Va. 392, 23 S. E. 744, 30 L. R. A. 842, 53 Am. St. 817; Deitz v. Providence Wash. Ins. Co., 33 W. Va. 526, 11 S. E. 50, 25 Am. St. 908.

[34] Bodine v. Exchange Fire Ins. Co., 51 N. Y. 117, 10 Am. Rep. 566.

[35] Arff v. Star Fire Ins. Co., 125 N. Y. 57, 25 N. E. 1073, 10 L. R. A. 609, 21 Am. St. 721.

[36] Carpenter v. German-American Ins. Co., 135 N. Y. 298, 31 N. E. 1015.

[37] Bernheimer v. Leadville, 14 Colo. 518, 24 Pac. 332; Gude v. Exchange Fire Ins. Co., 53 Minn. 220, 54 N. W. 1117.

[38] In John R. Davis Lumber Co. v. Hartford Fire Ins. Co., 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131, Mr. Justice Marshall said: "Leaving out of view the statute, * * * what the powers of an insurance broker are can hardly be a subject for serious controversy. He is the agent for the assured, according to all authorities on the subject, though at the same time, for some purposes, he may be the agent for the insurer, and his acts and representations within the scope of his authority as such agent are binding upon the insured. Mechem Ag., § 931. * * * Hamblet v. City Ins. Co., 36 Fed. 118; American Fire Ins. Co. v. Brooks, 83 Md. 22, 34 Atl. 373; Hartford Fire Ins. Co. v. Reynolds, 36 Mich. 502; Standard Oil Co. v. Triumph Ins. Co., 64 N. Y. 85. Questions involving the scope of the powers of an insurance broker to represent the insured arise most frequently where notice of cancelation

A broker is defined as a person who, "for compensation, not being the appointed agent or officer of the company in which such insurance or reinsurance is effected, acts or aids in any manner in the negotiating contracts of insurance or reinsurance or placing risks or effecting insurance or reinsurance for a person other than himself."[39] If he is employed by the insurer he is, of course, its agent.[40] But the mere fact that he solicits the insurance from the insured, and receives a commission from the company which delivers the policy to the insured, does not make him the agent of the company.[41] The broker may be the agent of one party for one purpose and of the other for another purpose. In Indiana he is said to be the agent of the company for the purpose of delivering the policy and receiving the premium.[42] In Texas he is its agent to collect premiums only;[43] and this is the rule by statute in Massachusetts.[44] In Pennsylvania[45] he is not the agent of the insurer even for this purpose. A broker who is employed only to secure a policy cannot, by virtue of such employment, represent his employer in other matters relating to the insurance. His agency ceases when the policy is procured, and he cannot thereafter cancel the policy, and his principal is not affected by notice of cancelation or of other mat-

is served by the insurer on such broker when the contract of insurance requires it to be served upon the insured. In such cases the question turns on whether the employment of the broker extended beyond the mere procurement of the insurance. If not, it is held that his agency ceased upon the delivery and acceptance of the policy, so that service of notice of cancelation upon him was ineffectual. * * * But the broker may be so clothed with authority as to have full power to act for the insured in canceling, as well as procuring, policies. * * * In all cases the familiar rule respecting the relation of principal and agent applies,—that, within the scope of his authority to procure insurance he stands in the place of the principal, and the latter is bound by whatever, within such scope, such agent may do, to the same extent as if it were done by the principal." See also, Morris McGraw Woodenware Co. v. German Fire Ins. Co., 126 La. Ann. 32, 52 So. 614, 38 L. R. A. (N. S.) 614, and note.

[39] Mass. Laws, 1887, ch. 214, § 93; Rev. Laws (1902), ch. 118, § 93.

[40] See Newark Fire Ins. Co. v. Sammons, 110 Ill. 166.

[41] Seamans v. Knapp-Stout & Co., 89 Wis. 171, 61 N. W. 757, 27 L. R. A. 362, 46 Am. St. 825.

[42] Indiana Ins. Co. v. Hartwell, 123 Ind. 177, 24 N. E. 100. To same effect is Herman v. Niagara Fire Ins. Co., 100 N. Y. 411, 3 N. E. 341, 53 Am. Rep. 197. But if he undertakes on application of the insured to procure a change in the policy he is held to become in that regard the agent of the insured. Duluth Nat. Bank v. Knoxville Fire Ins. Co., 85 Tenn. 76, 1 S. W. 689, 4 Am. St. 744.

[43] East Texas Fire Ins. Co. v. Blum, 76 Tex. 653.

[44] Davis v. Ætna &c. Ins. Co., 67 N. H. 335, 39 Atl. 902.

[45] Pottsville Mut. Fire Ins. Co. v.

ters relating to the risk.[46] The delivery of a policy to a broker, employed by the insured to procure it, is a delivery to the insured.[47] And where a company issued policies upon representations of brokers assuming to act for it and in pursuance of business methods customary between them, without any communication with the insured, the broker was held to be the agent of the insurer, although the policy provided that no person, unless duly authorized in writing, should be deemed its agent.[48]

§ 4164. **Powers of agents.**—The power of an agent may be determined not alone by the actual, but also by the apparent or ostensible, authority. The latter may be said to be such as the principal, intentionally or by want of ordinary care, allows a third person to believe the agent to possess.[49] A general agent can usually bind his principal by any act within the ordinary scope of the business.[50] His acts are the acts of the principal, and he may hence waive a condition in the policy which his principal could waive,[51] correct a misdescription of the property in the policy,[52] and do such other things, subject to the provision that his powers may legally be limited, if such limitations are known to the persons who deal with him.[53] Secret instructions, in derogation

Minnequa Springs Improvement Co., 100 Pa. St. 137.

[46] British-American Assur. Co. v. Cooper, 26 Colo. 452, 58 Pac. 592; Standard Leather Co. v. Northern Assur. Co., 156 Fed. 689; Insurance Co. of North America v. Wisconsin &c. R. Co., 134 Fed. 794, 67 C. C. A. 300; Herman v. Niagara Fire Ins. Co., 100 N. Y. 411, 3 N. E. 341, 53 Am. Rep. 197.

[47] Holmes v. Thomason, 25 Tex. Civ. App. 389, 61 S. W. 504.

[48] The insured had no knowledge of the actual relations between the company and the broker. McElroy v. British America Assur. Co., 94 Fed. 990, 36 C. C. A. 615.

[49] O'Brien v. New Zealand Ins. Co., 108 Cal. 227, 41 Pac. 298; California Ins. Co. v. Gracey, 15 Colo. 70, 24 Pac. 577, 22 Am. St. 376; Viele v. Germania Ins. Co., 26 Iowa 9; Slater v. Capital Ins. Co., 89 Iowa 628, 57 N. W. 422, 23 L. R. A. 181; Union Mutual Life Ins. Co. v. Wilkinson, 13 Wall. (U. S.) 222, 20 L. ed 617. See also, Manhattan Life Ins. Co. v. Carder, 82 Fed. 986, 27 C. C. A. 344.

[50] Croft v. Hanover Fire Ins. Co., 40 W. Va. 508, 21 S. E. 854, 52 Am. St. 902.

[51] Knickerbocker Life Insurance Co. v. Norton, 96 U. S. 234, 24 L. ed. 689. An agent of an insurance company acting within the scope of his authority may, upon notice of a breach of condition contained in a policy of insurance, waive the company's right to take advantage of a forfeiture. Home Fire Ins. Co. v. Kuhlman, 58 Nebr. 488, 78 N. W. 936, 76 Am. St. 111. It is immaterial what the agent is called so long as he is acting within the scope of his authority.

[52] Taylor v. State Ins. Co., 98 Iowa 521, 67 N. W. 577, 60 Am. St. 210.

[53] Paine v. Pacific Mut. Life Ins. Co., 51 Fed. 689, 2 C. C. A. 459; Shaffer v. Milwaukee &c. Ins. Co., 17 Ind. App. 204, 46 N. E. 557. And see also, where he represents the in-

of the ordinary powers which the public may properly assume to be possessed by such agents, are ineffectual.[54]

§ 4165. Restrictions in application or policy.—Insurance companies have become astute in contriving provisions designed to limit the authority and avoid the misconduct of agents but the courts have tried to see that they are not used as the instruments of fraud and injustice. Out of this condition, however, there has grown a mass of hopelessly conflicting decisions which cannot be reconciled on any theory other than the desire of the courts to do justice in the particular case. In many states this has been remedied by the enactment of statutes declaring the powers and duties of agents of insurance companies and prescribing the form of policy which must be used. Where these statutes exist, they are, of course, controlling. The effectiveness of such restrictive provisions often depends largely upon whether the applicant for insurance has knowledge of their existence. Where the limitation is inserted in the application, which is signed by the applicant, he is generally held bound by notice of its existence,[55] although in some cases this is not held conclusive.[56] Such limitations may be ineffectual in the particular case because not regarded as notice to the applicant, or because waived by the company or its authorized agent, or because by its conduct the company has estopped itself from asserting the defense; and in considering the power of an agent it is frequently important to bear in mind the distinction between acts which are connected with the procuring of the insurance and those which relate to the modification or waiver of conditions

sured, unknown to the insurer, Arispe Mercantile Co. v. Capital Ins. Co., 133 Iowa 272, 110 N. W. 593, 9 L. R. A. (N. S.) 1084, and note. And the insured is generally deemed to have notice of limitations in the application signed by him. New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. 837, and cases cited. Ruggles v. American Cent. L. Ins. Co., 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. 674; Hall v. Union &c. Ins. Co., 23 Wash. 610, 63 Pac. 505, 51 L. R. A. 288, 83 Am. St. 844.

[54] German Fire Ins. Co. v. Columbia Encaustic Tile Co., 15 Ind. App. 623, 43 N. E. 41; Hall v. Union &c. Ins. Co., 23 Wash. 610, 63 Pac. 505, 51 L. R. A. 288, 83 Am. St. 844.

[55] Ryan v. World Mut. Life Ins. Co., 41 Conn. 168, 19 Am. Rep. 490; New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. 837; Hall v. Union &c. Ins. Co., 23 Wash. 610, 63 Pac. 505, 51 L. R. A. 288, 83 Am. St. 844.

[56] State Ins. Co. v. Gray, 44 Kans. 731, 25 Pac. 197; Tubbs v. Dwelling-House Ins. Co., 84 Mich. 646, 48 N. W. 296.

in the policy which relate to the future. In a case where a policy contained a provision that the company "shall not be bound * * * by any act of or statement made * * * by any agent * * * which is not authorized by this policy or contained therein or in any written paper mentioned herein," it was said that the power can only be exercised in the mode prescribed, "unless it is shown that the agent possessed, actually or apparently, the power of his principal in respect to the provisions alleged to have been waived."[57] But as to whether the agent possesses the power either actually or apparently in the particular case is often a vexed question, depending somewhat on the nature of the agency, the nature of the act, and the provisions of the contract, and many of the courts hold that very comprehensive and stringent provisions against waiver may themselves be waived.[58]

§ 4166. **Limitations on authority.**—Some courts refuse to give effect to a provision in the policy limiting the power of the company's agent,[59] while others treat it as a stipulation by

[57] Messelback v. Norman, 122 N. Y. 578, 26 N. E. 34.

[58] It was said in a case where it was claimed that the agent had waived a provision requiring prompt payment of a premium note, that, "The written agreement of the parties, as embodied in the policy and the indorsement thereon, as well as the note and the receipts given therefor, was undoubtedly to the express purport that a failure to pay the notes at maturity would incur a forfeiture of the policy. It also contained an express declaration that the agents of the company were not authorized to make, alter or abrogate contracts or waive forfeitures. And these terms, had the company so chosen, it could have insisted on. But a party always has the option to waive a condition or stipulation made in his own favor. The company was not bound to insist upon a forfeiture, though incurred, but might waive it. It is not bound to act upon the declaration that its agents had not power to make agreements or waive forfeitures; but might, at any time, at its option, give them such power. The declaration was only tantamount to a notice to the assured, which the company could waive and disregard at pleasure. In either case, both with regard to the forfeiture and the powers of its agent, a waiver of the stipulation or notice would not be repugnant to the written agreement, because it would only be the exercise of an option which the agreement left in it. And whether it did exercise such option or not was a fact provable by parol evidence as well as by writing, for the obvious reason that it could be done without writing." Knickerbocker Life Ins. Co. v. Norton, 96 U. S. 234, 24 L. ed. 689. See, however, upon the general subject, Industrial Mut. &c. Co. v. Thompson, 83 Ark. 575, 104 S. W. 200, 10 L. R. A. (N. S.) 1064, and extended note.

[59] Continental Ins. Co. v. Brooks, 131 Ala. 614, 30 So. 876; Industrial Mut. Indemnity Co. v. Thompson, 83 Ark. 575, 104 S. W. 200, 10 L. R. A. (N. S.) 1064, and note; McElroy v. British American Assur. Co., 94 Fed.

which the assured, by accepting the policy, agrees to be bound.[60] In Wisconsin it is said[61] that "where the assured has accepted a policy containing a clause prohibiting the waiver of any of its provisions by the local agent, he is bound by such inhibition, and that any subsequently attempted waiver, merely by virtue of such agency, is a nullity. This proposition seems to be supported by the weight as well as the logic of the adjudicated cases." Provisions in a policy which restrict the future power of the agent by prescribing the manner in which he can act have often been sustained.[62] But there is some conflict even as to this, and the tendency in any event seems to be to hold that such provisions

990, 36 C. C. A. 615; Hanover Fire Ins. Co. v. Dole, 20 Ind. App. 333, 50 N. E. 772; Cave v. Home Ins. Co., 57 S. Car. 347, 35 S. E. 577; Niagara Ins. Co. v. Lee, 73 Tex. 641, 11 S. W. 1024; Kahn v. Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. 47. The local agent of an insurance company, who is authorized to make contracts of insurance, issue policies, and receive premiums therefor, and is clothed with all the authority of his principal with respect thereto, may waive a forfeiture of a policy under a provision that it shall be void if foreclosure proceedings are commenced, notwithstanding that the policy provides that the agent who issues the policy shall not have power to waive, modify or revive the same. Springfield &c. Co. v. Traders' Ins. Co., 151 Mo. 90, 52 S. W. 238, 74 Am. St. 521.

[60] Enos v. Sun Ins. Co., 67 Cal. 621, 8 Pac. 379; Burlington Ins. Co. v. Gibbons, 43 Kans. 15, 22 Pac. 1010, 19 Am. St. 118; Cleaver v. Traders' Ins. Co., 65 Mich. 527, 32 N. W. 660, 8 Am. St. 908; Greenwood v. New York Life Ins. Co., 27 Mo. App. 401; Weidert v. State Ins. Co., 19 Ore. 261, 24 Pac. 242, 20 Am. Rep. 809; Greene v. Lycoming Fire Ins. Co., 91 Pa. St. 387. But see Clevenger v. Mutual L. Ins. Co., 2 Dak. 114; Equitable Ins. Co. v. Cooper, 60 Ill. 509; Phenix Ins. Co. v. Hart, 149 Ill. 513, 36 N. E. 990; Zimmerman v. Home Ins. Co., 77 Iowa 685, 42 N. W. 462. See Thompson v. Traders' Ins. Co. of Chicago, 169 Mo. 12, 68 S. W. 889; Walsh v. Hartford Fire Ins. Co., 73 N. Y. 5. But see Collins v. Metropolitan L. Ins. Co., 32 Mont. 329, 80 Pac. 609, 1092, 108 Am. St. 578; Steen v. Niagara Fire Ins. Co., 89 N. Y. 315, 42 Am. Rep. 297; Union Cent. Life Ins. Co. v. Hook, 62 Ohio St. 256, 56 N. E. 906; Stevens v. Queen Ins. Co., 81 Wis. 335, 51 N. W. 555, 29 Am. St. 905. An agent of an insurance company who is only authorized to solicit and take applications for insurance, receive the premiums, and deliver the policies, which have been signed by the proper officers, has no authority, either express or implied, to waive a breach of the stipulation in the policy that subsequent additional insurance shall not be effected on the property without the consent of the underwriter. Alabama State Mut. Assur. Co. v. Long Clothing & Shoe Co., 123 Ala. 667, 26 So. 655.

[61] Hankins v. Rockford Ins. Co., 70 Wis. 1, 35 N. W. 34, citing many cases.

[62] Hartford Fire Ins. Co. v. Small, 66 Fed. 490, 14 C. C. A. 33; Behler v. German &c. Ins. Co., 68 Ind. 347; Kyte v. Commercial Union Assur. Co., 144 Mass. 43, 10 N. E. 518; Gould v. Dwelling-House Ins. Co., 90 Mich. 302, 51 N. W. 455; Wilkins v. State Ins. Co., 43 Minn. 177, 45 N. W. 1; Marvin v. Universal Life Ins. Co., 85 N. Y. 278, 39 Am. Rep. 657; Quinlan v. Providence Wash. Ins. Co., 133 N. Y. 356, 31 N. E. 31, 28 Am. St. 645; O'Brien v. Prescott Ins. Co., 134 N. Y. 28, 31 N. E. 265; Smith v. Niagara Fire

are binding on the assured only in respect to such matters as occur after the delivery of the policy.[63]

§ 4167. Limitations contained in application—Preparation of application.—It is argued with plausibility that while the courts should not give effect to a provision in the application which attempts to limit the authority of the agent, when it appears that the applicant was in any way misled, there seems to be no good reason why the company should not be permitted to prohibit its agent from acting as the amanuensis of the applicant. A person who signs a written statement should know its contents or be able to give an excuse for his ignorance other than his own negligence, and, as the application signed by the applicant is ordinarily, and often by statute required to be, attached to the policy,[64] and thus is delivered to the insured, he thus has an op-

Ins. Co., 60 Vt. 682, 15 Atl. 353, 1 L. R. A. 216, 6 Am. St. 144; Knudson v. Hekla Fire Ins. Co., 75 Wis. 198, 43 N. W. 954.

[63] Kausal v. Minnesota &c. Ins. Assn., 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776, where it is said: "It would be a stretch of legal principles to hold that a person dealing with an agent, apparently clothed with authority to act for his principal in the matter in hand, could be affected by notice, given after the negotiations were completed, that the party with whom he had dealt should be deemed transformed from the agent of one party into the agent of the other. To be efficacious, such notice should be given before the negotiations are completed. The application precedes the policy, and the insured cannot be presumed to know that any such provision will be inserted in the latter. To hold that by a stipulation unknown to the insured at the time he made the application, and when he relied upon the fact that the agent was acting for the company, he could be held responsible for the mistakes of such agent would be to impose burdens upon the insured which he never anticipated. Hence we think that if the agent was the agent of the company in the matter of making out and receiving the application, he cannot be converted into the agent of the insured by merely calling him such in the policy subsequently issued; neither can any mere form of words wipe out the fact that the insured truthfully informed the insurer, through its agent, of all matters pertaining to the application at the time it was made." See also, Boetcher v. Hawkeye Ins. Co., 47 Iowa 253. A clause in a policy withholding from agents authority "to make, alter or discharge this or any other contract in relation to the matter of this insurance" has no relation to the application which precedes the policy. "This provision of the policy does not take effect until the application is made and accepted, and the policy is issued. It has relation to the policy and other completed contracts concerning the insurance, and has no reference to the application, which precedes the policy, and which, until it is accepted and the policy issued, is a mere offer or proposition for a contract of insurance." Mutual Ben. Life &c. Ins. Co. v. Robison, 58 Fed. 723, 7 C. C. A. 444, 22 L. R. A. 325.

[64] As by Mass. Rev. Laws (1902), ch. 118, § 73; Iowa Code (1897), §§ 1741, 1819, 1826. In Michigan a copy of the application must be attached to the policy when requested by insured. Laws 1899, No. 87.

portunity to become further acquainted with its contents, so that if the statements in the application are incorrect, he should make the fact known to the company within a reasonable time, or be estopped from thereafter asserting it.[65] But some courts do not hold the applicant bound to know the contents of the application and policy.[66] In Pennsylvania it was said[67] that the law does not, in anticipation of a fraud upon the part of the company, impose upon the assured an absolute duty to read its policy when he receives it, although it was suggested that it would certainly have been an act of prudence on his part to do so; but, "One thing is certain, however; the company cannot repudiate the fraud of its agent, and thus escape the obligations of a contract consummated thereby, merely because Kister (the insured) accepted in good faith the act of the agent without examination." The Supreme Court of the United States recognizes the doctrine that when an insurance agent who is not limited in his authority, or when such limitation is not known to the insured, undertakes to prepare an application and writes the answers for the applicant, he is acting for the company; but the court holds that when such limitation is embodied in the application, which is signed by the insured, he must be presumed to have read it, and is therefore bound by its contents.[68] When the application is prepared by a general agent having no superior in the state, however, it has been held, that the question of limitations upon the agent's authority does not arise; and the company is bound by all answers

[65] Ryan v. World Mut. Life Ins. Co., 41 Conn. 168, 19 Am. Rep. 490; Reynolds v. Atlas Acc. Ins. Co., 69 Minn. 93, 71 N. W. 831.

[66] See note in 4 L. R. A. (N. S.) 607; ante, § 4112.

[67] Kister v. Lebanon Mut. Ins. Co., 128 Pa. St. 553, 18 Atl. 447, 5 L. R. A. 646, 15 Am. St. 696.

[68] New York L. Ins. Co. v Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. 837; Maier v. Fidelity Mut. Life Assn., 47 U. S. App. 322, 78 Fed. 566, 24 C. C. A. 239. And to the same effect see Dimick v. Metropolitan L. Ins. Co., 69 N. J. L. 384, 55 Atl. 291, 62 L. R. A. 774; Deming Invest. Co. v. Shawnee Fire Ins. Co., 16 Okla. 1, 83 Pac. 918, 4 L. R. A. (N. S.) 607; O'Rourke v. John Hancock Mut. Life Ins. Co., 23 R. I. 457, 50 Atl. 834, 57 L. R. A. 496, 91 Am. St. 643. See Fireman's Fund Ins. Co. v. Norwood, 69 Fed. 71, 16 C. C. A. 136. For cases showing that the insured may, under certain circumstances, be excused from reading the policy, see McMaster v. New York L. Ins. Co., 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. 10; State Ins. Co. v. Gray, 44 Kans. 731, 25 Pac. 197. For a case denying the doctrine of the Fletcher case, see Royal Neighbors v. Boman, 177 Ill. 27, 52 N. E. 264, 69 Am. St. 201, and also as so doing in effect see some of the decisions cited in the two following notes.

written by the agent, although the application is attached to the policy and delivered to the insured.[69] So, an agent who is authorized to receive applications for insurance represents the insurance company in the preparation of the application, and if he receives truthful information from the insured, and undertakes to fill out the application and inserts false or incorrect answers, his act ought to be held that of the company rather than that of the applicant. This rule is established by statute in many states, and is generally adopted even where no statutes are in existence.[70]

§ 4168. Provisions restricting power of officers and general agents.—A company cannot, by a provision in its policy, restrict its power to act through its officers or general agents. Thus, a provision that the terms of the policy cannot be waived or changed by any "officer, agent, or representative of this company" except in writing is invalid in so far as it attempts to restrict the power of the company as well as its agent.[71] This principal applies to a general agent as well as an officer of the corporation; as whatever the company can lawfully do can be done by its duly authorized agent. Where a policy provided that its provisions could not be waived by the president and sec-

[69] Michigan Mut. Life Ins. Co. v. Leon, 138 Ind. 636, 37 N. E. 584.

[70] Provident Sav. Life Assur. Soc. v. Cannon, 201 Ill. 260, 66 N. E. 388; Phœnix Ins. Co. v. Stark, 120 Ind. 444, 22 N. E. 413; Bartholomew v. Merchants' Ins. Co., 25 Iowa 507, 96 Am. Dec. 65; Kausal v. Minnesota &c. Ins. Assn., 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776, and note, 20 L. R. A. 277; Sternaman v. Metropolitan L. Ins. Co., 170 N. Y. 13, 62 N. E. 763, 57 L. R. A. 318, 88 Am. St. 625; Messelback v. Norman, 122 N. Y. 578, 26 N. E. 34; Union Mut. Life Ins. Co. v. Wilkinson, 13 Wall. (U. S.) 222, 20 L. ed. 617; American L. Insurance Co. v. Mahone, 21 Wall. (U. S.) 152, 22 L. ed. 593; Continental Fire Ins. Co. v. Whitaker, 112 Tenn. 151, 79 S. W. 119, 64 L. R. A. 451, 105 Am. St. 916; note in 4 L. R. A. (N. S.) 607. But compare McCoy v. Metropolitan Life Ins. Co., 133 Mass. 82. "In writing the application, and explaining the interrogatories and the meaning of the terms used, he is to be regarded as the agent of the company": Ryan v. World &c. Ins. Co., 41 Conn. 168, 19 Am. Rep. 490. But the court refused to go further and hold the company responsible for false statements written by the agent as such authority could not, by any possibility, have been contemplated as within the scope of the agency. But see Allen v. German-American Ins. Co., 123 N. Y. 6, 25 N. E. 309.

[71] Ruthven v. American Fire Ins. Co., 92 Iowa 316, 60 N. W. 663. See also, Murphy v. Royal Ins. Co., 52 La. Ann. 775, 27 So. 143; Lamberton v. Connecticut Fire Ins. Co., 39 Minn. 129, 39 N. W. 76, 1 L. R. A. 222; Wilson v. Commercial Union Assur. Co., 51 S. Car. 540, 29 S. E. 245, 64 Am. St. 700.

retary, the court said:[72] "This provision, however, may be modified by the company to the same extent as any other; and whatever the company can do can be done by its general agents." In Wisconsin it was said:[73] "We must hold, however, that such attempted restrictions upon the power of the company or its general officers or agents, acting within the scope of their general authority, to subsequently modify the contract and bind the company in a manner contrary to such previous provisions in the policy, are ineffectual." So, in New York it is said:[74] "Notwithstanding the provisions of the policy that 'anything less than a distinct specific agreement, clearly expressed and indorsed on the policy, should not be considered as a waiver of any printed or written condition or restriction therein,' the court recognize and affirm the law as settled in this state, that such condition can be dispensed with by the company or its general agents by oral consent as well as by writing." But it is held that a statutory restriction as to waiver cannot be waived.[75]

§ 4169. **Notice.**—"Notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from, or is at the time connected with, the subject-matter of his agency; for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal; and if he has not, still the principal, having intrusted the agent with the particular business, the other party has a right to deem his acts and knowledge obligatory upon the principal; otherwise, the neglect of the agent, whether designed or undesigned, might operate most injuriously to the rights and interests of such party."[76]

[72] German Ins. Co. v. Gray, 43 Kans. 497, 23 Pac. 637, 8 L. R. A. 70, 19 Am. St. 150.

[73] Renier v. Dwelling-House Ins. Co., 74 Wis. 89, 42 N. W. 208, and cases therein cited.

[74] Weed v. London &c. Ins. Co., 116 N. Y. 106, 22 N. E. 229.

[75] Anderson v. Manchester Fire Ins. Co., 59 Minn. 182, 60 N. W. 1095, 63 N. W. 241, 28 L. R. A. 609, 50 Am. St. 400; Straker v. Phenix Ins. Co., 101 Wis. 413, 77 N. W. 752.

[76] Phenix Ins. Co. v. Stocks, 149 Ill. 319, 36 N. E. 408. And see as to personal knowledge of officer, Modern Woodmen v. Breckenridge (Kans.), 89 Pac. 661, 10 L. R. A. (N. S.) 136; Story Agency (9th ed.) § 140. See also, Supreme Tribe v. Lennert (Ind.), 98 N. E. 115; Eagle Fire Co. v. Globe &c. Trust Co., 44 Nebr. 380, 62 N. W. 895; Forward v. Continental Ins. Co., 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637; Gans v. St. Paul &c. Ins. Co., 43 Wis. 108, 28 Am. Rep. 535; Mesterman v. Home Mut. Ins. Co., 5 Wash. 524, 32 Pac. 458, 34 Am. St. 877.

In some states the statute provides that where a company issues a policy "upon an application prepared by a third person assuming to act as its agent or otherwise, it shall be charged with his knowledge of facts relating to the property insured as they were stated in the application."[77] Hence, where a policy is issued by an agent who has knowledge of other insurance in the property, his knowledge is the knowledge of the company, and it is estopped to assert that consent to the concurrent insurance was not given in writing.[78] So, where true information is given to the agent with reference to matters inquired about, his knowledge is the knowledge of the company, and it is immaterial that the agent did not correctly write the answers.[79] So, the knowledge of the agent that the applicant for life insurance has made a false statement,[80] or that he is intemperate, or has some disease, has been held to be the knowledge of the company and made the basis of waiver or estoppel.[81] So, even where there is no written application containing representations and warranties, the company may be charged with a knowledge of the risk obtained by its agent through his own inquiries and investigations.[82] A company which gives to an agent the supervision and inspection of risks is ordinarily charged with knowledge of all the facts with reference to the risk learned by the agent while engaged in the performance of his duties.[83] But a person who is employed to procure insurance upon certain property, and who applies to the general agents of several companies for policies, and, after receiving them, collects the premiums and pays

[77] New Hampshire Pub. Stat. (1901), ch. 170, § 3.

[78] Phenix Ins. Co. v. Covey, 41 Nebr. 724, 60 N. W. 12; Home Fire Ins. Co. v. Hammang, 44 Nebr. 566, 62 N. W. 883, citing many cases.

[79] Mutual Ben. Life Ins. Co. v. Robison, 58 Fed. 723, 7 C. C. A. 444, 22 L. R. A. 325; Union Mut. Life Ins. Co. v. Wilkinson, 13 Wall. (U. S.) 222, 20 L. ed. 617. But see, Lyon v. United Moderns, 148 Cal. 470, 83 Pac. 804, 4 L. R. A. (N. S.) 247, 113 Am. St. 291.

[80] McGurk v. Metropolitan Life Ins. Co., 56 Conn. 528, 16 Atl. 263, 1 L. R. A. 563. But see Connecticut Fire Ins. Co. v. Buchanan, 141 Fed. 877, 73 C. C. A. 111, 4 L. R. A. (N. S.) 758, and note.

[81] Newman v. Covenant Mut. Ben. Assn., 76 Iowa 56, 40 N. W. 87, 1 L. R. A. 659, 14 Am. St. 196. See also, Supreme Tribe v. Lennert (Ind.), 98 N. E. 115; Modern Woodmen v. Breckenridge (Kans.), 89 Pac. 661, 10 L. R. A. (N. S.) 136, and note.

[82] Cumberland Valley &c. Co. v. Schell, 29 Pa. St. 31. See also, Metropolitan Life Ins. Co. v. Johnson (Ind. App.), 94 N. E. 785.

[83] Phenix Ins. Co. v. Holcombe, 57 Nebr. 622, 78 N. W. 300, 73 Am. St. 532.

the general agents the amounts claimed by them, is not the agent of the insurers, so as to charge them with his knowledge as to the existence of other policies.[84] And, an insurance company, by making a person its agent to deliver a policy, does not become chargeable with knowledge obtained by him while acting as agent of the insured in procuring the insurance.[85] The principal is ordinarily not chargeable with notice of facts learned by the agent in the course of an employment in no way connected with the agency.[86] But there are cases which apparently do not admit even this limitation;[87] and others hold the principal bound by knowledge acquired by the agent in another business, acquired at such a time with reference to the issuance of the policy as to justify the assumption that he had it in mind when the policy was issued.[88]

§ 4170. **Notice of loss to local agent.**—In a recent case the local agent of a fire insurance company had actual authority to accept applications for insurance, fix the premium or rate of insurance, and fill up, countersign and issue policies thereon, which he received from the company, already signed by its president and secretary. This was the extent of the agent's actual authority, and there was no evidence tending to show that his apparent authority was other or greater than his actual authority. The policy required written notice of loss to be given to the company. It was held that the agent had no authority to receive or waive notice of loss, and, hence, notice to him was not notice to the company.[89]

[84] United Firemen's Ins. Co. v. Thomas, 92 Fed. 127, 34 C. C. A. 240, 47 L. R. A. 450.

[85] United Firemen's Ins. Co. v. Thomas, 92 Fed. 127, 34 C. C. A. 240, 47 L. R. A. 450.

[86] St. Paul &c. Ins. Co. v. Parsons, 47 Minn. 352, 50 N. W. 240. See also, Roper v. National F. Ins. Co. (N. Car.), 76 S. E. 1067.

[87] Hartford Fire Ins. Co. v. Haas, 87 Ky. 531, 10 Ky. L. 573, 9 S. W. 720, 2 L. R. A. 64.

[88] Stennett v. Pennsylvania Fire Ins. Co., 68 Iowa 674, 28 N. W. 12. "The knowledge of the fire-works shown here was acquired by the agent, not while acting for the company or for his firm, but casually while attending to his own affairs. To make this knowledge affect the company, it must be shown that the agent afterward, with this information present in his mind, issued the policy, or did some act in the course of his duties as agent recognizing the continuing validity of the policy." Phœnix Ins. Co. v. Flemming, 65 Ark. 54, 44 S. W. 464, 39 L. R. A. 789, 67 Am. St. 900.

[89] Ermentrout v. Girard &c. Ins. Co., 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. 481, citing Lohnes v. Insurance Co. of North

§ 4171. **Rights and liabilities of agent.**—As between the principal and agent, their rights and liabilities are determined by the express or implied provisions of the contract of employment. The agent is entitled to his compensation for services performed, and the company cannot refuse to pay his commissions on the ground that it had decided to change its rates and charge a higher rate after the services were performed. An agent procured applications for insurance in accordance with his instructions and the rules and regulations of the company, and forwarded them to the home office of the defendant for its action upon them. The only objection made to delivering the policies was that the rate of premium on them was too low. It was held that while an agent is not usually entitled to his commissions until the transaction is complete, yet, if he has faithfully performed his part of the transaction, and from no fault of his own, but by the refusal of the principal to complete the contract, is not consummated, he is entitled to his commission.[90] The agent is responsible to the company for damage caused it by his negligent or wilful failure to obey instructions.[91] Thus, such an agent has been held liable to the company for neglect to cancel a policy within a reasonable time after being instructed so to do,[92] or by accepting a risk and issuing a policy contrary to instructions,[93] or by wrongfully and without authority cancel-

American, 121 Mass. 439; Bush v. Westchester Fire Ins. Co., 63 N. Y. 531; Smith v. Niagara Fire Ins. Co., 60 Vt. 682, 15 Atl. 353, 1 L. R. A. 216, 6 Am. St. 144. And to same effect see 3 Elliott's Ev., § 2352; Harrison v. Hartford Fire Ins. Co., 59 Fed. 732; Hicks v. British America Assur. Co., 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424. See Ruthven v. American Fire Ins. Co., 92 Iowa 316, 60 N. W. 663. See § 4186 infra.

[90] Currier v. Mutual &c. Assn., 108 Fed. 737, 47 C. C. A. 651. As to the agent's right to damages for breach of contract, see Pellet v. Manufacturers' & Merchants' Ins. Co., 104 Fed. 502, 43 C. C. A. 669.

[91] Queen City Fire Ins. Co. v. First Nat. Bank, 18 N. Dak. 603, 120 N. W. 545, 22 L. R. A. (N. S.) 509, and note; State Ins. Co. v. Jamison, 79 Iowa 245, 44 N. W. 371. But see, where instructions are ambiguous, Winne v. Niagara Fire Ins. Co., 91 N. Y. 185; American Cent. Ins. Co. v. Hagerty, 92 Hun (N. Y.) 26, 36 N. Y. S. 558, 21 Misc. (N. Y.) 213, 45 N. Y. S. 617.

[92] Franklin Ins. Co. v. Sears, 21 Fed. 290; Phœnix Ins. Co. v. Pratt, 36 Minn. 409, 31 N. W. 454. See also, British American Ins. Co. v. Wilson, 77 Conn. 559, 60 Atl. 293; Phœnix Ins. Co. v. Frissell, 142 Mass. 513, 8 N. E. 348.

[93] Continental Ins. Co. v. Clark, 126 Iowa 274, 100 N. W. 524; Hanover Fire Ins. Co. v. Ames, 39 Minn. 150, 39 N. W. 300; Franklin Fire Ins. Co. v. Bradford, 201 Pa. St. 32, 50 Atl. 286, 55 L. R. A. 408, 88 Am. St. 770.

ing a policy,[94] or by failing to reduce the amount of insurance as ordered by the company.[95] Acceptance of a premium by an insurance company is not a ratification, as between it and its agent, of the latter's unauthorized issuance of a policy, since, the policy being binding on the company, the premium becomes its property, as an incident to the policy, and did not prevent its seeking recourse over against its agent; and this though the agent had first deducted his commission from the premium.[96]

§ 4172. **Statutes affecting agents and compensation.**—In addition to statutes in some states requiring a license, which have been referred to in another section, there are other statutes that sometimes affect insurance agents or their compensation. In a recent case in New York it is held that the legislature cannot reduce the compensation of general agents of insurance companies under existing contracts, and that a provision in a contract of such an agent placed in charge of business in another state, that the contract is subject to the condition that the company continue to be legally authorized to transact business there, does not make the contract as to compensation subject to future legislation of the state where the company is incorporated.[97] The court also held that a provision of the statute limiting the amount which insurance companies might spend for securing new business was not retroactive and did not apply to an existing long term contract with a general agent so as to reduce the compensation under such contract. The question has also arisen in a number of cases as to the legality of rebates,[98] and of combinations among insurance agents and underwriters at common law and under the antitrust statutes, and some of such combinations have been held legal while others have been held unlawful, de-

[94] American Steam Boiler Ins. Co. v. Anderson, 130 N. Y. 134, 29 N. E. 231. As to the liability of sureties on agent's bond, see Royal Ins. Co. v. Clark, 61 Minn. 476, 63 N. W. 1029.

[95] Halsey v. Adams, 64 N. J. L. 724, 46 Atl. 773.

[96] Mechanics' & Traders' Ins. Co. v. Rion (Tenn.), 62 S. W. 44.

[97] Boswell v. Security Mut. L. Ins. Co., 193 N. Y. 465, 86 N. E. 532, 19 L. R. A. (N. S.) 946n.

[98] See note to Interstate Life Assur. Co. v. Dalton, in 23 L. R. A. (N. S.) 722. And as to commission on renewals and assignments thereof see note to, In re Wright, in 18 L. R. A. (N. S.) 193.

pending largely upon their nature and extent or upon the particular statute in question.[99] This subject, however, is elsewhere considered.[1]

[99] See note to Louisville Board of Fire Underwriters in 24 L. R. A. (N. S.) 153, and also note in 38 L. R. A. (N. S.) 459, and as to statutes regulating rates, see note in 37 L. R. A. (N. S.) 778.

[1] Vol. 2, §§ 880, 881.

CHAPTER CXXIV.

WAIVER AND ESTOPPEL IN INSURANCE CASES.

§ 4175. Definition of waiver.
4176. Knowledge and intent.
4177. Basis of waiver.
4178. Effect of mere silence.
4179. What may be waived.
4180. Waiver of certain defenses.
4181. Power of agent to waive.
4182. Waiver by agent.
4183. Prepayment of premium.
§ 4184. Waiver in writing only.
4185. Estoppel by act of agent.
4186. Facts known to company when policy issued.
4187. Oral testimony to show actual statements.
4188. Bad faith—Collusion between applicant and agent.

§ 4175. Definition of waiver.—A waiver is not strictly the same as an estoppel but is the voluntary relinquishment of a known right. It may be by express language or by acts from which an intention to waive may be inferred or from which a waiver follows as a legal result,[1] or, in other words, it may be considered as the result of an intentional relinquishment of a known right,[2] which may be shown by conduct as well as words.[3]

§ 4176. Knowledge and intent.—As a waiver is the intentional relinquishment of a right, both intent and knowledge of the facts are essential elements.[4] Hence, to establish a waiver of

[1] German Ins. Co. v. Gibson, 53 Ark. 494, 14 S. W. 672. See also, Templer v. Muncie Lodge (Ind. App.), 97 N. E. 546; Fraser v. Ætna Life Ins. Co., 114 Wis. 510, 90 N. W. 476. The waiver of a forfeiture gives the policy the same force and effect as it originally possessed. Siltz v. Hawkeye Ins. Co., 71 Iowa 710, 29 N. W. 605.

[2] Ward v. Metropolitan L. Ins. Co., 66 Conn. 227, 33 Atl. 902, 50 Am. St. 80; Rice v. Fidelity & Deposit Co., 103 Fed. 427, 43 C. C. A. 270; Fraser v. Ætna Life Ins. Co., 114 Wis. 510, 90 N. W. 476.

[3] Fraser v. Ætna Life Ins. Co., 114 Wis. 510, 90 N. W. 476. It is distinguished from estoppel in this case, also in Stiepel v. German American &c. Ins. Assn., 55 Mo. App. 224, and in many other cases. But the terms are often used indiscriminately. See McCormick v. Orient Ins. Co., 86 Cal. 260, 24 Pac. 1003; Globe Mut. Life Ins. Co. v. Wolff, 95 U. S. 326, 24 L. ed. 387, and other cases referred to in the following sections; Kidder v. Knights Templars &c. Indem. Co., 94 Wis. 538, 69 N. W. 364,

[4] Diehl v. Adams County Mut. Ins. Co., 58 Pa. St. 443, 98 Am. Dec. 302; Findeisen v. Metropole Fire Ins. Co., 57 Vt. 520; Ryan v. Springfield Fire & Marine Ins. Co., 46 Wis. 671, 1 N. W. 426. See also, Lewis v. Phœnix

any of the rights of the insurer it must be shown that there was "knowledge on the part of the insurer of the act of omission on the part of the insured which he is claimed to have dispensed with or waived. The knowledge on a waiver need not be expressly shown, but may be implied when the act of commission or omission is of such a character as fairly to preclude the idea of ignorance."[5] And, as already indicated, the intent may also be inferred or appear as a legal result of conduct.[6]

§ 4177. Basis of waiver.—It has been held that a waiver, to be operative, must be supported by an agreement founded upon a valuable consideration, or the acts relied upon must be such as to estop a party from insisting upon a performance of the contract, or the forfeiture of the conditions.[7] This rule was at one time declared in New York, but it was subsequently held that such a waiver need not be based upon a new consideration or upon facts sufficient to establish a technical estoppel,[8] and this is now the prevailing rule.[9] Yet, at least some of the elements of an estoppel will usually be found in such cases, and it is not far out of the way to say, as said in a New York case, that "while the later decisions all hold that such waiver need not be based upon a technical estoppel, in all the cases where this question is

Mut. Life Ins. Co., 44 Conn. 72; Robertson v. Metropolitan Life Ins. Co., 88 N. Y. 541; Bennecke v. Connecticut Mut. Life Ins. Co., 105 U. S. 355, 26 L. ed 990; Findeisen v. Metropole Fire Ins. Co., 57 Vt. 520. Actual and not mere constructive knowledge is held requisite in Wiley v. Rome Ins. Co. (Ga. App.), 76 S. E. 1067, but it is also held that the company is chargeable with knowledge of all pertinent facts which have come to the knowledge of its authorized agent.

[5] 2 Biddle Ins., § 1053. See also, Tobin v. Western Mut. Aid Soc., 72 Iowa 261, 33 N. W. 663.

[6] Simpson v. Sadd, 4 De G. M. & G. 665; West v. Platt, 128 Mass. 372; Titus v. Glens Falls Ins. Co., 81 N. Y. 419, 8 Abb. N. Cas. 315; Hartford Life &c. Ins. Co. v. Unsell, 144 U. S. 439, 36 L. ed. 496, 12 Sup. Ct. 671; McQuillan v. Mut. Reserve Fund Life Assn., 112 Wis. 665, 87 N. W. 1069, 88 N. W. 925, 56 L. R. A. 233, 88 Am. St. 986, and many other cases cited in following sections.

[7] Merchants' Mut. Ins. Co. v. Lacroix, 45 Tex. 158; Weidert v. State Ins. Co., 19 Ore. 261, 24 Pac. 242, 20 Am. St. 809. See Equitable Life Assur. Soc. v. McElroy, 83 Fed. 631, 28 C. C. A. 365.

[8] Roby v. American Cent. Ins. Co., 120 N. Y. 510, 24 N. E. 808; Titus v. Glens Falls Ins. Co., 81 N. Y. 410, 8 Abb. N. Cas. 315.

[9] Queen Ins. Co. v. Young, 86 Ala. 424, 5 So. 116, 11 Am. St. 51, and note; Schimp v. Cedar Rapids Ins. Co., 124 Ill. 354, 16 N. E. 229; Northern Assur. Co. v. Carpenter (Ind. App.), 94 N. E. 779; Hollis v. State Ins. Co., 65 Iowa 454, 21 N. W. 774; Carpenter v. Continental Ins. Co., 61 Mich. 635, 28 N. W. 749; Grubbs v. North Carolina Home Ins. Co., 108 N. Car. 472, 13 S. E. 236, 23 Am. St. 62.

presented, where there has been no express waiver, the fact is recognized that there exist the elements of an estoppel."[10]

§ 4178. Effect of mere silence.—A waiver in the strict sense cannot well be inferred from mere silence. Where there is no duty to speak or act and no word or act has been said or done to mislead the insured or throw him off his guard, mere silence will not sustain a waiver.[11] But there are cases in which silence is treated as a waiver, although in most of them there was a duty to speak or act or at least some element of estoppel.[12]

§ 4179. What may be waived.—The provisions of an insurance contract are, almost without exception, intended for the benefit of the insured, and upon their breach it is optional with the insurer to claim a forfeit. Such conditions may, therefore, be waived.[13] And the same has been held as to by-laws in a mutual company for its benefit.[14] As above stated, mere silence will not,

[10] German Ins. Co. v. Gibson, 53 Ark. 494, 14 S. W. 672; Armstrong v. Agricultural Ins. Co., 130 N. Y. 560, 29 N. E. 991; Gibson Elec. Co. v. Liverpool &c. Ins. Co., 159 N. Y. 418, 54 N. E. 23. "Nor, in general, where the facts do not constitute an estoppel, should one who neither knows the fact of the forfeiture nor is chargeable with fault in not knowing it be held to have waived the same by acts or conduct not intended to have such an effect." St. Paul &c. Ins. Co. v. Parsons, 47 Minn. 352, 50 N. W. 240.

[11] Titus v. Glens Falls Ins. Co., 81 N. Y. 410, 8 Abb. N. Cas. 315; Moore v. New York Bowery Fire Ins. Co., 55 Hun (N. Y.) 540, 29 N. Y. St. 768, 10 N. Y. S. 44, revd. 130 N. Y. 537, 29 N. E. 757; McAllaster v. Niagara Fire Ins. Co., 156 N. Y. 80, 50 N. E. 502; Mueller v. South Side Fire Ins. Co., 87 Pa. St. 399. See also, 3 Elliott Ev., § 2357; Adreveno v. Mutual &c. Life Assn., 38 Fed. 806; Ayres v. Hartford Fire Ins. Co., 17 Iowa 176, 85 Am. Dec. 553; Texas Banking Co. v. Hutchins, 53 Tex. 61, 37 Am. Rep. 750. But compare, Williamsburg City Fire Ins. Co. v. Cary, 83 Ill. 453; Westchester &c. Ins. Co. v. Earle, 33 Mich. 143; Guernsey v. American Ins. Co., 17 Minn. 104; Diehl v. Adams County Mut. Ins. Co., 58 Pa. St. 443, 98 Am. Dec. 302.

[12] California Southern Hotel Co. v. Callender, 94 Cal. 120, 29 Pac. 859, 28 Am. St. 99; Hartford Fire Ins. Co. v. McLemore, 7 Tex. Civ. App. 317, 26 S. W. 928; Wakefield v. Orient Ins. Co., 50 Wis. 532, 7 N. W. 647.

[13] 3 Elliott Ev., § 2298; Coursin v. Pennsylvania Ins. Co., 46 Pa. St. 323; Ellis v. Massachusetts Mut. Life Ins. Co., 113 Cal. 612, 45 Pac. 988, 54 Am. St. 373. The furnishing of proofs of death within a definite time is waived by a letter from the company asking that the claim be allowed to rest until the adjuster of the company can see the claimant. Turner v. Fidelity &c. Co., 112 Mich. 425, 70 N. W. 898, 38 L. R. A. 529, 67 Am. St. 428. The company waives the provision requiring the certificate of the nearest notary public where it retains the one furnished for twenty-three days, and then objects to it on the ground that there is a nearer notary, but does not give his name or address. Paltrovitch v. Phœnix Ins. Co., 143 N. Y. 73, 37 N. E. 639, 25 L. R. A. 198. See also, Equitable L. Ins. Co. v. Ellis (Tex.), 152 S. W. 625.

[14] Brotherhood of Locomotive Fire-

ordinarily at least, amount to a waiver, but in some states it is held that the company cannot "sleep upon its intention" to avoid a policy to the prejudice of the insured.[15] Where it is provided by the laws of the state or the charter of a corporation that an act shall be done, and the manner in which it shall be done, and the act is declared void if done otherwise, it is held that the insurer cannot waive the performance of the act in the prescribed manner.[16] And the rule is general that statutory provisions affecting the form of the contract cannot be waived by the parties.[17]

§ 4180. **Waiver of certain defenses.**—An insurer is not, ordinarily, obliged to state the ground of refusal to pay a loss but may refuse to pay without specifying the ground of its refusal and thereafter insist upon any good defense it may have under the contract.[18] If, however, the insurer does specify the ground of refusal to pay it may be estopped thereby from asserting other reasons and defenses. And where an insurance company, with knowledge of the forfeiture, remains silent and puts the insured to the inconvenience and expense of preparing proofs of loss which, under the defense of forfeiture, was wholly unnecessary, this has been held to amount to a waiver of the forfeiture.[19] So, it has been stated generally that, "It is well settled that such de-

men and Enginemen v. Corder (Ind. App.), 97 N. E. 125; Metropolitan L. Ins. Co. v. Johnson (Ind. App.), 94 N. E. 785. See also, Bloomington Mut. Life Ben. Assn. v. Blue, 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558; Bruner v. Brotherhood of American Yeomen, 136 Iowa 612, 111 N. W. 977; Morrison v. Wisconsin Odd Fellows Mut. Life Ins. Co., 59 Wis. 162, 18 N. W. 13.

[15] Appleton Iron Co. v. British American Assur. Co., 46 Wis. 23, 1 N. W. 9, 50 N. W. 1100.

[16] Leonard v. American Ins. Co., 97 Ind. 299; Cravens v. New York Life Ins. Co., 148 Mo. 583, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. 628, affd. 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. 962.

[17] N. H. Pub. St. (1901), ch. 171, § 18; Anderson v. Manchester Fire Assur. Co., 59 Minn. 182, 60 N. W. 1095, 63 N. W. 241, 28 L. R. A. 609, 50 Am. St. 400. An insurance company waives the right to rebuild, although the thirty days provided in the policy within which to exercise the option has not expired, where it has expressly refused to rebuild and give notice that it would pay the amount of the loss which might be fixed by arbitrators. Platt v. Aetna Ins. Co., 153 Ill. 113, 38 N. E. 580, 26 L. R. A. 853, 46 Am. St. 877.

[18] Devens v. Mechanics', Traders' Ins. Co., 83 N. Y. 168.

[19] Phœnix Ins. Co. v. Flemming, 65 Ark. 54, 44 S. W. 464, 39 L. R. A. 789, 67 Am. St. 900; Firemen's Fund Ins. Co. v. Norwood, 69 Fed. 71, 16 C. C. A. 136; Marthinson v. North British &c. Ins. C., 64 Mich. 372, 31 N. W. 291; Thompson v. Phenix Ins. Co., 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. 1019. A general statement

fenses are waived when the company, with knowledge of all the facts, requires the assured by virtue of the contract to do some act, or incur some expense or trouble inconsistent with the claim, that the contract had become inoperative in consequence of a breach of some of the conditions."[20]

§ 4181. **Power of agent to waive.**—As a general rule, if the authority of the agent is general, so that his acts are the acts of the company, he can waive a provision of the policy if it is of such a character that it could have been waived by the company.[21] But even a general agent may be limited as to territory and business, and he can, of course, waive only provisions in respect to matters within the real or apparent scope of his agency.[22]

§ 4182. **Waiver by agent.**—The insured may rely upon the representations of an agent who issues the policy and upon his assumed authority to waive provisions within the apparent scope of his authority when there are no restrictions upon the agent's

in a letter calling for the proofs of the loss, that the company did not waive any manner of defense, was held insufficient. Marthinson v. North British &c. Ins. Co., 64 Mich. 372, 31 N. W. 291. It has been held that the company waives a cause of forfeiture of the policy by failure to mention it when it undertakes to state definitely its reasons for denying liability. "Good faith requires that the company should apprise the plaintiff of its position; and, failing to do this, it estops itself from asserting any defenses other than that brought to the notice of the plaintiff." Smith v. German Ins. Co., 107 Mich. 270, 30 L. R. A. 368; Towle v. Ionia &c. Ins. Co., 91 Mich. 219, 51 N. W. 987 and cases there cited.

[20] Corson v. Anchor Mut. Fire Ins. Co., 113 Iowa 641, 85 N. W. 806; citing Brown v. State Ins. Co., 74 Iowa 428, 38 N. W. 135, 7 Am. St. 495; Ruthven v. American Fire Ins. Co., 102 Iowa 550, 71 N. W. 574; Brock v. Des Moines Ins. Co., 106 Iowa 30, 75 N. W. 683; Granger v. Manchester Fire Assur. Co., 119 Mich. 177, 77 N. W. 693; Trippe v. Provident Fund. Soc., 140 N. Y. 23, 35 N. E. 316, 22 L. R. A. 432, 37 Am. St. 529; McNally v. Phenix Ins. Co., 137 N. Y. 389, 33 N. E. 475. A failure to give notice of loss as required by the policy is not waived by retaining the proofs of loss sent after the policy was dead and all liability on it had ceased, where the insurer gave notice of the denial of any liability on the policy. Ermentrout v. Girard Fire & Marine Ins. Co. of Philadelphia, 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. 481.

[21] Kruger v. Western Fire &c. Ins. Co., 72 Cal. 91, 13 Pac. 156, 1 Am. St. 42; Farum v. Phœnix Ins. Co., 83 Cal. 246, 23 Pac. 869, 17 Am. St. 233; Berliner v. Travelers' Ins. Co., 121 Cal. 451, 58 Pac. 922; West v. Norwich Union Fire Ins. Soc., 10 Utah 442, 37 Pac. 685; Alexander v. Continental Ins. Co., 67 Wis. 422, 30 N. W. 727, 58 Am. Rep. 869.

[22] Imperial Fire Ins. Co. v. Dunham, 117 Pa. St. 460, 12 Atl. 668, 2 Am. St. 686. See also, Hollis v. State Ins. Co., 65 Iowa 454, 21 N. W. 774. And compare Fidelity Mut. Life Ins. Co. v. Bussall, 75 Ark. 25, 86 S. W. 814.

authority which are brought to his knowledge.[23] But where the policy provided that additional insurance, without the written assent of the company indorsed thereon, would render the policy void, and that its agents had no power to waive such condition, the court said:[24] "It cannot be successfully maintained but that the company has the right and the power to restrict, as it may choose, the powers and duties of its agents, and, when the authority is expressly limited and restricted by the policy which the insured receives, there can be no good reason, either in law or equity, why such limitations and restrictions shall not be considered as known to the insured, and binding upon him. * * * The fact that the plaintiff may not have read the printed conditions of his policy, and relied, in ignorance of them upon the implied or assumed powers of the agent, cannot help him. * * * When the policy of insurance, as in this case, contains an express limitation upon the power of the agent, such agent has no legal right to contract as agent of the company with the insured, so as to change the conditions of the policy, or to dispense with the performance of any essential requisite contained therein, either by parol or writing; and the holder of the policy is estopped, by accepting the policy, from setting up or relying upon powers in the agent in opposition to limitations and restrictions in the policy."[25] Yet where a policy provided that no conditions thereof should be waived or altered unless consent thereto was indorsed on the policy, and the company's agent consented to a removal of the insured stock to other premises, and continued to accept premiums, it was held that the insurer could not successfully defend an action on the policy on the ground that the consent was not binding because not indorsed on the policy.[26]

[23] Kitchen v. Hartford Fire Ins. Co., 57 Mich. 135, 23 N. W. 616, 58 Am. Rep. 344; Liverpool &c. Ins. Co. v. Sheffy, 71 Miss. 919, 16 So. 307.

[24] Cleaver v. Traders' Ins. Co., 65 Mich. 527, 32 N. W. 660, 8 Am. St. 908. To the same effect is New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. 837. See also, Egan v. Westchester Ins. Co., 28 Ore. 289, 42 Pac. 611.

[25] Kyte v. Commercial Union Assur. Co., 144 Mass. 43, 10 N. E. 518; Burlington Ins. Co. v. Campbell, 42 Nebr. 208, 60 N. W. 599; Catoir v. American Life Ins. & Trust Co., 33 N. J. L. 487; Merserau v. Phœnix Mut. Life Ins. Co., 66 N. Y. 274; First Nat. Bank v. Lancashire Ins. Co., 62 Tex. 461; Carey v. German American Ins. Co., 84 Wis. 80, 54 N. W. 18, 20 L. R. A. 267, 36 Am. St. 907.

[26] Pollock v. German Fire Ins. Co., 127 Mich. 460, 86 N. W. 1017.

And there are many other decisions holding that provisions may be waived by the company or agent having apparent authority even though not indorsed on the policy or in writing as required by the terms of the policy.[27]

§ 4183. Prepayment of premuim.—An agent authorized to make contracts of fire insurance and issue policies has authority to waive payment in cash of premiums, and to give credit therefor, unless there are restrictions upon his authority of which the insured has notice, and if the agent collects the premium and fails to pay it over to the insurance company, the rights of the assured are not affected thereby. "By the weight of authority the agent is held to have this discretionary power, although the policy in terms denies it. * * * The waiver of the payment of the premium in cash, is an act within the exercise of the agent's general authority to issue policies and collect the premiums, and such waiver may be either express or implied."[28] But there are decisions apparently to the contrary.[29]

§ 4184. Waiver in writing only.—Provisions in insurance policies that their terms and conditions can only be waived or changed by an indorsement in writing upon the policy are generally construed to apply only to conditions which enter into and form a part of the contract, and which are essential to make

[27] Continental Fire Ins. Co. v. Brooks, 131 Ala. 614, 30 So. 876; Industrial Mut. Indemnity Co. v. Thompson, 83 Ark. 574, 104 S. W. 200, 10 L. R. A. (N. S.) 1064 and note; Metropolitan Life Ins. Co. v. Johnson (Ind. App.), 94 N. E. 785; Viele v. Germania Ins. Co., 26 Iowa 9, 96 Am. Dec. 83; James v. Mutual Reserve Fund Life Assn., 148 Mo. 1, 49 S. W. 978; Grubbs v. North Carolina Home Ins. Co., 108 N. Car. 472, 13 S. E. 236, 23 Am. St. 62; Niagara Ins. Co. v. Lee, 73 Tex. 641, 11 S. W. 1024.

[28] Bodine v. Exchange Fire Ins. Co., 51 N. Y. 117, 10 Am. Rep. 566; Stewart v. Union &c. Ins. Co., 155 N. Y. 257, 49 N. E. 876, 42 L. R. A. 147; Newark Mach. Co. v. Kenton Ins. Co., 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768. See also, Farnum v. Phœnix Ins. Co., 83 Cal. 246, 23 Pac. 869, 17 Am. St. 233; Milwaukee Mechanics' Ins. Co. v. Schallman, 188 Ill. 213, 59 N. E. 12; New York L. Ins. Co. v. Greenlee, 42 Ind. App. 82, 84 N. E. 1101; Western Assur. Co. v. McAlpin, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. 423; Metropolitan Life Ins. Co. v. Willis, 37 Ind. App. 48, 76 N. E. 560. But compare, Neff v. Metropolitan Life Ins. Co., 39 Ind. App. 250, 73 N. E. 1041; National Mut. Fire Ins. Co. v. Barnes, 41 Kans. 161, 21 Pac. 165; Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co., 92 Mich. 482, 52 N. W. 1070. 20 L. R. A. 277; Lebanon Mut. Ins. Co. v. Hoover, 113 Pa. St. 591, 8 Atl. 163, 57 Am. Rep. 511.

[29] Wilkins v. State Ins. Co., 43 Minn. 177, 45 N. W. 1; Tomsecek v.

it binding, and not those which refer to what is to be done after a loss.[30] Such provisions are given full force and effect by some courts;[31] while others limit their binding force to subagents or special agents, and hold that general officers and agents of the company, when acting within the scope of their authority, may waive this provision by an oral stipulation.[32] But in any event the company may, by its conduct, be estopped to assert that a waiver in a manner other than that provided in the policy is binding.[33] Where an agent had general authority the court said:[34] "He had power to bind the company by consenting that the policy remain in force notwithstanding the transfer of title and the sale on mortgage foreclosure; and notwithstanding the condition of the contract that such consent should be indorsed on the policy, it might be given otherwise. The company could not, by such a provision in its policy, divest itself of the power to afterward enter into further agreements or stipulations, through its proper agents, concerning the risk." And this seems to be the rule supported by the weight of authority, at least in the case of a general agent.[35]

§ 4185. Estoppel by act of agent.—In order to prevent fraud and injustice, the doctrine of estoppel is applied where the insured has been misled to his prejudice by the agent of the insurance company. The cases in which this rule has been applied have been classified as follows: 1. Where there were misrepre-

Travelers' Ins. Co., 113 Wis. 114, 88 N. W. 1013, 57 L. R. A. 455, 90 Am. St. 846. See also, Collins v. Metropolitan Life Ins. Co., 32 Mont. 329, 80 Pac. 609, 108 Am. St. 578.

[30] Carson v. Jersey City Ins. Co., 43 N. J. L. 300, 39 Am. Rep. 584, affd. 44 N. J. L. 219.

[31] Gladding v. California &c. Fire Ins. Assn., 66 Cal. 6, 4 Pac. 764; Enos v. Sun Ins. Co., 67 Cal. 621, 8 Pac. 379; Gould v. Dwelling-House Ins. Co., 90 Mich. 302, 51 N. W. 455; Barnard v. National Fire Ins. Co., 38 Mo. App. 106; Morrison v. North Amer. Ins. Co., 69 Tex. 353, 6 S. W. 605, 5 Am. St. 63; Northern Assur. Co. v. Grand View Bldg. Assn., 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. 133. See also, note in 10 L. R. A. (N. S.) 1064.

[32] Renier v. Dwelling-House Ins. Co., 74 Wis. 89, 42 N. W. 208. See note in 10 L. R. A. (N. S.) 1064.

[33] Gould v. Dwelling-House Ins. Co., 90 Mich. 302, 51 N. W. 455; McFarland v. Kittanning Ins. Co., 134 Pa. St. 590, 19 Atl. 796, 19 Am. St. 723; Gans v. St. Paul Fire &c. Ins. Co., 43 Wis. 108, 28 Am. Rep. 535.

[34] St. Paul &c. Ins. Co. v. Parsons, 47 Minn. 352, 50 N. W. 240; Anderson v. Manchester Fire Assur. Co., 59 Minn. 182, 60 N. W. 1095, 63 N. W. 241, 28 L. R. A. 609, 50 Am. St. 400.

[35] See note in 10 L. R. A. (N. S.) 1064.

sentations by the agent with reference to some facts material to the risks, or made so by the terms of the contract contained in an application prepared by the agent in the name of the insured, but without his authority, and upon which the company acted in issuing the policy.[36] 2. Where the agent, having been authorized by the insured to fill out the application in his name, misstates by a mistake or inadvertence the information given by the insured and thereby misleads the company.[37] 3. Where the policy declares that certain facts or conditions will invalidate the policy unless disclosed to the insurer and indorsed on the policy, and the company issues the policy although it has knowledge through its agent of the facts relied upon to defeat the policy.[38] All of these cases, however, relate to transactions prior to the comple-

[36] Combs v. Hannibal Sav. & Ins. Co., 43 Mo. 148, 97 Am. Dec. 383; Benninghoff v. Agricultural Ins. Co., 93 N. Y. 495; Sprague v. Holland &c. Ins. Co., 69 N. Y. 128; Vilas v. New York &c. Ins. Co., 72 N. Y. 590, 28 Am. Rep. 186; Ames v. New York Union Ins. Co., 14 N. Y. 253; Kister v. Lebanon Mut. Ins. Co., 128 Pa. St. 553, 18 Atl. 447, 5 L. R. A. 646, 15 Am. St. 696. See also, People's Fire Ins. Assn. v. Goyne, 79 Ark. 315, 96 S. W. 365, 16 L. R. A. (N. S.) 1180, and note; Roe v. National L. Ins. Co., 137 Iowa 696, 115 N. W. 500, 17 L. R. A. (N. S.) 1144 and note.

[37] Creed v. Sun Fire Office of London, 101 Ala. 522, 14 So. 323, 23 L. R. A. 177, 46 Am. St. 134; Stone v. Hawkeye Ins. Co., 68 Iowa 737, 28 N. W. 47, 56 Am. Rep. 870; Home Fire Ins. Co. v. Fallon, 45 Nebr. 554, 63 N. W. 860; Rowley v. Empire Ins. Co., 36 N. Y. 550; Baker v. Home Life Ins. Co., 64 N. Y. 648; Grattan v. Metropolitan Life Ins. Co., 92 N. Y. 274, 44 Am. Rep. 372; Bennett v. Agricultural Ins. Co., 106 N. Y. 243, 12 N. E. 609; Home Ins. Co. v. Hancock, 106 Tenn. 513, 62 S. W. 145, 52 L. R. A. 665, and cases cited in note. In some cases this rule is carried almost far enough to permit estoppel where the agent is in collusion with the applicant. See Whitney v. National &c. Assn., 57 Minn. 472, 59 N. W. 943. See also, Germania Life Ins. Co. v. Lunkenheimer, 127 Ind. 536, 26 N. E. 1082; Schwarzbach v. Ohio Valley &c. Union, 25 W. Va. 622, 52 Am. Rep. 227. The rule that a breach of warranty of the truth of the applicant's answers avoids the insurance policy without reference to his good faith or the materiality of the answer does not apply where the falsity of the answer resulted from a mistake in judgment or a blunder of the company's agent, who was charged by the company with the preparation of the application, and who made the answers upon a full and truthful statement of the facts by the applicant. Mutual Ben. Life &c. Ins. Co. v. Robison, 58 Fed. 723, 7 C. C. A. 444, 22 L. R. A. 325. See statement of rule by Judge Cooley in Ætna Live Stock &c. Ins. Co. v. Olmstead, 21 Mich. 246, 4 Am. Rep. 483.

[38] Van Schoick v. Niagara Fire Ins. Co., 68 N. Y. 434; Richmond v. Niagara Fire Ins. Co., 79 N. Y. 230; Short v. Home Ins. Co., 90 N. Y. 16, 43 Am. Rep. 138. Where the omission to mention incumbrance and other insurance in an application was by the advice of the solicitor who issued the policy in the name of the agent, and who had full knowledge of the facts, the company was estopped to assert a forfeiture. Goode v. Georgia Home Ins. Co., 92 Va. 392, 23 S. E. 744, 30 L. R. A. 842, 53 Am. St. 817.

tion of the contract. In the New York case,[39] in which the above classification was made, it was held that "the principle which relieves the party insured from responsibility for unauthorized representations, made by the agent of the insurer in respect to some incident of the risk, and permits them to be disregarded in an action to enforce the contract, has no application where the point in issue is as to the subject of the insurance, and the contract is explicit upon that point. If the contract of insurance relates to one definite and distinct subject, it cannot be turned into a contract for the insurance of another and different subject on proof that the agent of the company, by mistake, described the wrong property in his application." But there is much conflict on this general subject, as well as to whether nonwaiver stipulations apply only to conditions subsequent.[40]

§ 4186. **Facts known to company when policy issued.**—By the weight of authority, although the Supreme Court of the United States, under a contract which required a waiver to be indorsed on the policy, recently held to the contrary,[41] an insurance company will not be permitted to take advantage of a condition contained in the policy to avoid payment of a loss when the facts rendering the policy void by its terms were known to the insurer at the time it issued the policy and accepted the premium. Such a policy, if void, is void from the moment of its delivery. This doctrine rests upon the ground that facts made known to the agent of the company, who is empowered by it to solicit insurance, countersign and issue policies and collect premiums, are known to the principal, and that a fraud would be perpetrated if an insurer, through the medium of its agents, were allowed to deliver its policy and accept the premium with knowledge of facts which under its provisions rendered it void ab initio, and thereafter assert its invalidity.[42] Thus, where the insured warranted

[39] Sanders v. Cooper, 115 N. Y. 279, 22 N. E. 212, 5 L. R. A. 638, 12 Am. St. 801.

[40] Note to Gish v. Insurance Co. of North America in 13 L. R. A. (N. S.) 826, and note to People's Fire Ins. Co. v. Goyne, in 16 L. R. A. (N. S.) 1180.

[41] Northern Assur. Co. v. Grand View Bldg. Assn., 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. 133. See also, Jenkins v. Quincy Mut. Fire Ins. Co., 7 Gray (Mass.) 370; Wheeler v. U. S. Casualty Co., 71 N. J. L. 396, 59 Atl. 347; affd. 73 N. J. L. 677, 67 Atl. 432.

[42] Fireman's Fund Ins. Co. v. Norwood, 69 Fed. 71, 16 C. C. A. 136;

that "a continuous clear place of 150 feet shall hereafter be maintained" between the property insured and a certain building, and the agent of the insurer knew that the existing facts were otherwise, and that it was not within the power of the insured to change them, the policy was held valid.[43] In Kentucky it has also been

Northern Assur. Co. v. Grand View Bldg. Assn., 101 Fed. 77, 41 C. C. A. 207 (but this case was reversed in 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. 133). These cases present a very full review of the authorities on both sides of the question, as Judge Sanborn filed dissenting opinions in each case. See also, Home Ins. Co. v. Mendenhall, 164 Ill. 458, 45 N. E. 1078, 36 L. R. A. 374; German-American Ins. Co. v. Yeagley, 163 Ind. 651, 71 N. E. 897; Independent School Dist. v. Fidelity Ins. Co., 113 Iowa 65, 84 N. W. 956; German Ins. Co. v. Shader, 68 Nebr. 1, 93 N. W. 972, 60 L. R. A. 918; Gandy v. Orient Ins. Co., 52 S. Car. 224, 29 S. E. 655; Mesterman v. Home Mut. Ins. Co., 5 Wash. 524, 32 Pac. 458, 34 Am. St. 877. Where the agent of the company knew at the time that the policy was issued that fireworks were intended to be kept on the premises, the issuance of the policy under such circumstances is a waiver of a condition therein forbidding the keeping of fireworks. "It is now too well settled to require discussion that the issuance of a policy of insurance with knowledge of facts which, by the terms of the policy, render it void, will be treated as a waiver of such ground of forfeiture. * * * This is true even though the policy contains a stipulation that the conditions of the policy shall not be waived by any officer or agent of the company unless such waiver be indorsed upon the policy. It is a general rule of law that the parties to a written contract may afterward change or alter such contract by a parol agreement to that effect, and contracts with insurance companies furnish no exception to this rule." Phœnix Ins. Co. v. Flemming, 65 Ark. 54, 44 S. W. 464, 39 L. R. A. 789, 67 Am. St. 900; Dwelling House Ins. Co. v. Brodie, 52 Ark. 11, 11 S. W. 1016, 4 L. R. A. 458. "It has uniformly been held by this court that a condition of this character in a contract of insurance will not operate to avoid it after a loss, providing the company before delivering the policy had knowledge of the fact that the insured, notwithstanding the warranty, or the statement, and the condition, was not the sole owner, or that it was incumbered. In such cases the company is deemed to have waived the condition, or by the delivery of the policy with a condition avoiding it in case the insured is not the sole owner, or that the property is incumbered, and accepting the premium, is held estopped from setting up the condition as a defense. It was never supposed that such a condition was intended to apply to a state of facts in regard to which the company had been fully informed when it accepted the risk." Forward v. Continental Ins. Co., 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637. See also, Hartford Fire Ins. Co. v. Keating, 86 Md. 130, 38 Atl. 29, 63 Am. St. 499; Hamilton v. Dwelling-House Ins. Co., 98 Mich. 535, 57 N. W. 735, 22 L. R. A. 527; Dailey v. Preferred Masonic Mut. Acc. Assn., 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171, revd. 102 Mich. 299, 60 N. W. 694, 26 L. R. A. 171; Reed v. Equitable Fire & Marine Ins. Co., 17 R. I. 785, 24 Atl. 833, 18 L. R. A. 496. As to the effect of knowledge by the company's agent of the falsity of statements in the application, see Clemans v. Supreme Assembly, 131 N. Y. 485, 30 N. E. 496, 16 L. R. A. 33, annotated. To the same effect see Dowling v. Lancashire Ins. Co., 92 Wis. 63, 65 N. W. 738, 31 L. R. A. 112. But compare Iverson v. Metropolitan Life Ins. Co., 151 Cal. 746, 91 Pac. 609, 13 L. R. A. (N. S.) 866n; Gish v. Insurance Co., of North America, 16 Okla. 59, 87 Pac. 869, 13 L. R. A. (N. S.) 826n.

[43] Michigan Shingle Co. v. State Inv. & Ins. Co., 94 Mich. 389, 53 N. W. 945, 22 L. R. A. 319, where the court said: "The defendant insists that

held[44] that the rule which charges the insurer with the knowledge of its agent of errors or misstatements in the application is not affected by a condition in the policy that the insured shall be responsible for the acts of the agent who makes out the application. A renewal policy of fire insurance was issued to an ignorant and illiterate person without a written application, by an agent who had full power to write insurance and deliver the policy without reference to the home office. It was held that the insurer was bound by the knowledge of the condition of the title of the insured, although he may have acquired such knowledge in business having no connection with the insurance.[45] It has also been held in a number of cases that a provision in the policy that the knowledge of the agent of matters not stated in the application shall not bind the company does not prevent the insured from showing that he made true answers, but that they were wrongfully recorded by the agent of the company.[46] Nor

the clause * * * must be rendered literally and without regard to the knowledge of the agent as to what the actual distance was, thereby asserting that it has the right to accept the money of the insured, issuing its policy therefor, and lead him to understand that he has a valid insurance until a loss occurs, and then to repudiate its liability. Such a rule as this would enable it to affirm a contract entered into by it with full knowledge of all the facts, in so far as such contract might be of advantage to it, and to repudiate it the moment it ceased to be advantageous. This is inequitable and contrary to the well-established rule in reference to when and how the repudiation of a contract shall be made. The knowledge of the agent is the knowledge of the company. 'If the insurer receives the premiums with full knowledge of facts constituting a breach of one of the conditions of the policy, the right to insist that the policy is forfeited for that cause is gone.'"

[44] Hartford Fire Ins. Co. v. Haas, 87 Ky. 531, 10 Ky. L. 573, 9 S. W. 720, 2 L. R. A. 64.

[45] See also, § 4169 supra.

[46] Parno v. Iowa Merchants Mut. Ins. Co., 114 Iowa 132, 86 N. W. 210. The court said: "It is sought to distinguish these cases on the ground that in the policy in suit the answers of the applicant were made warranties. But that was also the fact in a number of the cases in which the rule stated has been indorsed by this court. In Stone v. Hawkeye Ins. Co., 68 Iowa 737, 28 N. W. 47, in which the facts were similar to those before us, it is said: 'It makes no difference, we think, that plaintiff agreed that the representations in the application should be regarded as warranties by him. He consented to that agreement in the belief that the agent had written down in the application the very statement he had made. As the agent was empowered by the company to take the statement, and acted under that authority when he wrote it, plaintiff was not charged with the duty of seeing to it that it was correctly taken. He had the right to assume that this was done. It would be manifestly unjust to hold that he was bound absolutely by a statement which was wrongfully interpolated into the application by defendant, and which he did not know was there when he consented to the agreement.'" See also, McElroy v. British American Assur. Co., 94 Fed. 990, 36 C. C. A. 615; Glover v. National Fire Ins. Co., 85 Fed. 125, 30

will a similar provision prevent the insured from having the contract rescinded where he was induced to enter into it by the fraudulent representations of the agent of the company.[47] But the doctrine of estoppel which, as a general rule, is applicable when the policy is issued with knowledge of the facts does not apply when the policy, as a contract, is contrary to law.[48] It is said that the knowledge of the agent, of facts which will defeat the policy, estops the company only when there is no application signed by the assured.[49] The court said: "The cases in which knowledge of the agent through whom insurance is taken, may operate to defeat the right of the company to avail itself of the fact so known, at the time it is taken, are those in which there is no application signed by the assured stating to the contrary of such existing facts, but rests upon a condition expressed in the policy merely. Then it may be presumed that the statement of it in the policy as required by the condition was omitted by mistake or waived." But there are cases which go much farther than this and apply the rule where the statements are inserted in an application and warranted. The company is not estopped, however, by the knowledge of the agent that the insured intends to violate one of the conditions of the policy. Thus, knowledge on the part of a fire insurance company's soliciting agent at the time of the issuance of the policy that the insured does not intend to comply with the condition requiring him to keep a set of books, and to take and preserve an inventory, to be produced in case of loss, does not estop the company from setting up the insured's noncompliance with the condition as a defense

C. C. A. 95; Roe v. National Life Ins. Assn., 137 Iowa 696, 115 N. W. 500, 17 L. R. A. (N. S.) 1144 and note; Phœnix Ins. Co. v. Allen, 109 Ind. 273, 10 N. E. 85; Marston v. Kennebec Mut. Life Ins. Co., 89 Maine 266, 36 Atl. 389, 56 Am. St. 412; Otte v. Hartford Life Ins. Co., 88 Minn. 423, 93 N. W. 608, 97 Am. St. 532; Sternaman v. Metropolitan Life Ins. Co., 170 N. Y. 13, 62 N. E. 763, 57 L. R. A. 318, 88 Am. St. 625. But see Sun Fire Office v. Wich, 6 Colo. App. 103, 39 Pac. 587; United States Life Ins. Co. v. Smith, 92 Fed. 503, 34 C. C. A. 506; Dimick v. Metropolitan Life Ins. Co., 69 N. J. L. 384, 55 Atl. 291, 62 L. R. A. 774.

[47] McCarty v. New York Life Ins. Co., 74 Minn. 530, 77 N. W. 426.

[48] Spare v. Home Mut. Ins. Co., 9 Sawy. (U. S.) 142, 17 Fed. 568.

[49] Kenyon v. Knights Templar &c. Aid Assn., 122 N. Y. 247, 25 N. E. 299. See note to Hoose v. Prescott Ins. Co. (Mich.), 11 L. R. A. 340.

to a claim for loss. The effect of future conduct is determined by the terms of the contract.[50]

§ 4187. Oral testimony to show actual statements.—Where the agent writes erroneous statements in the application, the prevailing rule is that oral testimony may be received to show the fact.[51] So, in Pennsylvania it was said, with reference to certain cases: "In each there was no question but that the warranty was made, and it was conceded that if there were a mutual mistake between the contracting parties, parol evidence is admissible to reform the policy. None declares that the fraud or mistake of a knavish or blundering agent, done within the scope of the powers given him by the company, will enable the latter to avoid a policy to the injury of the insured, who innocently became a party to the contract. The authorities go far, very likely not too far, in holding the assured responsible for his warranty, and in excluding oral evidence to contradict or vary it; but they do not establish that where an agent of the assurer has cheated the assured into signing the warranty and paying the premium, and the policy was issued upon the false statements of the agent himself, the assured shall not prove the fact and hold the principal

[50] Sowers v. Mutual Fire Ins. Co., 113 Iowa 551, 85 N. W. 763; Gray v. Germania Fire Ins Co., 155 N. Y. 180, 49 N. E. 675.

[51] People's Fire Ins. Assn. v. Goyne, 79 Ark. 315, 96 S. W. 365, 16 L. R. A. (N. S.) 1180 and note; Fireman's Fund Ins. Co. v. Norwood, 69 Fed. 71, 16 C. C. A. 136; American Life Ins. Co. v. Mahone, 21 Wall. (U. S.) 152, 22 L. ed. 593; Union Mut. Life Ins. Co. v. Wilkinson, 13 Wall. (U. S.) 222, 20 L. ed. 617, where the authorities are cited and reviewed by Judge Caldwell; many authorities are also cited in Spalding v. New Hampshire Fire Ins. Co., 71 N. H. 441, 52 Atl. 858, and the later ones in the opinion and note first referred to in this note. In Parno v. Iowa Merchants' Mut. Ins. Co., 114 Iowa 132, 86 N. W. 210, it was said: "Appellant's next contention is that the matter of estoppel is not susceptible of proof, because it would necessitate the contradiction of the terms of a writing by parol evidence. It is the rule in this state that where the assured has returned truthful answers to the agent of the company, who has recorded them incorrectly in the application, the facts may be shown by oral evidence, to estop the company from setting up the statements in the application as a defense. Warshawky v. Anchor &c. Ins. Co., 98 Iowa 221, 67 N. W. 237." Carey v. Home Ins. Co., 97 Iowa 619, 66 N. W. 920; McComb v. Council Bluffs Ins. Co., 83 Iowa 247, 48 N. W. 1038; Jamison v. State Ins. Co., 85 Iowa 229, 52 N. W. 185; Reynolds v. Iowa & Nebraska Ins. Co., 80 Iowa 563, 46 N. W. 659; Key v. Des Moines Ins. Co., 77 Iowa 174, 41 N. W. 614. In Donnelly v. Cedar Rapids Ins. Co., 70 Iowa 693, 28 N. W. 607, the court asserts that the parol evidence in such a case is not introduced for the purpose of contradicting the written contract, but only to estop the company from setting up as a defense the

to the contract, as if he had committed the wrong."[52] The Supreme Court of the United States, however, has recently taken a somewhat different view of this question,[53] and Massachusetts, New Jersey and Rhode Island refuse to recognize this rule, and hold that a waiver of the forfeiture existing at the inception of the contract cannot be shown by oral testimony of what occurred at or before the closing of the contract;[54] but even in these states, it seems that a waiver occurring after the inception of the contract may be shown by parol.[55] And many of the courts have criticized and refused to follow the decision of the Supreme Court of the United States to which reference has just been made.[56]

§ 4188. Bad faith—Collusion between applicant and agent. —Where there is collusion between the applicant and the agent of the company, knowledge of the fraud attempted by the applicant cannot be imputed to the company, and made the basis of an estoppel.[57] The principal is bound by the acts of his agent

falsity of the statements in the application.

[52] Eilenberger v. Protective Mut. Fire Ins. Co., 89 Pa. St. 464; quoted in Kister v. Lebanon Mut. Ins. Co., 128 Pa. St. 553, 18 Atl. 447, 5 L. R. A. 646, 15 Am. St. 696.

[53] Northern Assur. Co. v. Grand View Bldg. Assn., 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. 133. See also, Kentucky &c. Concentrating Co. v. Norwich Union Fire Ins. Soc., 146 Fed. 695, 77 C. C. A. 121.

[54] Batchelder v. Queen Ins. Co., 135 Mass. 449; Dewees v. Manhattan Ins. Co., 35 N. J. L. 366; Franklin Fire Ins. Co. v. Martin, 40 N. J. L. 568, 29 Am. Rep. 271; Bennett v. St. Paul Fire &c. Ins. Co., 55 N. J. L. 377, 27 Atl. 641; Reed v. Equitable Fire and Marine Ins. Co., 17 R. I. 785, 24 Atl. 833, 18 L. R. A. 496. In the last case it was said: "We recognize the tendency of decision in favor of the insured, and, if this were a new question in this state, we might feel compelled to yield to the weight of authority. Opposed to this line of decisions, Massachusetts has stood almost alone, with a sturdiness characteristic of the commonwealth."

[55] Oakes v. Manufacturers' Fire & Marine Ins. Co., 135 Mass. 248; Metropolitan Life Ins. Co. v. McTague, 49 N. J. L. 587, 9 Atl. 766, 60 Am. Rep. 661.

[56] People's Fire Ins. Assn. v. Goyne, 79 Ark. 315, 96 S. W. 365, 16 L. R. A. (N. S.) 1180, and note; Orient Ins. Co. v. McKnight, 197 Ill. 190, 64 N. E. 339; German-American Ins. Co. v. Yellow Poplar Lumber Co., 27 Ky. L. 105, 84 S. W. 551; Grand View Bldg. Assn. v. Northern Assur. Co., 73 Nebr. 149, 102 N. W. 246, affd. 203 U. S. 106, 51 L. ed. 109, 27 Sup. Ct. 27, reviewed in 60 Cent. L. J. 484; Welch v. Fire Assn. of Phila., 120 Wis. 456, 98 N. W. 227. The West Virginia court first followed the federal case in Maupin v. Scottish Union & Nat. Ins. Co., 53 W. Va. 557, 45 S. E. 1003, but afterward overruled the prior decision. Medley v. German Alliance Ins. Co., 55 W. Va. 342, 47 S. E. 101. But the annotator in 16 L. R. A. (N. S.) 1165, approves the decision of the Supreme Court of the United States referred to, and see Deming Invest. Co. v. Shawnee Fire Ins. Co., 16 Okla. 1, 83 Pac. 918, 4 L. R. A. (N. S.) 607.

[57] Mallen v National Life Assn. (Mo. App.), 153 S. W. 1065; Cen-

while he acts within the scope of his reputed authority, but if he commits a fraud upon his principal, an applicant who is particeps criminis will not be allowed to profit by the fraud.[58] This general rule is well settled, but it has been held not to apply where the statute provided that a false answer known to the insurer's agent should constitute no defense.[59]

tennial Mut. Life Assn. v. Parham, 80 Tex. 518, 16 S. W. 316. Where an untrue answer is written with the consent of the applicant, there can be no recovery. Blooming Grove &c. Ins. Co. v. McAnerney, 102 Pa. St. 335, 48 Am. Rep. 209.

[58] Eilenberger v. Protective Mut. Fire Ins. Co., 89 Pa. St. 464; Hanf v. Northwestern Masonic Aid Assn., 76 Wis. 450, 45 N. W. 315. See also to same effect, Maier v. Fidelity Mut. Life Assn., 78 Fed. 566, 24 C. C. A. 239; Caruthers v. Kansas Mut. Life Ins. Co., 108 Fed. 487; Rockford Ins. Co. v. Nelson, 65 Ill. 415; Mudge v. Supreme Court, 149 Mich. 467, 112 N. W. 1130, 14 L. R. A. (N. S.) 279n, 119 Am. St. 686; National Life Ins. Co. v. Minch, 53 N. Y. 144; Sprinkle v. Knights Templar &c. Life &c. Co., 126 N. Car. 678, 36 S. E. 112.

[59] Prudential Ins. Co. v. Kilbane, 15 Ohio C. C. 62.

CHAPTER CXXV.

THE STANDARD POLICY AND ITS PROVISIONS.

§ 4195. In general.
4196. The New York standard.
4197. The binding clause.
4198. Construction of the standard policy.
4199. Effect of a breach of condition.
4200. First clause of standard policy.
4201. First clause—Parties.
4202. The premium.
4203. Term of insurance.
4204. The amount.
4205. Description of the property—In general.
4206. Goods held in trust.
4207. May cover shifting stock.
4208. Ambiguous descriptions—Reformation.
4209. Presumption as to nature of business.
4210. Descriptions—When warranties.
4211. Description of merchandise—What included in the description.
4212. Description of buildings.
4213. Location of property—In general.
4214. Location material — When change does not prevent recovery.
§ 4215. Location — Materiality — Removal—Illustrations.
4216. Risks insured against.
4217. Proximate cause — Electric wires.
4218. Agency—Authorization.
4219. Application and survey—Application a part of the policy.
4220. Misconduct of insured in procuring policy—Entirety of contract.
4221. Concealment and misrepresentation.
4222. Statement of interest.
4223. Fraud and false swearing.
4224. Excluded risks — Invasion — Riot.
4225. Excluded risks—Theft.
4226. Excluded risks—Neglect to protect property.
4227. Excluded risks—Explosion.
4228. Lightning.
4229. Fall of building.
4230. Earthquake — City ordinance preventing repair.
4231. Excluded property — Exceptions and limitations.
4232. Plate glass, frescoes and decorations.

§ 4195. In general.—A standard form of fire insurance policy is now in general use and is required by legislation in many of the states. Having considered the general rules and principles and given many illustrations of their application, it is therefore deemed advisable at this stage to consider the rulings and decisions upon particular clauses of the standard policy, first giving a brief review of the legislation upon the subject and a general

explanation of the nature and formal parts of such policy, and its construction.[1]

§ 4196. The New York standard.—What is known as the New York standard form of policy went into effect on the first day of May, 1887.[2] It does not permit riders which change

[1] In 1873 (Laws (1873), ch. 331) the legislature of Massachusetts provided for a form which, after various modifications, in 1887 became the present standard policy. The principal difference between this policy and what has since become known as the New York standard policy is the provision which permits the parties to modify its language by riders attached to the policy. The New Hampshire form was adopted in 1885 (Laws (1885) ch. 93, § 3), and is modeled after that of Massachusetts, with such changes as were rendered necessary by the New Hampshire statutes, portions of which are required to be printed upon the back of the policy and form part of the contract. Maine also followed Massachusetts, and in 1895 provided for a standard form which should be as nearly as practicable the same as that of Massachusetts. Laws (1895) ch. 18. The Minnesota act of 1889 (Minn. Gen. Stat. (1894), § 3200, Gen. Laws 1889, ch. 217) imposed upon the insurance commissioner the duty of preparing a form which should become obligatory after that year. The New York form was prepared and went into use, but the statute was held unconstitutional because it was attempted to delegate legislative powers to the insurance commissioner. Anderson v. Manchester Fire Assur. Co., 59 Minn. 182, 60 N. W. 1095, 63 N. W. 241, 28 L. R. A. 609, 50 Am. St. 400. The Pennsylvania act of 1891 has been held unconstitutional by the Supreme Court of the state in O'Neil v. American Fire Ins. Co., 166 Pa. St. 72, 30 Atl. 943, 26 L. R. A. 715, 45 Am. St. 650. An attempt to cure the defect was defeated in 1895. The New York form is in common use. The Wisconsin Statute of 1891 was subject to the same objections, but it was cured in 1895. In 1895 (Minn. Laws (1895) ch. 175, § 53, Rev. Laws (1905), § 1640) the legislature adopted the Massachusetts instead of the New York form, with such modifications as were necessary to prevent conflict with the valued-policy law then in force. Riders were permitted to explain or modify the policy. The insurance companies adopted a general rider which embraced substantially the provisions of the New York standard policy, but the legislature of 1897 (Laws 1897, ch. 254) prohibited the use of the coinsurance rider, and the making of changes of any kind except as specifically authorized by the act.

[2] Provided for by N. Y. Laws (1886) ch. 488; Consol. Laws (1909), p. 2607. It was adopted by Michigan in 1889, by North Dakota in 1890, New Jersey in 1892, North Carolina in 1893, South Dakota in 1893, Connecticut in 1894, Rhode Island in 1895, Iowa in 1897, (Iowa has not prescribed a complete form of policy; but a common form is in use, and the statute requires it to contain certain matters) and Louisiana in 1898. In 1891 Wisconsin passed a law which directed the insurance commissioner to prepare a form which should conform to the New York standard policy, and provided that five days' notice of cancelation by the company should be given, and provided also that proof of loss should be made within sixty days after the fire. This policy went into effect in 1891. In 1895, the question having arisen as to the constitutionality of the legislation, the standard policy was enacted in the form of a statute. Some important changes were made at that time, but it is still, in effect, the New York standard. The New York form has been generally adopted by the insurance companies and is in common use in states which have not yet adopted a standard form.

any of its conditions, like the Massachusetts and New Hampshire forms. All variations from the prescribed form are provided for by "clauses" which may be attached to the policy, and which are known as the Application and Survey Clause, Assessment, Instalment or Credit Clause, Coinsurance Clause, Conditions as to Incumbrances, Lightning Clause, Mortgage Clauses, Percentage, Limitation and Value Clauses. Most of the states have followed this form.

§ 4197. **The binding clause.**—All the states which require the use of a standard form, except North Carolina, prescribe penalties for using another form, and all but New York, New Hampshire and North Carolina make a policy issued in violation of the law binding on the company. The Massachusetts and Rhode Island statutes prescribe penalties for using other forms, "but such policy shall be binding upon the company using the same." Minnesota and South Dakota also provide,—"and such company shall thereafter be disqualified from doing any insurance business in this state."[2a] And even though the statute provides that any contracts made contrary to provisions of the standard policy shall be void, liability cannot be escaped by the use of a form which in some slight respect departs from the standard.[3]

§ 4198. **Construction of the standard policy.**—As the policy is prepared by the insurance company it is held, notwithstand-

[2a] Mass. Rev. Laws (1902), ch. 118, § 105; Rev. Laws Minn. (1905), § 1721; Gen. Laws R. I. (1909), ch. 222, § 6; Rev. Codes S. Dak. (1903), § 666.

[3] In Michigan it was said, "Contracts of insurance, so far as the public are concerned, stand upon no different basis than other contracts. The object was to protect policy-holders, and to provide a policy fair to the insured and the insurer and avoid litigation. It was undoubtedly well known to the legislature that policy-holders do not usually examine and scrutinize their policies with the same care that they do other contracts which they make, involving their ordinary business transactions. The statute imposes a penalty upon the insurance company for issuing such a policy, but imposes none on the insured. In using the word 'void,' the legislature certainly did not contemplate that an insurance company might insert a clause not provided for in the standard policy, receive premiums year after year upon it, and, when the loss occurs, say to the insured, 'Your policy is void because we inserted a clause in it contrary to the law of Michigan.' Such a result would be a reproach upon the legislature and the law. The law so construed, instead of operating to protect the insured, would afford the surest means to oppress and defraud them, and thus defeat the very object the legislature had in view. This statute comes clearly within that class of cases which holds the word 'void' to mean 'voidable.'" Armstrong v.

ing the form is required by statute, that it should be strictly construed in favor of the insured.[4] When there is doubt as to the true construction to be given to the language, the court should lean against a construction which would limit the liability of the insurer.[5] Conditions for the forfeiture of an insurance policy will be strictly construed against the insurer, where it retains the premium and seeks by such condition to escape liability after loss occurs.[6] It is well settled that written parts of the contract control the printed parts where there is a conflict, but this is also subject to the rule that words of exception in an insurance policy, if doubtful, are to be construed most strictly against the party for whose benefit they are intended.[7] An insurance policy is an original independent agreement taking effect from its date, and it has been held that its interpretation is not to be controlled or affected by prior policies of which it

Western Mfgrs. Mut. Ins. Co., 95 Mich. 137, 54 N. W. 637.

[4] Davis v. Connecticut Fire Ins. Co., 158 Cal. 766, 112 Pac. 549, 32 L. R. A. (N. S.) 604, and note; German Ins. Co. v. Hayden, 21 Colo. 127, 40 Pac. 453, 52 Am. St. 206; Duncan v. Nat. Mut. Fire Ins. Co., 44 Colo. 472, 98 Pac. 634, 20 L. R. A. (N. S.) 340n; Adair v. Southern Mut. Ins. Co., 107 Ga. 297, 33 S. E. 78, 45 L. R. A. 204, 73 Am. St. 122; McEvoy v. Security Fire Ins. Co., 110 Md. 275, 73 Atl. 157, 22 L. R. A. (N. S.) 964, 132 Am. St. 428, and note; Hoffman v. Ætna Fire Ins. Co., 32 N. Y. 405, 88 Am. Dec. 337, affg. 19 Abb. Pr. (N. Y.) 325, 24 N. Y. Super. Ct. 501; Teutonia Fire Ins. Co. v. Mund, 102 Pa. 89. See note in 5 L. R. A. 799. This was the old rule before the standard form was required, and while the reason given for it is not so clearly apparent as formerly the rule still obtains. But the object is to carry out the intention of the parties and the construction should be reasonable. Note in 5 L. R. A. 779, and note in 132 Am. St. 438. As to construction of policy being for the court when unambiguous, but often for the jury when ambiguous and parol evidence being admitted to apply to the subject-matter or the like, see note in 33 L. R. A. (N. S.) 156. See as to conflict of laws as to construction, note in 63 L. R. A. 856, and also note in 23 L. R. A. (N. S.) 968.

[5] Georgia Home Ins. Co. v. Allen, 119 Ala. 436, 24 So. 399; Home Ins. Co. v. Feyerabend, 7 Kans. App. 231, 52 Pac. 899; Liverpool & London & Globe Ins. Co. v. Kearney, 180 U. S. 132, 45 L. ed. 460, 21 Sup. Ct. 326. See also, Rogers v. Phœnix Ins. Co., 121 Ind. 570, 23 N. E. 498. A contract of insurance will, if possible, be construed to prevent a forfeiture. Bridges v. National Union, 73 Minn. 486, 77 N. W. 270, 77 N. W. 411.

[6] Canton Ins. Office v. Woodside, 90 Fed. 301, 33 C. C. A. 63. See note to Lancaster Fire Ins. Co. v. Lenheim, in 33 Am. Rep. 783; also Ætna Life Ins. Co. v. Deming, 123 Ind. 384, 24 N. E. 86. See also, Vette v. Clinton Fire Ins. Co., 30 Fed. 668; Goddard v. East Texas Fire Ins. Co., 67 Tex. 69, 1 S. W. 906, 60 Am. Rep. 1.

[7] Monroe Building & Loan Assn. v. Liverpool & L. & G. Ins. Co., 50 La. Ann. 1243, 24 So. 238. See also, Fire Ins. Assn. v. Merchants & Miners' Transportation Co., 66 Md. 339; Kratzenstein v. Western Assur. Co. of Toronto, 116 N. Y. 54, 22 N. E. 221, 5 L. R. A. 799, and note.

is technically the renewal.[8] The standard policy is a statutory law as well as a contract, and its provisions are therefore binding upon all the parties. In a recent case in Michigan[9] it was claimed that as the standard policy is prescribed by state authority, it should not be subject to the rule that such contracts are to be construed most favorably to the insured. The question was not determined, as it was said that the terms employed in the policy under consideration had been in previous use in insurance contracts and had received judicial construction. It is to be presumed that the terms used in the standard policy are used in the sense in which they were previously used and defined. In New York it was said:[10] "The policy, although of the standard form, was prepared by the insurers, who are presumed to have had their own interests primarily in view, and hence, when the meaning is doubtful, it should be construed most favorably to the insured, who had nothing to do with the preparation thereof. * * *

[8] Temple v. Niagara Fire Ins. Co., 109 Wis. 372, 85 N. W. 361.

[9] John Davis & Co. v. Insurance Co., 115 Mich. 382, 73 N. W. 393.

[10] Matthews v. American Cent. Ins. Co., 154 N. Y. 449, 48 N. E. 751, 39 L. R. A. 433, 61 Am. St. 627. In another recent case, commenting upon the standard policy, the New York Court of Appeals said: "The practice which prevailed before this enactment, whereby each company prescribed the form of its contract, led to great diversity in the provisions and conditions of insurance policies, and frequently to great abuse. Parties taking insurance were often misled by unusual clauses or obscure phrases concealed in a mass of verbiage, and often so printed as to almost elude discovery. Unconscionable defenses, based upon such conditions, were not infrequent, and courts seem sometimes to have been embarrassed in the attempt to reconcile the claims of justice with the law of contracts. Under the law of 1886, companies are not permitted to insert conditions in policies at their will. The policies they now issue must be uniform in their provisions, arrangement and type. Persons seeking insurance will come to understand to a greater extent than heretofore the contract into which they enter. Now, as heretofore, it is competent for the parties to a contract of insurance, by agreement in writing or parol, to modify the contract after the policy has been issued, or to waive conditions or forfeitures. * * * The principle that courts lean against forfeitures is unimpaired, and in weighing evidence tending to show a waiver of conditions or forfeitures, the court may take into consideration the nature of the particular condition in question, whether a condition precedent to any liability, or one relating to the remedy merely, after a loss has been incurred. But where the restrictions upon an agent's authority appear in the policy, and there is no evidence tending to show that his powers have been enlarged, there seems to be no good reason why the authority expressed should not be regarded as the measure of his power; nor is there any reason why courts should refuse to enforce forfeitures plainly incurred, which have not been expressly or impliedly waived by the company." Quinlan v. Providence Washington Ins. Co., 133 N. Y. 356, 31 N. E. 31, 28 Am. St. 645; Rickerson v. Hartford Fire Ins. Co., 149 N. Y. 307, 43 N. E. 856.

Moreover, when a liberal construction would lead to manifest injustice to the insured and a liberal but still more reasonable construction would prevent injustice by not requiring an impossibility, the latter should be adopted, because the parties are presumed, when the language used by them permits, to have intended a reasonable and not an unreasonable result."

§ 4199. Effect of a breach of condition.—The decisions are conflicting upon the question of the effect of a violation of a condition in a fire insurance policy. The weight of authority seems to support the view that a violation of a condition that works a forfeiture of the policy merely suspends the insurance during the violation, and if the violation is discontinued during the life of the policy and does not exist at the time of the loss, the policy revives and the company is liable, although it had never consented to the violation of the conditions in the policy, and such violation has been such that the company could, had it known of it at the time, have declared a forfeiture therefor.[11] But the decisions are not uniform; and it is held in a number of them

[11] As sustaining the view that the policy is merely suspended, see Born v. Home Ins. Co., 110 Iowa 379, 81 N. W. 676, 80 Am. St. 300, and note; and the elaborate note in 107 Am. St. 92, 130 et seq.; State Ins. Co. v. Schreck, 27 Nebr. 527, 43 N. W. 340, 6 L. R. A. 524, 20 Am. St. 696 (breach of condition as to mortgages); Omaha Fire Ins. Co. v. Dierks, 43 Nebr. 473, 61 N. W. 740; Johansen v. Home Fire Ins. Co., 54 Nebr. 548, 74 N. W. 866; Home Fire Ins. Co. of Omaha v. Johansen, 59 Nebr. 349, 80 N. W. 1047; Tompkins v. Hartford Fire Ins. Co., 22 App. Div. (N. Y.) 380, 49 N. Y. S. 184; Lounsbury v. Protection Ins. Co., 8 Conn. 459, 21 Am. Dec. 686 (breach of condition as to use of premises); Schmidt v. Peoria Marine & Fire Ins. Co., 41 Ill. 295; New England Fire & Marine Ins. Co. v. Wetmore, 32 Ill. 221; Traders' Ins. Co. v. Catlin, 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595; Phœnix Ins. Co. v. Lawrence, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; Joyce v. Main Ins. Co., 45 Maine 168, 71 Am. Dec. 536; United States Fire & Marine Ins. Co. of Baltimore v. Kimberly, 34 Md. 224, 6 Am. Rep. 325; Hinckley v. Germania Fire Ins. Co., 140 Mass. 38, 1 N. E. 737, 54 Am. Rep. 445; Greenleaf v. St. Louis Ins. Co., 37 Mo. 25; Garrison v. Farmers' &c. Ins. Co., 56 N. J. L. 235, 28 Atl. 8; Hennessey v. Manhattan Fire Ins. Co., 28 Hun (N. Y.) 98; Wilkins v. Tobacco Ins. Co., 30 Ohio St. 317, 27 Am. Rep. 455; Cumberland Valley Mut. Protection Co. v. Schell, 29 Pa. St. 31; Mutual Fire Ins. Co. v. Coatesville Shoe Factory, 80 Pa. St. 407; Krug v. German Fire Ins. Co., 147 Pa. St. 272, 23 Atl. 572, 30 Am. St. 729; Jacobs v. Equitable Ins. Co., 19 U. C. Q. B. 250 (breach of condition as to other insurance); New England Fire & Marine Ins. Co. v. Schettler, 38 Ill. 166; Germania Fire Ins. Co. v. Klewer, 129 Ill. 599, 22 N. E. 489; Western Assurance Co. v. Mason, 5 Ill. App. 141; Phenix Ins. Co. v. Johnston, 42 Ill. App. 66, affd. 143 Ill. 106, 32 N. E. 429; Obermeyer v. Globe Mut. Ins. Co., 43 Mo. 573; Insurance Co. of North America v. Garland, 108 Ill. 220 (breach of condition as to occupancy); Schuermann v. Dwelling-

that upon breach of a condition by which a forfeiture of the insurance may be declared, the policy becomes void and can never be restored to validity except with the consent of the insurer.[12] In some states the insurance company is required, upon notice of a breach of a condition in the policy, to take some affirmative action to show that it does not intend to waive the forfeiture.[13] Much of the apparent conflict may be reconciled by carefully considering the particular provision in the contract in question, as there is often a difference in the language and effect, and also, perhaps, to some extent, by considering whether the knowledge or notice of the breach reached the insurer before or after the loss.[14]

§ 4200. First clause of standard policy.—The first clause or formal provision found in the usual standard fire policy is given

House Ins. Co., 57 Ill. App. 200, affd. 161 Ill. 437, 43 N. E. 1093, 52 Am. St. 377; Ætna Ins. Co. v. Meyers, 63 Ind. 238; Ring v. Phœnix Assur. Co., 145 Mass. 426, 14 N. E. 525; La-Selle v. Hoboken Fire Ins. Co., 43 N. J. L. 468; Whitney v. Black River Ins. Co., 72 N. Y. 117, 28 Am. Rep. 116; Power v. Ocean Ins. Co., 19 La. 28, 36 Am. Dec. 665 (by temporary alienation); Lane v. Maine Mut. Fire Ins. Co., 12 Maine 44, 28 Am. Dec. 150; Worthington v. Bearse, 12 Allen (Mass.) 382, 90 Am. Dec. 152; Hitchcock v. Northwestern Ins. Co., 26 N. Y. 68; Shearman v. Niagara Fire Ins. Co., 46 N. Y. 526, 7 Am. Rep. 380.

[12] German &c. Ins. Co. v. Humphrey, 62 Ark. 348, 35 S. W. 428, 54 Am. St. 297 (as to mortgages); Insurance Co. of North America v. Wicker, (Tex.) 54 S. W. 300, affd. 93 Tex. 390, 55 S. W. 740; Hill v. Middlesex &c. Assur. Co., 174 Mass. 542, 55 N. E. 319 (as to use of premises); Lyman v. State Mut. Fire Ins. Co., 14 Allen (Mass.) 329; Kyte v. Commercial Union Assur. Co., 149 Mass. 116, 21 N. E. 361, 3 L. R. A. 508; Burgess v. Equitable Marine Ins. Co., 126 Mass. 70, 30 Am. Rep. 654; Frost's Detroit L. &c. Works v. Millers' &c. Ins. Co., 37 Minn. 300, 34 N. W. 35, 5 Am. St. 846; Wheeler v. Traders' Ins. Co., 62 N. H. 450, 13 Am. St. 582; Fernandez v. Great Western Ins. Co., 48 N. Y. 571, 8 Am. Rep. 571; Mead v. Northwestern Ins. Co., 7 N. Y. 530, Seld. Notes 21; Jennings v. Chenango County Mut. Ins. Co., 2 Den. (N. Y.) 75; Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. 379; Carey v. German &c. Ins. Co., 84 Wis. 80, 54 N. W. 18, 20 L. R. A. 267, 36 Am. St. 907. See also, Edwards v. Farmers' Mut. Ins. Co., 128 Ga. 353, 57 S. E. 707, 119 Am. St. 385, and note (breach by tenant); Georgia Home Ins. Co. v. Rosenfield, 95 Fed. 358, 37 C. C. A. 96 (by other insurance); Fabyan v. Union &c. Ins. Co., 33 N. H. 203; Moore v. Phœnix Ins. Co., 62 N. H. 240, 13 Am. St. 556 (as to vacancy); East Texas Fire Ins. Co. v. Kempner, 87 Tex. 229, 27 S. W. 122, 47 Am. St. 99.

[13] Alabama State Mut. Assur. Co. v. Long Clothing & Shoe Co., 123 Ala. 667, 26 So. 655; Appleton Iron Co. v. British American Assur. Co., 46 Wis. 23, 1 N. W. 9, 50 N. W. 1100.

[14] These considerations are suggested as reconciling many of the decisions in the note to Phenix Ins. Co. v. Grove, in 25 L. R. A. (N. S.) 1-23, where most of the authorities on both sides are reviewed.

below.[15] As will be seen, this is the provision containing the direct promise or agreement of insurance on the part of the company, stating the names of the parties, the consideration or premium, the term, the risk and the maximum amount, followed by a description of the property and a provision as to its remaining in the same location. Most of these subjects have already been treated in a more or less general way, but it remains to further consider them briefly under this clause.

§ 4201. First clause—Parties.—If the wrong person is named as the insured, the policy may be reformed in a proper case in equity.[16] The contract is personal, and refers to the person, and not to the thing out of which the interest arises.[17] Only the interest of the person named in the policy is covered by the contract, unless some form of words is used to express the contrary intention, and this is so held notwithstanding an oral agreement with the agent at the time the policy is issued that it shall also cover interests of another person.[18] Where the person named as the insured knows that the company issued the policy under a mistaken idea that another person was being insured, the person named in the policy is not protected.[19] The mere fact that the name of the insured is misspelled, as Connor for O'Connor, is immaterial

[15] The —— Insurance Company, in consideration of the stipulations herein named and of —— dollars premium, does insure —— for the term of —— from the —— day of ——, 19—, at noon, to the —— day of ——, 19—, at noon, against all direct loss or damage by fire, except as herein provided, to an amount not exceeding —— dollars, to the following described property while located and contained as described herein, and not elsewhere, to wit, ——. This form has been followed in the standard policies of New York, New Jersey, Rhode Island, Connecticut, Louisiana, Iowa, Michigan, Wisconsin, South Dakota, North Dakota and North Carolina. The following is found in the standard polices of Massachusetts, Minnesota, Maine and New Hampshire: "In consideration of —— dollars to it paid by the insured, hereinafter named, the receipt whereof is hereby acknowledged, does insure —— and —— legal representatives against loss or damage by fire, to the amount of —— dollars. (Description of property insured.) * * * Said property is insured for the term of ——, beginning on the —— day of ——, in the year —— at noon, and continuing until the —— day of ——, in the year —— at noon, against all loss or damage by fire originating from any cause except * * *." Rev. Laws of Mass. 1902, vol. II, 1147.

[16] Spare v. Home &c. Ins. Co., 8 Sawy. (U. S.) 618, 15 Fed. 707.

[17] Cummings v. Cheshire &c. Ins. Co., 55 N. H. 457.

[18] Fuller v. Phœnix Ins. Co., 61 Iowa 350, 16 N. W. 273.

[19] Travis v. Peabody Ins. Co., 28 W. Va. 583.

where the identity of the party is clearly shown.[20] Reference to the interest as "his," where the insured is a woman, is immaterial.[21] A policy procured by contractors issued in the name of the owner, with the clause "contractors' insurance for thirty days," covers the interest of the contractors, and may be enforced for their benefit.[22] An unauthorized change of the name of an insured party will not, as a general proposition, affect the rights of the insured, but when "the insurer in issuing a policy deals with a party who remains in possession of the instrument after execution, and is alone entitled to recover the amount thereof, in case of loss, he is authorized to assume that such party has the power to consent to such changes in it before breach as will inure to the benefit of the insured, and tend to perfect the validity of the contract."[23] The name of the party insured is sometimes omitted from the policy and a general phrase, such as "for whom it may concern," is used. So the insured is often described as agent, executor or trustee. The right of an appointee under a policy payable to him as his interests may appear is not an independent right on which such person is entitled to sue, but it is a mere right to receive the whole or part of the money to which the insured may be entitled, and hence such a provision does not affect the insurer's discharge for breach of condition by the assured.[24]

§ 4202. **The premium.**—The standard form provides for a statement of the amount of the premium in the written contract. Questions as to the necessity for the payment of this amount, what will constitute a waiver thereof, and the like, have been already considered,[25] so that further treatment in this connection is unnecessary. It may be added, however, that when the policy acknowledges the receipt of the premium this has been held to make a prima facie case of its payment,[26] and the same

[20] Hibernia Ins. Co. v. O'Connor, 29 Mich. 241; Clark v. German &c. Ins. Co., 7 Mo. App. 77.

[21] Simon v. Home Ins. Co., 58 Mich. 278, 25 N. W. 190. See also, as to partnership, Hartford Protection Ins. Co. v. Harmer, 2 Ohio St. 452.

[22] German Fire Ins. Co. v. Thompson, 43 Kans. 567, 23 Pac. 608.

[23] Martin v. Tradesmen's Ins. Co., 101 N. Y. 498, 5 N. E. 338.

[24] Wunderlich v. Palatine Fire Ins. Co., 104 Wis. 395, 80 N. W. 471.

[25] See §§ 4132, 4133, 4183; also Unterharnscheidt v. Missouri &c. L. Ins. Co., (Iowa) 138 N. W. 459, and cases there reviewed.

[26] Lee v. Fraternal Mut. Ins. Co., 1 Handy (Ohio) 217, 12 Ohio Dec. 109.

has been held where the insured produces a policy and puts it in evidence in an action thereon.[27]

§ 4203. Term of insurance.—The standard form contemplates that dates which limit the term shall be inserted, but where this is not done, it has been held that the insurance is nevertheless good for a reasonable time, and the burden is on the company to show that the policy was not in force at the time of the fire.[28] It has also been held that it may be shown by oral evidence that the policy was to take effect at a time other than its date;[29] that the insurance begins when the policy is applied for and dated, although it is not delivered for some days thereafter;[30] that the parties may agree that the termination of the insurance shall be at the option of the insured, and leave the date blank;[31] and that a contract may be given a retrospective operation and be made to cover property at a distance, although it has already been destroyed, where neither party has knowledge of the fact.[32] A policy "from the 14th day of February, 1868, until the 14th day of August, 1868," was held to cover a loss which occurred on the 14th day of August.[33] In the absence of a settled custom to the contrary, it has been held that a contract does not expire until midnight of the last day named.[34] But, as shown in the form heretofore given the term is ordinarily stated as from noon of a designated day to noon of another designated day, and while this has been held in some states to mean sun time as a matter of law,[35] it has been held in others to be a question for the jury on

[27] Berliner v. Travelers' Ins. Co., 121 Cal. 458, 53 Pac. 922, 41 L. R. A. 467, 66 Am. St. 49; Sheldon v. Connecticut Mut. Life Ins. Co., 25 Conn. 207, 65 Am. Dec. 565. See as to conditions in policy requiring payment of premium, Union Central Life Ins. Co. v. Pauley, 8 Ind. App. 85, 35 N. E. 190; Watrous v. Mississippi Val. Ins. Co., 35 Iowa 582; Harle v. Council Bluffs Ins. Co., 71 Iowa 401, 32 N. W. 396.

[28] Schroeder v. Trade Ins. Co., 109 Ill. 157.

[29] Atlantic Ins. Co. v. Goodall, 35 N. H. 328.

[30] Hubbard v. Hartford Fire Ins. Co., 33 Iowa 325.

[31] Imboden v. Detroit Fire & Marine Ins. Co., 31 Mo. App. 321.

[32] Security Fire Ins. Co. v. Kentucky &c. Ins. Co., 7 Bush (Ky.) 81, 3 Am. Rep. 301.

[33] Isaacs v. Royal Ins. Co., L. R. 5 Exch. 296; Insurance Co. of North America v. McDowell & Brown, 50 Ill. 120, 99 Am. Dec. 497; Insurance Co. of North America v. Garland, 108 Ill. 220.

[34] Herald Co. v. Northern Assur. Co., 4 Mont. L. Rep. (Can.) (Super. Ct.) 254.

[35] Henderson v. Reynolds, 84 Ga. 159, 10 S. E. 734, 7 L. R. A. 327; Ex parte Parker, 35 Tex. Cr. 12, 29 S. W. 480, 790.

proof of custom, as to whether it means sun or standard time.[36] The period may be limited by some other part of the policy. Thus, where a policy covered a "frame shingle roof hop-house, while drying hops" from loss or damage "by fire to the property so specified," from the 15th day of August to the 15th day of October, 1875, and within the term, but after the insured had ceased drying hops, a fire occurred, it was held that the company was not liable for damages caused thereby.[37] But where an accident policy purported to insure the complainant for a term of twelve months from noon on the 25th day of October, 1901, it was held that a subsequent clause providing that the policy did not cover any disability from any disease contracted within fifteen days from noon of the date of the policy was repugnant to the former clause and should be rejected.[38] The party alleging a change in the date of the expiration of the policy after it was issued has the burden of showing it.[38a]

§ 4204. **The amount.**—Controversy seldom arises as to the maximum amount of insurance, as this clearly appears in the policy. The measure of damages under special provisions of the contract and the valued-policy laws of the different states will be referred to elsewhere. If the policy is valued, the full amount named therein is recoverable in event of a total loss. This may result by force of a statutory provision, or from the express language of the policy in the absence of such a statute.

§ 4205. **Description of the property—In general.**—The object of the descriptive clause is the identification of the property, and where this is clear parts which are false or erroneous may be disregarded.[39] Thus, where the property is erroneously de-

[36] Jones v. German Ins. Co. of Freeport, 110 Iowa 75, 81 N. W. 188, 46 L. R. A. 860 (held to mean sun time unless contrary shown by custom); Rochester German Fire Ins. Co. v. Peaslee-Gaulbert Co., 120 Ky. 752, 27 Ky. L. 1155, 87 S. W. 1115, 1 L. R. A. (N. S.) 364 (jury authorized to find standard time meant on proof of custom).

[37] Langworthy v. Oswego & O. Ins. Co., 85 N. Y. 632.

[38] Bean v. Ætna L. Ins. Co., 111 Tenn. 186, 78 S. W. 104. See also, Jones v. Pennsylvania Casualty Co., 140 N. Car. 262, 52 S. E. 578, 5 L. R. A. (N. S.) 932, 111 Am. St. 843; ante, vol. 2, § 1515.

[38a] Insurance Co. of North America v. Brim, 111 Ind. 281, 12 N. E. 315.

[39] Hatch v. New Zealand Ins. Co., 67 Cal. 122, 7 Pac. 411. See also, vol. 2, §§ 1535, 1659, note 74.

scribed as a building of three stories instead of one and a half stories, it is sufficient if the building is identified by reference to the street and number so that the company cannot have been misled.[40] Any ambiguity in the description written in the policy will be construed liberally in favor of the insured. It will usually cover not only what is specifically enumerated, but also what is necessarily appurtenant thereto.[41] And where a policy was written by a general agent upon a brick building "and its addition adjoining and communicating," after notice from the owner that he wanted the policy to cover not only the brick building but also a wooden building which, although separated from it by a few feet, was connected by a passageway and used with it, the wooden building was held to be covered.[42]

§ 4206. Goods held in trust.—The word trust in this connection is to be given its ordinary popular and not its technical meaning.[43] Property described as "their own or held in trust" covers a piano left for sale or rent.[44] A policy "on goods, being stock in trade," etc., whether on commission or held in trust, covers goods in store or on joint account and sold for mutual profit of the insured and another party.[45] "The property of the insured, or held in trust" includes cloth left with the insured to be manufactured into clothing.[46] So, an insurance on "mer-

[40] Massell v. Protective Mut. Fire Ins. Co., 19 R. I. 565, 35 Atl. 209.

[41] Lovewell v. Westchester Fire Ins. Co., 124 Mass. 418, 26 Am. Rep. 671; Hannan v. Williamsburgh &c. Ins. Co., 81 Mich. 556, 45 N. W. 1120, 9 L. R. A. 127; Buchanan v. Exchange Fire Ins. Co., 61 N. Y. 26.

[42] Shepard v. Germania Fire Ins. Co., 165 Mich. 172, 130 N. W. 626, 33 L. R. A. (N. S.) 156n. And similar rulings have been made in many cases. Bickford v. Ætna Ins. Co., 101 Maine 124, 63 Atl. 552, 8 Am. & Eng. Ann. Cas. 92; Phenix Ins. Co. v. Martin (Miss.), 16 So. 417; Marsh v. Concord Mut. Fire Ins. Co., 71 N. H. 253, 51 Atl. 898; Arlington Co. v. Colonial Assur. Co., 180 N. Y. 337, 73 N. E. 34; Guthrie Laundry Co. v. Northern Assur. Co., 17 Okla. 571, 87 Pac. 649, 10 Am. & Eng. Ann. Cas. 936; Carpenter v. Allemania Fire Ins. Co., 156 Pa. St. 37, 26 Atl. 781. But see Peoria Sugar Ref. Co. v. Peoples' Fire Ins. Co., 52 Conn. 581; Arlington Mfg. Co. v. Norwich Un. Fire Ins. Co., 107 Fed. 662, 48 C. C. A. 542; Franklin Fire Ins. Co. v. Hellerick, 20 Ky. L. 1703, 49 S. W. 1066.

[43] Phœnix Ins. Co. v. Favorite, 49 Ill. 259. In Czerweny v. National F. Ins. Co., 139 N. Y. S. 345, a fire insurance policy on goods held "in trust" was held to cover matches stored with the insured as a bailee for hire.

[44] Snow v. Carr, 61 Ala. 363, 32 Am. Rep. 3.

[45] Millaudon v. Atlantic Ins. Co., 8 La. 561. See also, Graham v. Insurance Co., 2 Disn. (Ohio) 255.

[46] Stillwell v. Staples, 19 N. Y. 401.

chandise generally, and without exception, their own, or held in trust, or on assignment, contained in the back building and shed adjoining," covers household furniture and wearing apparel and books received and held on deposit subject to the order of the owner.[47]

§ 4207. **May cover shifting stock.**—A policy upon a stock of goods may cover additions made from time to time after the insurance was affected as well as those on hand when the policy was issued.[48] So, insurance upon merchandise in a store covers the stock as diminished and increased from time to time in the ordinary course of business.[49] As said in one case,[50] "Any other construction of a policy of insurance upon a stock in trade continually changing, would render it worthless as an indemnity. It is a primary principle in the construction of the contract of insurance to give it the effect as an indemnity which the parties to it designed." Thus, it was held that a policy on a stock of goods in a saloon which was being operated at the time the policy was issued covers newly purchased goods of the same character, not exceeding in value the amount insured.[51] And the rule supported by the weight of authority is that, in the absence of a provision limiting the insurer's liability to loss when the property is at a certain location, there may be a recovery for loss of it at another place than that stated in describing it when it is of such a nature that its ordinary use makes it necessary to take it from place to place and not leave it permanently at all times in such location.[52]

[47] Siter v. Morrs, 13 Pa. St. 218. Where loss was made payable to a trustee as his interest might appear the company was held estopped from denying liability, on the ground that it did not know the nature and character of the trust. Peerless Mineral &c. Co. v. German-American Ins. Co. (Wis.), 138 N. W. 1023.

[48] American Cent. Ins. Co. v. Rothchild, 82 Ill. 166.

[49] American Cent. Ins. Co. v. Rothchild, 82 Ill. 166; Peoria Marine & Fire Ins. Co. v. Anapow, 51 Ill. 283; American Cent. Ins. Co. v. Rothchild, 82 Ill. 166; Planters' Mut. Ins. Co. v. Engle, 52 Md. 468; Kunzze v. American &c. Ins. Co., 41 N. Y. 412; Sharpless v. Hartford Fire Ins. Co., 140 Pa. St. 437, 21 Atl. 451.

[50] Hooper v. Hudson River Fire Ins. Co., 17 N. Y. 424.

[51] Manchester Fire Assur. Co. v. Feibleman, 118 Ala. 308, 23 So. 759.

[52] Note to Benton v. Farmers' Mut. Fire Ins. Co., in 26 L. R. A. 237, and note to Lathers v. Mutual Fire Ins. Co. (135 Wis. 431) in 22 L. R. A. (N. S.) 848. Post, §§ 4214, 4215.

§ 4208. Ambiguous descriptions—Reformation.—Where a misdescription of the property insured in a policy occurs through the mutual mistake of the parties, the policy may be reformed in equity,[53] and in some jurisdictions a recovery may be had upon a proper showing without first going into a court of equity to obtain a reformation,[54] but where a party accepts a policy without objection and makes no attempt to have the description corrected, he cannot recover if the description cannot be applied to the property destroyed.[55] Parol evidence is admissible to establish the identity and extent of the property covered by the policy of insurance and to explain any latent ambiguity in the description,[56] but a party cannot by such evidence establish a new and different contract.[57] Thus, it has even been held that a contract relating to one subject cannot be turned into a contract for a different subject by evidence that the agent of the company by mistake described the wrong property,[58] nor can a policy which in plain terms describes certain property be varied by parol evidence so as to show that only a particular interest was to be insured.[59] As a general proposition, there can be no re-

[53] Carey v. Home Ins. Co., 97 Iowa 619, 66 N. W. 920; Collins v. St. Paul &c. Ins. Co., 44 Minn. 440, 46 N. W. 906. See also, Phenix Ins. Co. v. Hilliard, 59 Fla. 590, 52 So. 799, 138 Am. St. 171, and note; Gleason v. Prudential F. Ins. Co. (Tenn.), 151 S. W. 1030.

[54] Phenix Ins. Co. v. Allen, 109 Ind. 273, 10 N. E. 85; State Ins. Co. v. Schreck, 27 Nebr. 527, 43 N. W. 340, 6 L. R. A. 524, 20 Am. St. 696; Ætna Ins. Co. v. Brannon, 99 Tex. 391, 89 S. W. 1057, 2 L. R. A. (N. S.) 548. See also, Lumbermen's Mut. Ins. Co. v. Bell, 166 Ill. 400, 45 N. E. 130, 57 Am. St. 140; Northern Assur. Co. v. Carpenter (Ind. App.), 94 N. E. 779.

[55] Goddard v. Monitor Ins. Co., 108 Mass. 56, 11 Am. Rep. 307.

[56] Storer v. Elliot Fire Ins. Co., 45 Maine 175; Bowman v. Agricultural Ins. Co., 59 N. Y. 521; Snow v. Carr, 61 Ala. 363, 32 Am. Rep. 3; Wheeler v. Traders' Ins. Co., 62 N. H. 326, 13 Am. St. 582. See also, Eggleston v. Council Bluffs Ins. Co., 65 Iowa 308, 21 N. W. 652; Baker v. State Ins. Co., 31 Ore. 41, 48 Pac. 699, 65 Am. St. 807.

[57] Holmes v. Charlestown &c. Ins. Co., 10 Metc. (Mass.) 211, 43 Am. Dec. 428.

[58] Sanders v. Cooper, 115 N. Y. 279, 22 N. E. 212, 5 L. R. A. 638, 12 Am. St. 801. But see, Glover v. Nat. Fire Ins. Co., 85 Fed. 125, 30 C. C. A. 95. And reformation has often been had for mistake in stating the party or interest insured. Phenix Ins. Co. v. Hilliard, 59 Fla. 590, 52 So. 799, 138 Am. St. 171; Keith v. Globe Ins. Co., 52 Ill. 518, 4 Am. Rep. 634; Esch Bros. v. Home Ins. Co., 78 Iowa 334, 43 N. W. 229, 16 Am. St. 443; McIntosh v. North State Fire Ins. Co., 152 N. Car. 50, 67 S. E. 45, 136 Am. St. 818.

[59] Lancaster Mills v. Merchants' Cotton-Press & Storage Co., 89 Tenn. 1, 14 S. W. 317, 24 Am. St. 586. See also, Collins v. St. Paul &c. Ins. Co., 44 Minn. 440, 46 N. W. 906; Floars v. Aetna Life Ins. Co., 144 N. Car. 232, 56 S. E. 915, 11 L. R. A. (N. S.) 357, and note.

covery for property not described in the policy, unless it is shown that there was a mutual mistake or that the company is estopped to deny that the property claimed to be covered was not in fact that which is described in the policy.[60] Where it was contended that the policy covered only the warehouse company's interest in the goods contained in the warehouse, the Supreme Court of the United States said:[61] "Blanket and floating policies are sometimes issued to factors or to warehousemen, intended only to cover margins uninsured by other policies, or to cover nothing more than the limited interest which the factor or warehouseman may have in the property which he has in charge. In those cases, as in all others, the subject of the insurance, its nature and its extent, are to be ascertained from the words of the contract which the parties have made. It is as true of policies of insurance as it is of other contracts, that, except when the language is ambiguous, the intention of the parties is to be gathered from the policies alone. There are cases in which resort may be had to parol evidence to ascertain the subject insured; but they are cases of latent ambiguity." Then, referring to the language of the policy in question the court said that it was not ambiguous, and continued as follows: "The parties to whom the policy was issued were warehouse-keepers, receiving from various persons cotton and other merchandise on deposit. They were empowered by their charter to receive bailments and to make charges against the bailors for handling, labor, and custody. They were also authorized to make advances upon the goods deposited with them, and their charges, expenses, advances, and commissions were made liens on the property. They had, therefore, an interest in the merchandise deposited with them, which they might have caused to be specifically insured. It was also at their option to obtain insurance upon the entire interest in the merchandise, whether held by them or by the depositors. Nothing in their charter forbids such insurance. It is undoubtedly the law that wharfingers, warehousemen, and commission-merchants, having goods in their possession, may insure

[60] Martin v. Farmers' Ins. Co. of Cedar Rapids, 84 Iowa 516, 51 N. W. 29. But see, Phenix Ins. Co. v. Gebhart, 32 Nebr. 144, 49 N. W. 333.

[61] Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527, 23 L. ed. 868.

them in their own names, and in case of loss may recover the full amount of insurance, for the satisfaction of their own claims first, and hold the residue for the owners. * * * Such insurance is not unusual, even when not ordered by the owners of goods, and when so made it inures to their benefit. And such insurance, we must hold, the warehouse company sought and obtained by the policy of the plaintiff in error. The words 'merchandise held in trust' aptly describe the property of the depositors. The warehouse company held the merchandise in trust for their customers, not, it is true, as technical trustees, but as trustees in the sense that the goods had been intrusted to them."

§ 4209. Presumption as to nature of business.—An insurance company may be presumed to know the nature of the goods ordinarily kept by those engaged in a certain business,[62] and to have this, as well as the usual methods of carrying on the business, in mind when it issues the policy.[63] So, an agent of the company has been presumed to be familiar with the construction of the building insured and the company charged with such knowledge.[64]

§ 4210. Descriptions—When warranties.—Whether descriptions of the character and use of the insured property constitute a warranty usually depends on the language of the contract. It has been held that unless the contrary intention clearly appears, the word "dwelling" in a policy will be construed as descriptive of the property, and not as a warranty that the building is then being occupied as a dwelling-house.[65] So, a description of the property as a brick building is not a warranty that it is entirely constructed of brick.[66] Describing a building as a storehouse

[62] Hall v. Insurance Co. of North America, 58 N. Y. 292.

[63] Wheeler v. Traders' Ins. Co., 62 N. H. 326, 13 Am. St. 582, citing authorities. See also, Boyd v. Mississippi Home Ins. Co., 75 Miss. 47, 21 So. 708; Eddy v. Farmers' Mut. Ins. Co., 20 App. Div. (N. Y.) 109, 46 N. Y. S. 695.

[64] Pettit v. State Ins. Co., 41 Minn. 299, 43 N. W. 378.

[65] Niagara Fire Ins. Co. v. Johnson, 4 Kans. App. 16, 45 Pac. 789. See also, Browning v. Home Ins. Co., 71 N. Y. 508, 27 Am. Rep. 86. Contra, Merwin v. Star Fire Ins. Co., 72 N. Y. 603, affg. 7 Hun (N. Y.) 659. And see, Boyd v. Insurance Co., 90 Tenn. 212, 16 S. W. 470, 25 Am. St. 676. Compare also, Wolrod v. Des Moines F. Ins. Co. (Iowa), 140 N. W. 218.

[66] Gerhauser v. North British &c. Ins. Co., 7 Nev. 174.

is not a warranty that it shall be used for no other purpose.[67] On the other hand, however, it has been held that a misdescription in a material respect is a breach of warranty without reference to the intention of the parties,[68] and that description of the use and occupation is a warranty.[69] But a statement that the building insured is used for the storage of ice is not a warranty that ice was stored there when the policy was issued.[70] Other illustrative cases have already been referred to the chapter on Representations and Warranties.[70a]

§ 4211. Description of merchandise—What included in the description.—A policy on a stock "manufactured and in process of manufacture" is held to cover unmanufactured stock.[71] A policy on "merchandise," such as is usually kept in country stores, covers hardware, china, glassware, etc., if such articles are commonly kept in such places.[72] A policy on a stock of clothing, manufactured or in the process of manufacture, which contains a provision excluding liability for "loss of property owned by any other party" does not include clothing belonging to another person taken to be manufactured under a contract by which it was to be at the manufacturer's risk.[73] A policy "on their stock of watches, watch trimmings, etc." covers the entire stock, including plate, silverware, tools of the trade and such other goods as form part of similar stocks in the same city.[74] It has been held that words "stock in trade," as applied to the business of a baker, have a more extended meaning than when applied to the business of a merchant, and cover tools and implements necessary for the carrying on of the business, including a horse and cart.[75] Where the policy covered "rags" and "old metals," it was held that evidence was admissible to show that by the usage of the trade the terms had acquired a broader sig-

[67] Franklin Fire Ins. Co. v. Brock, 57 Pa. St. 74.

[68] Tesson v. Atlantic Mut. Ins. Co., 40 Mo. 33, 93 Am. Dec. 293.

[69] Franklin Fire Ins. Co. v. Martin, 40 N. J. L. 568, 29 Am. Rep. 271; Texas Banking & Ins. Co. v. Stone, 49 Tex. 4.

[70] Dolliver v. St. Joseph &c. Ins. Co., 131 Mass. 39.

[70a] Ch. CXXI.

[71] Spratley v. Hartford Ins. Co., 1 Dillon (U. S.) 392, Fed. Cas. No. 13256.

[72] Franklin Fire Ins. Co. v. Updegraff, 43 Pa. St. 350.

[73] Getchell v. Aetna Ins. Co., 14 Allen (Mass.) 325.

[74] Crosby v. Franklin Ins. Co., 5 Gray (Mass.) 504.

[75] Moadinger v. Mechanics' Fire Ins. Co., 2 Hall (N. Y.) 490.

nification than applied to those words as commonly used.[76] A policy upon a "stock of hair, wrought, raw and in process, as retail hair store," does not cover fancy goods made of other materials, although usually kept and sold in a retail hair store.[77] Insurance on jewelry and clothing constituting a stock in trade does not include such articles as musical instruments, surgical instruments, guns and books.[78] A policy on "English, American and West India goods" does not include teas and nutmegs.[79] Insurance on "wholesale stock of drugs, paints, oils, dyestuffs and other goods * * * not more hazardous," while "contained in three-story brick and basement metal-roof building," covers the entire stock of goods contained in such building.[80] A policy which insures the party as "a manufacturer of brass clock-works" has also been held to cover all the articles ordinarily employed in such manufacture, although the keeping and use of certain articles is prohibited by the printed terms of the policy.[81] So, it has been held that a policy on "all the articles constituting the stock of a pork house, and all articles contained within the building described and appurtenant thereto," covers whatever belongs to the stock without reference to ownership of particular articles, notwithstanding the fact that there is a provision in the policy requiring goods on commission to be insured as such.[82] But a policy insuring a railroad company on its wood and logs cut and piled along its line does not cover property belonging to other parties which is destroyed by sparks from the company's locomotives and for which it is responsible in damages.[83] The word "guano" has been held to include fertilizer.[84] Whether flax is included in the term grain has been held for the jury to determine.[85] A policy on "freight cars owned or used by the company" protects the cars of another road while in the posses-

[76] Mooney v. Howard Ins. Co., 138 Mass. 375, 52 Am. Rep. 277.

[77] Medina v. Builders' Mut. Fire Ins. Co., 120 Mass. 225.

[78] Rafel v. Nashville Marine & Fire Ins. Co., 7 La. Ann. 244.

[79] Huckins v. People's Mut. Fire Ins. Co., 11 Fost. (N. H.) 238.

[80] Wilson Drug Co. v. Phœnix Assur. Co., 110 N. Car. 350, 14 S. E. 790.

[81] Bryant v. Poughkeepsie Mut. Fire Ins. Co., 17 N. Y. 200.

[82] Ætna Ins. Co. v. Jackson, Owsley & Co., 16 B. Mon. (Ky.) 242.

[83] Monadnock R. R. v. Manufacturers' Ins. Co., 113 Mass. 77.

[84] Planters' Mut. Ins. Co. v. Engle, 52 Md. 468.

[85] Hewitt v. Watertown Fire Ins. Co., 55 Iowa 323, 7 N. W. 596, 39 Am. Rep. 174.

sion of and used by the insured.[86] The word "machinery" includes all instruments intended to be operated exclusively by machinery in the business of the insured which are so used from time to time in the regular and ordinary prosecution of the business referred to in the policy, and covers movable dies worked by a press, which, when not in use, were deposited and kept on shelves.[87] Where the insured is permitted to occupy a portion of a warehouse for the purpose of rehandling tobacco, he may, on the destruction of the premises by fire, recover for the tobacco which was on hand and for sale.[88] A policy on a creamery building and merchandise, which consisted chiefly of butter and cheese, manufactured and in the process of manufacture, covers milk cans used in the business.[89] Millet hay is included in an insurance policy on "grain."[90] Carpets and bed clothing are covered by the term "household furniture."[91] Stationery and boxes of a glove manufacturer, however, are not included in the term "all other kinds of implements."[92] A policy on "live stock" covers a horse acquired after the date of the policy.[93] A policy on the machinery of a paper mill was held to cover all machinery, tools and implements used in connection therewith in the manufacture of paper.[94] A policy on "tools used in the manufacture of boots and shoes" includes patterns for making tools.[95] A policy on eggs "in pickle" covers the eggs at any time while in store undergoing the process of pickling.[96]

In one case the insured were manufacturers of machinery, parts of which were made of cast iron, and the policy covered "their fixed and movable machinery, engines, lathes and tools." They were obliged to keep themselves supplied with wooden patterns in order to make the iron castings neces-

[86] Commonwealth v. Hide &c. Ins. Co., 112 Mass. 136, 17 Am. Rep. 72.
[87] Seavey v. Central Mut. Fire. Ins. Co., 111 Mass. 540.
[88] Western Assurance Co. v. Ray, 105 Ky. 523, 20 Ky. L. 1360, 49 S. W. 326.
[89] Cronin v. Fire Assn., 112 Mich. 106, 70 N. W. 448.
[90] Norris v. Farmers' Mut. Fire Ins. Co., 65 Mo. App. 632.
[91] Patrons' Mut. Aid. Soc. v. Hall, 19 Ind. App. 118, 49 N. E. 279.
[92] Stemmer v. Scottish Union &c. Ins. Co., 33 Ore. 65, 49 Pac. 588, 53 Pac. 498.
[93] Mills v. Farmers' Ins. Co., 37 Iowa 400.
[94] Buchanan v. Exchange Fire Ins. Co., 61 N. Y. 26.
[95] Adams v. New York Bowery Fire Ins. Co., 85 Iowa 6, 51 N. W. 1149.
[96] Hall v. Concordia Fire Ins. Co., 90 Mich. 403, 51 N. W. 524.

sary to the completion of their machinery, and their practice was to send these patterns to various foundries from which they procured castings. It was held that it could not be shown by parol evidence that the parties intended to include patterns under the general term of tools.[97] In another case a policy covered merchandise in a store and furniture and fixtures in a building to be used by the assured "as a fancy-goods and Yankee-notion store." It contained provisions against certain hazardous and extra hazardous articles, but plaintiff was permitted to show that fireworks and firecrackers constituted an ordinary, usual, and recognized portion of a stock of fancy goods and Yankee notions, and were therefore covered by the policy.[98] A policy on a "stock in trade, being mostly chamber furniture in sets and other articles usually kept by furniture dealers," based on an application which is made a part of the contract, which described it as "household furniture, * * * being my stock in trade, mostly chamber furniture in sets," has been held to cover paints and varnishes used in finishing furniture, although applicant, in answer to the question as to whether any highly inflammable matter was kept in or on the premises, answered, "Not to my knowledge."[99] So, a policy on a stock of "paints, oils, brushes, blinds, and such other merchandise, while contained in the second story of the frame building," etc., was held to cover such articles as set tackle and fall, ropes, knives, cans, scales, etc., which were kept for use and not for sale.[1] A policy on all the furniture contained in a brick

[97] Lovewell v. Westchester Fire. Ins. Co., 124 Mass. 418, 26 Am. Rep. 671, where the court said: "The usual meaning of the word 'tool' is 'an instrument of manual operation,' that is, an instrument to be used and managed by hand instead of being moved and controlled by machinery. We see no grounds for holding that these patterns are machines or parts of machines. As we understand the case presented, they, or some of them at least, were not raised or lowered by machinery, but were of such a size or shape that they were applied and removed by hand. * * * We think therefore that, without doing any violence to the language of the policy, it may be interpreted as covering all patterns which from their size and shape admitted of being applied and managed by the hand of one man."

[98] Barnum v. Merchants' Fire Ins. Co., 97 N. Y. 188.

[99] Haley v. Dorchester &c. Ins. Co., 12 Gray (Mass.) 545.

[1] We think the term "merchandise" not only may be, but often is, used as a synonym of goods, wares and commodities. "If used in an insurance policy to describe the goods of a merchant, it might, perhaps, be very properly limited to goods intended for sale. If used for the same purpose to describe the goods of a painter, we think it might be held to cover property intended for use and not for sale." Hartwell v. California Ins. Co., 84 Maine 524, 24 Atl. 954.

building and additions attached has been held to cover furniture in a frame building on the next lot extending over against the rear of the brick building, and used in connection therewith as a storehouse;[2] but a policy on lumber "in yard" does not protect lumber in a clearing in a forest.[3]

§ 4212. **Description of buildings.**—"The three-story granite building" is a proper description of a building with a granite front three stories in front and rear, although but one story in the middle.[4] But it has been held that "his frame building detached occupied by the assured as a tannery" does not include an engine and machinery;[5] that a building twenty-five feet from a detached dwelling is not contiguous to it;[6] and that a policy describing the property as "buildings adjoining and communicating, occupied, * * * situated detached," does not mean that they are detached from each other, but that the whole house is detached from other buildings.[7] A policy on an "elevator building and additions" covers a warehouse standing two and one-half feet from the elevator building attached thereto by boards nailed to both buildings.[8]

Whether counters and shelving are included in insurance upon a building may depend upon whether they are movables or fixtures.[9] A policy on a building while in the process of construction has been held to cover the building after it is completed.[10] Where the property is described as "the Wolfe house," it may be shown by parol evidence that the parties intended to include a certain barn.[11] A "starch manufactory" includes machinery and fixtures necessary for the manufacture of starch.[12] A policy on a steam saw mill covers not only the

[2] Maisel v. Fire Assn., 59 App. Div. (N. Y.) 461, 69 N. Y. S. 181. See also, Gross v. Western Assur. Co., 92 Wis. 656, 66 N. W. 712.

[3] Cook v. Loew, 69 N. Y. S. 614, 34 Misc. (N. Y.) 276.

[4] Medina v. Builders' Mut. Fire Ins. Co., 120 Mass. 225.

[5] Sunderlin v. Aetna Ins. Co., 18 Hun (N. Y.) 522.

[6] Olson v. St. Paul F. & M. Ins. Co., 35 Minn. 432, 29 N. W. 125, 59 Am. Rep. 333.

[7] Broadwater v. Lion Fire Ins. Co., 34 Minn. 465, 26 N. W. 455.

[8] Cargill v. Millers' &c. Ins. Co., 33 Minn. 90, 22 N. W. 6.

[9] Capital City Ins. Co. v. Caldwell, 95 Ala. 77, 10 So. 355.

[10] Frost's Detroit L. &c. Works v. Millers' &c. Ins. Co., 37 Minn. 300, 34 N. W. 35, 5 Am. St. 846.

[11] Claffey v. Hartford Fire Ins. Co., 68 Cal. 169, 8 Pac. 711.

[12] Peoria Marine & Fire Ins. Co. v. Lewis, 18 Ill. 553.

building, but the machinery necessary to make it a steam saw mill in all its parts.[13] A policy on "an unfinished house" does not cover material which has been prepared for the house and deposited in an adjoining building,[14] but the word "house" in a policy includes whatever is appurtenant and necessary to the house as a building.[15] A policy on a barn, which, although an agricultural building, should not strictly have been described as a barn, but which, had there been a correct description, would have been insured at the same rate, is valid.[16] Machinery placed in a mill building and designed for a portion of the mill has been held real property within the meaning of a valued policy law.[17] A policy on a frame steam saw mill, with a specific amount on the "boiler, engine, machinery and belting contained therein," covers a planing mill in a shed on the same floor with the machinery proper and connected with it by belting.[18] Fixtures built into and forming a part of a building are covered by the policy, although such fixtures are included among others in a separate item covered by other insurance, where the indemnity on the latter item is not sufficient to cover the loss on the fixtures.[19] A policy describing a building as used for the manufacture of lead pipe covers wooden reels on which the pipe is coiled.[20] The words "pottery building," as descriptive of the property, do not cover a two-story brick boiler house, built at the end of but not connected by a door with a three-story brick building in which pottery is manufactured, where the lower part of the boiler house is used exclusively in connection with another and distinct business in a different building, although the second story is used for storing pottery.[21] The word "store" is equivalent to the word "shop," and properly describes a bakery and restaurant.[22] A structure

[13] Bigler v. New York Cent. Ins. Co., 22 N. Y. 402. And see as to another building being included as an "addition," Ferguson v. Lumbermans' Ins. Co., 45 Wash. 209, 88 Pac. 128.

[14] Ellmaker's Exrs. v. Franklin Fire Ins. Co., 5 Pa. St. 183.

[15] Workman v. Insurance Co., 2 La. 507, 22 Am. Dec. 141.

[16] Dobson v. Sotterby, M. & M. 90.

[17] British America Assur. Co. v. Bradford, 60 Kans. 82, 55 Pac. 335 (under ch. 102, Laws 1893).

[18] James River Ins. Co. v. Merritt & Robertson, 47 Ala. 387. See also, Ferguson v. Lumbermans' Ins. Co., 45 Wash. 209, 88 Pac. 128.

[19] Niagara Fire Ins. Co. v. D. Heenan & Co., 181 Ill. 575, 54 N. E. 1052.

[20] Collins v. Charlestown &c. Ins. Co., 10 Gray (Mass.) 155.

[21] Forbes v. American Ins. Co., 164 Mass. 402, 41 N. E. 656.

[22] Richards v. Washington F. & M. Ins. Co., 60 Mich. 420, 27 N. W. 586.

which has been injured by fire may, while in its injured condition, be insured as a "building."[23] Permission to use a building for "any mercantile purpose" does not permit its use as a restaurant.[24] The word "school-house" means a house or building in which school is kept, and is not restricted to a district school-house.[25] A cellar wall is a part of a building,[26] and in describing the building it is not necessary to refer to the cellar underneath the same.[27] The words "a two-story brick building" are sufficient to describe a building which is two stories in front and one in the rear.[28]

A policy on a planing mill building and addition, and machinery, including shafting, gearing, belting, saws, tools, force pump and hose therein, has been held to cover an engine room from which motive power was furnished, which was situated twenty-two feet from the mill building and connected therewith by shafting for the transmission of power, and by a spout through which shavings were forced into the engine room.[29] And a policy which covered "one two-story frame dwelling and additions thereto, occupied by the assured as a dwelling house," was held to cover a carriage house and stable under the same roof and in the rear of the portion occupied for dwelling purposes, but attached thereto.[30] So, there are many other cases in which structures have been held to be additions when connected with the main building by use although not directly attached or closely connected physically.[31]

[23] Hamburg &c. Ins. Co. v. Garlington, 66 Tex. 103, 18 S. W. 337, 59 Am. Rep. 613.

[24] Garretson v. Merchants' &c. Ins. Co., 81 Iowa 727, 45 N. W. 1047.

[25] Luthe v. Farmers' Mut. Fire Ins. Co. of Ripon, 55 Wis. 543, 13 N. W. 490.

[26] Ervin v. New York &c. Ins. Co., 3 Thomp. & C. (N. Y.) 213.

[27] Benedict v. Ocean Ins. Co., 31 N. Y. 389. See Ohage v. Union Ins. Co., 82 Minn. 426, 85 N. W. 212.

[28] Carr v. Hibernia Ins. Co., 2 Mo. App. 466.

[29] Home Mut. Ins. Co. v. Roe, 71 Wis. 33, 36 N. W. 594. The court said: "It conclusively appears, that the engine in the engine-room, was the only motive power for propelling any of the machinery in either of the buildings. The engine was used for no other purpose. It was, therefore, an essential part of the mill. Without it there would have been no complete mill. * * * Stress is laid upon the fact that the engine, which was the principal machine, was not specifically mentioned in the policy. But we are inclined to think it was covered by the word 'machinery', and that other things were specifically enumerated for fear that they might not otherwise be included." See also, Marsh v. New Hampshire Fire Ins. Co., 70 N. H. 590, 49 Atl. 88.

[30] Hannan v. Williamsburgh &c. Ins. Co., 81 Mich. 556, 45 N. W. 1120, 9 L. R. A. 127. See also, Phenix Ins. Co. v. Martin (Miss.), 16 So. 417. But compare, North British &c. Ins. Co. v. Tye, 1 Ga. App. 380, 58 S. E. 110.

[31] Shepard v. Germania Fire Ins. Co., 165 Mich. 172, 130 N. W. 626, 33 L. R. A. (N. S.) 156, and note; Tate

§ 4213. Location of property—In general.—Under the usual provision, though not found in the Massachusetts form, the property is insured while located as described "and not elsewhere."[32] In a recent case it appeared that the policy was issued to a judge who was in the habit, while holding court in neighboring counties, of taking the insured property along with him for use in such other places. The court recognized the fact that a number of cases construed somewhat similar language as being merely descriptive of the place at which the property was located at the time the insurance was obtained, and that others hold that such language must be construed with reference to the use of the property, and if this ordinarily causes it to be absent from such place, the company is liable. It was said: "However in this policy the insurance company so definitely and unequivocally expresses a contract by which it is not bound for the loss of the property when absent from the named place, that there is no room for construction. The protection afforded by the policy is expressly limited to the time that the subject of the insurance shall be contained in the house described and whenever it is taken therefrom it was removed beyond the protection of the contract."[33] But much may depend upon the nature and customary use of the property, and the weight of authority is to the effect that, unless the policy clearly covers the property only when at the particular location, the nature and ordinary use of the property may be such that it will be covered even though temporarily removed from the place described and in use at another place.[34]

v. Jasper County Farmers' Mut. Ins. Co., 133 Mo. App. 584, 113 S. W. 659. See ante, § 4205.

[32] "The general doctrine is fully established that insurance of property in a certain place will not follow the property on its removal to a place different from that in which it was insured. Some courts have in some particulars qualified this general proposition, * * * but the general doctrine is recognized in all of them." See extensive note to Benton v. Farmers' Mut. Ins. Co., 102 Mich. 281, 60 N. W. 691, in 26 L. R. A. 237, on "Location of Movable Property as Affecting Fire Insurance Thereon."

[33] Mawhinney v. Southern Ins. Co., 98 Cal. 184, 32 Pac. 945, 20 L. R. A. 87; Green v. Liverpool &c. Ins. Co., 91 Iowa 615, 60 N. W. 189; L'Anse v. Fire Assn. of Philadelphia, 119 Mich. 427, 78 N. W. 465, 43 L. R. A. 838, 75 Am. St. 410; Haws v. St. Paul &c. Ins. Co., 130 Pa. 113, 15 Atl. 915, 18 Atl. 621; British America Assur. Co. v. Miller, 91 Tex. 414, 44 S. W. 60, 39 L. R. A. 545, 66 Am. St. 901.

[34] Note to Lathers v. Mut. Fire Ins. Co., in 22 L. R. A. (N. S.) 848; see ante, § 4207. This is further considered in the next following section.

§ 4214. Location material—When change does not prevent recovery.—There is much apparent, and some real, conflict among the authorities upon the question suggested in the last preceding section. "As a rule," says Mr. Joyce,[35] "locality and place are essential, but in determining how far locality is important in describing the property insured reference must be had to the character of the property, to a consideration of what is the primary object in effecting the insurance, and also to the fact to what uses the property insured would in all reasonable probability be put. So usage may be a controlling factor in the matter, as may also be the fact, in the case of certain kinds of property, whether the removal thereof is permanent or temporary. Where the policy is upon a class of property the risk upon which, from its particular character, depends so much upon place or location that the same constitutes an essential element of the contract; as in the case of a stock of goods or furniture 'contained in' a specified building, then such property will, as a rule, not be covered, if changed or removed to another place or locality. The insurer for various reasons in cases of this character might refuse to accept the risk altogether, or might accept it at an enhanced premium if he had known that its location was other than that designated, and the right of the insurer to know exactly what risk he is undertaking cannot be denied. But if the primary object is to insure the property described, and the character of the property is such as to warrant that presumption, then its exact location may be a subordinate matter of more or less importance." Many courts construe the statement that the insured property is "contained in" a certain place, or the like, as descriptive merely of its location at the time the insurance was obtained, or with reference to the use of the property, and if this ordinarily causes it to be absent from such place, and while so absent it is destroyed, the property is nevertheless protected by the policy.[36] The insured thus has the right to the use of the property in

[35] 2 Joyce Ins., § 1742; Bradbury v. Fire Ins. Assn., 80 Maine 396, 15 Atl. 34, 6 Am. St. 219; Lyons v. Providence Washington Ins. Co., 14 R. I. 109, 51 Am. Rep. 364.

[36] McCluer v. Girard Fire & Marine Ins. Co., 43 Iowa 349, 22 Am. Rep. 249; Mills v. Farmers' Ins. Co., 37 Iowa 400; American Cent. Ins. Co. v. Haws, 7 Sad. (Pa.) 558, 11 Atl. 107, 20 Wkly. Notes Cas. 370; Noyes v. Northwestern Nat. Ins. Co., 64 Wis. 415, 25 N. W. 419, 54 Am. Rep. 415.

the usual manner without losing his protection, and he may remove it temporarily if it be necessary in making such use of it.[37] This general doctrine, we think, is supported by the weight of authority, in the absence of some provision to the contrary.[38] Thus, where the policy was upon a house, grain, hay and horses situated on a certain section, it was held to cover the horses while in ordinary use on the farm or temporarily away from home.[39] So, a policy covering a farm barn and livestock therein, "on the farm and from lightning at large," was held in a recent case to cover a horse while, according to custom, temporarily off the farm and on another farm for the purpose of being broken.[40] And a sealskin coat "contained in the two-story frame dwelling-house," etc., was held covered by the policy while in a fur store, where it had been sent for repairs.[41] So, it was held that where the company insured farm horses, it assumed any risk arising from the ordinary use of the animals for farm purposes, although the risk was greater than that assumed while the animals were in the barn.[42] And insurance upon carriages "contained in" a described building "occupied as a livery and sales stable" covers a carriage while undergoing repairs at a repair shop.[43]

But the decisions are not uniform upon this question, as some courts construe the provision more strictly, although in most instances it will be found that there is a difference in the language or the nature and use of the property. Thus, where the policy insured plaintiff's "frame stable building, occupied by assured as a hack, livery and boarding stable, situated on the north side of Court street, Auburn, Me.," it was held not to cover the loss of a hack while in a repair shop on another street, to which it had been

[37] Farmers' Mut. F. Ins. Assn. v. Kryder, 5 Ind. App. 430, 31 N. E. 851, 51 Am. St. 284. See also, Bradbury v. Westchester Fire Ins. Co., 80 Maine 396, 15 Atl. 34, 6 Am. St. 219.

[38] Note in 22 L. R. A. (N. S.) 848; Boyd v. Mississippi Home Ins. Co., 75 Miss. 47, 21 So. 708; McKeesport Mach. Co. v. Ben Franklin Ins. Co., 173 Pa. St. 53, 34 Atl. 16 (going even further), and authorities cited in next following notes.

[39] Peterson v. Mississippi Valley Ins. Co., 24 Iowa 494, 95 Am. Dec. 748. To the same effect, see Mills v. Farmers' Ins. Co., 37 Iowa 400, where the horses were killed by lightning when six miles from home.

[40] Lathers v. Mutual Fire Ins. Co., 135 Wis. 431, 116 N. W. 1, 22 L. R. A. (N. S.) 848n.

[41] Noyes v. Northwestern Nat. Ins. Co., 64 Wis. 415, 25 N. W. 419, 54 Am. Rep. 415.

[42] Holbrook v. St. Paul &c. Ins. Co., 25 Minn. 229.

[43] Niagara Fire Ins. Co. v. Elliott, 85 Va. 962, 9 S. E. 694, 17 Am. St. 115.

removed before the fire without the knowledge and consent of the company.[44] So, it has been held that a policy on a fire engine, hose, hose-cart, while located and contained in the engine-house, "and not elsewhere," does not cover a loss on the property which was being used at the time to extinguish a fire several hundred feet from the fire-engine house.[45] And, where the application requests insurance upon property "while on the premises only," and the policy covers farming utensils, and live stock on the described premises, and hay in stacks, it does not cover property taken temporarily, for the purpose of plowing, to a place twenty miles distant.[46] It has been held that a harvesting machine in-

[44] Bradbury v. Fire Ins. Assn., 80 Maine 396, 15 Atl. 34, 6 Am. St. 219. The court said: "The general rule is that the place where the personalty insured is kept is of the essence of the contract, as by that the character of the risk is largely determined, and the property is covered by the policy only while in the place described. Wood Ins. (2d ed.), p. 115; Blodgett Fire Ins., p. 22; Eddy Street Iron Foundry v. Hampden Mut. Fire Ins. Co., 1 Cliff. (U. S.) 300; Maryland Fire Ins. Co. v. Gusdorf, 43 Md. 506; Fitchburg R. Co. v. Charlestown &c. Ins. Co., 7 Gray (Mass.) 64. The following cases are cited as an exception to the general rule, and as sustaining the plaintiff's contention. Everett v. Continental Ins. Co., 21 Minn. 76; Holbrook v. St. Paul &c. Ins. Co., 45 Minn. 229; McCluer v. Girard Fire & Marine Ins. Co., 43 Iowa 349, 22 Am. Rep. 249; Longueville v. Western Assur. Co., 51 Iowa 553, 2 N. W. 394, 33 Am. Rep. 146; Lyons v. Providence Washington Ins. Co., 13 R. I. 347, 43 Am. Rep. 32. We think a careful examination of all these cases will show that the chattels insured were so described in the policy that they can be identified without reference to the building or place where they were kept, and the courts held that the words 'contained in' a certain building, or kept in a certain building or place, was a part only of the description of the chattel; and if from its nature, or character, or ordinary use, the parties must have understood that it was to be out of the building or place a part of the time in ordinary use, the policy should be held to cover it while so out. This is going to the verge in construing the language used by the parties in a contract, when, ordinarily, it does not bear such meaning. But this case does not appear to us to be within the authority of those cases. * * * The policies are similar to an insurance of a shop-keeper on his stock of goods in his shop, or of a railroad company on its rolling stock on its road,—constantly changing. In such cases the property insured can be ascertained only from the place of business named. Lyons v. Providence Washington Ins. Co., 13 R. I. 347, 43 Am. Rep. 32. * * * The policies insure such of the plaintiff's carriages, hacks, etc., as are contained in his stable at the time of loss."

[45] L'Anse v. Fire Assn. of Philadelphia, 119 Mich. 427, 78 N. W. 465, 43 L. R. A. 838, 75 Am. St. 410; British America Assur. Co. v. Miller, 91 Tex. 414, 44 S. W. 60, 39 L. R. A. 545, 66 Am. St. 901.

[46] Lakings v. Phenix Ins. Co., 94 Iowa 476, 62 N. W. 783, 28 L. R. A. 70. This case recognizes the rule that the property insured may sometimes be taken from the place described in the policy where it is of such a character that the use must have been within the contemplation of the parties, but holds that the language of the policy takes it out of the operation of the rule. See also, Green v. Liverpool &c. Ins. Co., 91 Iowa 615, 60 N. W. 189. And

sured while "operating in the grain fields and in transit from place to place in connection with harvesting," is not protected while in a blacksmith's shop for the purpose of being repaired.[47] Even in such cases, however, it is held that where the property is removed the policy is merely suspended, and if there is no loss and the property is returned it re-attaches.[48] So, it has been held that the right of the company to deny liability where the property insured is specifically located in a given building, on the ground that it has been removed and was destroyed at a different place, may be waived by acts and declarations of the company after the loss showing an intention to relinquish such right after knowledge of removal.[49]

§ 4215. Location—Materiality—Removal—Illustrations.—Where a policy insured household goods contained in a dwelling house, and they were burned while stored in a barn on the same premises, it was held that the knowledge of the company that the goods were so stored did not amount to a waiver of the provision in the policy.[50] So, it has been held that a policy upon the contents of a building, described in no other way, will not cover articles then contained in the building after they are removed and stored elsewhere.[51] But a policy covering "oil while contained in tank" in a certain location was held binding, al-

compare Phœnix Ins. Co. v. Stewart, 53 Ill. App. 273; Eaton v. Phœnix Ins. Co., 15 Ky. L. 441.

[47] Mawhinney v. Southern Ins. Co., 98 Cal. 184, 32 Pac. 945, 20 L. R. A. 87; Benicia Agricultural Works v. Germania Ins. Co., 97 Cal. 468, 32 Pac. 512.

[48] British America Assur. Co. v. Miller, 91 Tex. 414, 44 S. W. 60, 39 L. R. A. 545, 66 Am. St. 901. See also, Sumter Warehouse &c. Co. v. Phœnix Assur. Co., 76 S. Car. 76, 56 S. E. 654, 10 L. R. A. (N. S.) 736n, 121 Am. St. 941.

[49] Montgomery v. Delaware Ins. Co., 55 S. Car. 1, 32 S. E. 723.

[50] In English v. Franklin Fire Ins. Co., 55 Mich. 273, 54 Am. Rep. 377, Mr. Justice Cooley said: "The defendant merely undertook a certain responsibility while the goods were in the house; and it was at the plaintiff's option to have them there or elsewhere as he pleased. If they were lost by fire when elsewhere, the loss was not one against which the defendant had undertaken to insure him. Nor was defendant called upon to cancel the policy by reason of the goods being removed from the building where they were insured. If the dwelling-house had been repaired and the goods restored to it, the policy would again have covered them; and this, for anything that appears to the contrary, may have been what both parties desired. At any rate it does not appear that the plaintiff desired the policy canceled; and if he had desired it, the cancelment would have been optional with defendant."

[51] Benton v. Farmers' &c. Ins. Co., 102 Mich. 281, 60 N. W. 691, 26 L. R. A. 237.

though the tank had been swept away from such location by a flood.[52] A policy upon horses and colts "while in barn, and by lightning only while in use, or running in pasture, or yard on his farm, in the town" covers loss by lightning at any place on the farm in the town.[53] And where a horse was insured while "in barn or in fields," it was held to be covered while in a barn built on the farm after the policy was issued.[54] A vessel insured while lying at a certain dock is not covered by the policy while moored outside in the river some 700 yards distant for the purpose of being refitted.[55] Where the policy described the goods as being "in the store part" of the building, it was held not to cover loss of goods which had been removed to the second or third stories, which were not used for ordinary store purposes.[56] A policy on "furniture * * * in a house" however, has been held to cover property stored in a garret which is not in common use.[57] Where the policy described the property as contained in the "framed dwelling-house and bake-house, front and rear, situated at No. 17 Thomas St.," it was held not to cover flour in a shed leading from the bake-house to the front house.[58] Wearing apparel described as contained in a certain building was held not covered by the policy after it was removed to a place where the owner was residing as the removal was not considered such a temporary one as the parties might reasonably be supposed to have contemplated.[59] But wearing apparel is insured while worn by the party in the streets of a city.[60] Where the insured desired to remove goods covered by the policy to another building and secured an indorsement on the policy to the effect that it was "transferred to cover similar property" in the new building, and the goods were destroyed before they were removed, the company was held liable for the loss.[61]

[52] Western & A. Pipe Lines v. Home Ins. Co., 145 Pa. St. 346, 22 Atl. 665, 27 Am. St. 703.

[53] Boright v. Springfield F. & M. Ins. Co., 34 Minn. 352, 25 N. W. 796.

[54] Trade Ins. Co. v. Barracliff, 45 N. J. L. 543, 46 Am. Rep. 792.

[55] Pearson v. Commercial Union Assur. Co., L. R. 1 App. Cas. 498.

[56] Boynton v. Clinton & E. Mut. Ins. Co., 16 Barb. (N. Y.) 254.

[57] Clarke v. Firemen's Ins. Co., 18 La. 431.

[58] Moadinger v. Mechanics' Fire Ins. Co., 2 Hall (N. Y.) 490.

[59] Towne v. Fire Assn. of Philadelphia, 27 Ill. App. 433.

[60] Longueville v. Western Assur. Co., 51 Iowa 553, 2 N. W. 394, 33 Am. Rep. 146.

[61] Kunzze v. American &c. Ins. Co., 41 N. Y. 412.

A policy covered goods in two places, one a salesroom and the other a storeroom, and the insured, wishing to remove the goods from the storage room to the salesroom, gave notice of the fact to the company, and obtained an indorsement on the policy acknowledging notice of the fact that the goods were "about being removed," and agreeing for a consideration that "this policy should cover pro rata in both places during removal, and thereafter in the last named locality only." It was held that, "When this consent was obtained and indorsed on the policy, it did not make it necessary for the plaintiffs to remove. They might avail themselves of the privilege they had purchased, or they might refrain from doing so. If they did not move, they lost the money they paid to secure the privilege, but they lost nothing more. Their policy was unaffected by the indorsement unless they acted under it. If they acted under it, and entered upon the work of removal, they were not bound to suspend their business while that work was in progress, and devote all their energies to the transfer of the goods. They had the right to continue to buy and ship, pending the removal, as well as before and after, just as they were in the habit of doing; and the policy covered, concurrently with others, the stock actually used in the ordinary way, without regard to the specific articles of which it was composed. While the removal was in progress, the protection of the policy was on each part of the stock, according to its pro rata value. When the whole stock was transferred, the whole effect of the policy was transferred to the actual site of the stock. We think, therefore, that the indorsement did not limit the policy to the articles that were in the Jayne street building" from which they were to be removed at the time of the indorsement.[62] Where a policy insured a threshing outfit against loss by fire "while not in use," and the outfit had been in use, but was hauled to another place and left standing near a farm house preparatory for use, and a few days later was there destroyed by fire, it was held that the machines were not in use within the meaning of the policy.[63] So, insurance on a harvester while in use in "Tulare county" has

[62] Sharpless v. Hartford Fire Ins. Co., 140 Pa. St. 437, 21 Atl. 451.

[63] Minneapolis Threshing Mach. Co. v. Firemen's Ins. Co., 57 Minn. 35, 58 N. W. 819, 23 L. R. A. 576, 47 Am. St. 572.

been held not to cover a loss which occurred while it was stored in a shed, not being actually used for harvesting purposes.[64]

§ 4216. **Risks insured against.**—The standard policy adopted in many states insures "against all direct loss or damage by fire except as hereinafter provided." The restrictive word "direct" does not, however, appear in the Massachusetts form. "Direct loss or damage by fire" means loss or damage accruing directly from fire as the destroying agency, in contradistinction to the remoteness of fire as such agency. The word "direct" means merely the immediate or proximate as distinguished from the remote cause.[65] Loss by fire means the result of ignition of the property or of some substance near it. But is it not necessary that any part of the insured property shall be actually ignited or consumed by fire.[66] Thus, in one case a house protected by a policy of insurance against damage by fire was injured by the falling of a part of the wall of an adjoining house, and it was held that fire was the proximate cause of the loss, and that the insurers were liable, although the house insured had never been on fire.[67] The word "fire," it is said, does not include heat of a degree too low to cause ignition, but actual ignition is not necessary, as the policy protects against all the direct consequences of actual ignition.[68] Where the property was injured by great heat occasioned by the closing of a register, and there was no ignition, it was held that the

[64] Slinkard v. Manchester Fire Assur. Co., 122 Cal. 595, 55 Pac. 417.

[65] Ermentrout v. Girard &c. Ins. Co., 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. 481. See also, California Ins. Co. v. Union Compress Co., 133 U. S. 387, 33 L. ed. 730, 10 Sup. Ct. 365. See as to proximate causes, Williamsburgh City Fire Ins. Co. v. Willard, 164 Fed. 404, 90 C. C. A. 392, 21 L. R. A. (N. S.) 103n; Richmond Coal Co. v. Commercial Union Assur. Co., 159 Fed. 985.

[66] Transatlantic Fire Ins. Co. v. Dorsey, 56 Md. 70, 40 Am. Rep. 403; Russell v. German Fire Ins. Co., 100 Minn. 528, 111 N. W. 400, 10 L. R. A. (N. S.) 326. As to what is "fire" see and compare, German Am. Ins. Co. v. Hyman, 42 Colo, 156, 94 Pac. 27, 16 L. R. A. (N. S.) 77; Western Woolen Mill Co. v. Northern Assur. Co., 139 Fed. 637, 72 C. C. A. 1; Furbush v. Consolidated Patrons &c. Ins. Co., 140 Iowa 240, 118 N. W. 371. As to fire originating within a vehicle, see Preston v. Ætna Ins. Co., 193 N. Y. 142, 85 N. E. 1006, 19 L. R. A. (N. S.) 133.

[67] Johnston v. West Scotland Ins. Co., 7 Shaw & D. 52; Ermentrout v. Girard F. & M. Ins. Co., 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. 481. See also, Davis v. Connecticut Fire Ins. Co., 158 Cal. 766, 112 Pac. 549, 32 L. R. A. (N. S.) 604, and note.

[68] Gibbons v. German Ins. &c. Inst., 30 Ill. App. 263.

damage was not caused by fire within the meaning of the policy.[69] The rule is thus stated by Richards:[70] "The proximate results of fire within the rule of law establishing the liability of the insurer may include other things than combustion; as, for example, injuries to the insured property by water from the fire-engines, or exposure of goods during the fire, or during their reasonable removal, and the loss of goods by theft during the fire or during a reasonable removal to a place of safety." Damage by water used in preventing the destruction of the building and its contents by fire is within a policy insuring against damage by fire.[71] So, a fire is the proximate cause of damage to goods which is suffered in the process of removal to save them from fire.[72] But it has been held that such a policy does not protect against damage occasioned to the goods while being removed from a neighboring building under the apprehension of a spread of fire.[73] A fire policy covers loss or damage by fire occasioned by explosion or any other cause not expressly excepted in the policy.[74] In an elaborate decision in which many cases were reviewed, it was said the rule should be:[75] "That where the effects produced are the immediate results of the action of the burning substance in contact with the building, it is immaterial whether these results manifest themselves in the form of combustion, or of explosion, or of both combined. In either case, the damage occurring is by the action of fire, and covered by the ordinary terms of a policy against loss by fire." Damage by fire caused by a break in pipes resulting from a boiler explosion within the building is not covered, however, by a policy which provides that

[69] Austin v. Drewe, 6 Taunt. 436; Scripture v. Lowell Mut. Fire Ins. Co., 10 Cush. (Mass.) 356, 57 Am. Dec. 111; Babcock v. Montgomery County Mut. Ins. Co., 6 Barb. (N. Y.) 637, affd. 4 N. Y. 326. See also, American Towing Co. v. German Fire Ins. Co., 74 Md. 25, 21 Atl. 553. But see Massachusetts and Wisconsin cases cited in notes 80 and 81, infra.

[70] Richards Ins., § 128; Stanley v. Western Insurance Co., L. R. 3 Exch. 71; White v. Republic Fire Ins. Co., 57 Maine 91, 2 Am. Rep. 22.

[71] John Davis & Co. v. Insurance Co. of North America, 115 Mich. 382, 73 N. W. 393.

[72] Balestracci v. Firemen's Ins. Co., 34 La. Ann. 844; Lewis v. Springfield Fire & Marine Ins. Co., 10 Gray (Mass.) 159. See also, Case v. Hartford &c. Ins. Co., 13 Ill. 676; White v. Republic Fire Ins. Co., 57 Maine 91, 2 Am. Rep. 22; Independent Mutual Ins. Co. v. Agnew, 34 Pa. St. 96, 75 Am. Dec. 638.

[73] Hillier v. Allegheny &c. Ins. Co., 3 Pa. St. 470, 45 Am. Dec. 656.

[74] Germania Ins. Co. v. Sherlock, 25 Ohio St. 33.

[75] Scripture v. Lowell Mut. Fire Ins. Co., 10 Cush. (Mass.) 356, 57 Am. Dec. 111.

the company shall not be liable for loss caused by explosion unless fire ensues, and in that event for the damage by fire only.[76] A lamp is not a fire within the meaning of a policy covering damages by fire or lightning, and there can be no recovery for damages caused by smoke therefrom when no ignition occurs outside of the lamp.[77] And it has been held that there can be no recovery for overheating caused by the unskilful use of fire in a factory, where there is no combustion.[78] So, it is said that where fire is employed as an agent, either for ordinary purposes of heating the insured building, or for the purposes of manufacture, or as an instrument of art, the company is not liable for the consequences so long as the fire itself is confined within the limits of the agencies employed. Hence under a policy insuring against all direct loss or damage by fire, it has been held that the insurer is not liable for damages arising from smoke or soot coming from a defective stovepipe, and resulting from a fire intentionally built in a stove and kept confined therein, nor for damage caused by water used in cooling portions of the building heated by such stovepipe, when the use of such water is not necessary to prevent ignition, and that in order to bring such consequences within the risk there must be actual ignition outside of the agencies employed, not purposely caused by the insured, and the consequences of such ignition dehors the agencies.[79] In a comparatively recent case in Massachusetts,[80] however, it was held that the company was liable for

[76] John Davis & Co. v. Insurance Co. of North America, 115 Mich. 382, 73 N. W. 393. See also, German Am. Ins. Co. v. Hyman, 42 Colo. 156, 94 Pac. 27, 16 L. R. A. (N. S.) 77.

[77] Fitzgerald v. German &c. Ins. Co., 30 Misc. (N. Y.) 72, 62 N. Y. S. 824; Briggs v. North Am. Mercantile Ins. Co., 53 N. Y. 446.

[78] Scripture v. Lowell Mut. Fire Ins. Co., 10 Cush. (Mass.) 356, 57 Am. Dec. 111. See generally, note to 36 Am. St. 857.

[79] Cannon v. Phœnix Ins. Co., 110 Ga. 563, 35 S. E. 775, 78 Am. St. 124. See also, Gibbons v. German Ins. &c. Inst., 30 Ill. App. 263. But see Massachusetts and Wisconsin cases cited in notes 80, 81.

[80] Way v. Abington Mut. Fire Ins. Co., 166 Mass. 67, 43 N. E. 1032, 32 L. R. A. 608, 55 Am. St. 379. See further, extended notes to Gilson v. Delaware &c. Canal Co., 36 Am. St. 857; Hiller v. Allegheny &c. Ins. Co., 45 Am. Dec. 656, 55 Am. St. 379; Lynn Gas & Electric Co. v. Meriden Fire Ins. Co., 158 Mass. 570, 33 N. E. 690, 20 L. R. A. 297, 35 Am. St. 540; Russell v. German Fire Ins. Co., 100 Minn. 528, 111 N. W. 400, 10 L. R. A. (N. S.) 326. In the case first cited it was contended that the policy was not intended to apply to a fire which is lighted and maintained for ordinary purposes for which fires are used in buildings, and which is confined to its place thus fitted for such fires. But Mr. Justice Knowlton said: "We are not disposed to question the soundness of the general principle on which this contention is founded, and

damages caused to the insured goods by smoke and soot escaping from the stove in which the fire had been built for ordinary purposes. And in a still more recent case in Wisconsin it is held that insurance against all direct loss and damage by fire includes loss by smoke, soot and excessive heat caused by a fire kindled with unusually inflammable material in a furnace designed to heat the building, although the fire does not escape from the furnace and is not communicated to the property injured.[81] A policy on a tug and her fixtures insuring against loss or damage by fire does not cover injury to the interior of her boiler caused by overheating or leaking of water. "The terms of the policy in this case," said the court, "are such as are ordinarily employed in fire policies on steam vessels, where the risk is taken on the hull and all the machinery and appurtenances, of the vessel. And it is conceded that for any injury done by fire to any part of the vessel, or her machinery, whether to the boiler or any other part, if the injury was done by ignition or heat generated beyond the furnace, where the fire was intended to burn, the insurance company would be liable. But the subject of the insurance here necessarily excepts the operation of fire to a certain extent. The subject of the policy is a steam-tug, her boiler and other machinery. * * * The fire, while in the furnace, was in its proper place, and where it was intended to be; and it was placed

we find it by no means easy to determine whether the principle should be extended far enough to cover an occasional fire in a chimney incidental to the ordinary use of the stove, or whether such a fire should be held to be one for whose unexpected injurious consequences an insurance company should be liable. We are inclined to the opinion that a distinction should be made between a fire intentionally lighted and maintained for a useful purpose in connection with the occupation of a building, and a fire which starts from such a fire without human agency in a place where fires are never lighted nor maintained, although such ignition may naturally be expected to occur occasionally as an incident to the maintenance of necessary fires, and although the place where it occurs is constructed with a view to prevent damage from such ignition. A fire in a chimney should be considered rather a hostile fire, than a friendly one, and as such, if it causes damage, it is within the provisions of ordinary contracts of fire insurance."

[81] O'Connor v. Queen Ins. Co., 140 Wis. 388, 122 N. W. 1038, 25 L. R. A. (N. S.) 501n, 133 Am. St. 1081n. But compare Austin v. Drewe, 4 Camp. 360; Western Woolen Mill Co. v. Northern Assur. Co., 139 Fed. 637, 72 C. C. A. 1; Cannon v. Phœnix Ins. Co., 110 Ga. 563, 35 S. E. 775, 78 Am. St. 124; Gibbons v. German Ins. &c. Inst., 30 Ill. App. 263; Fitzgerald v. German-American Ins. Co., 30 Misc. (N. Y.) 72, 62 N. Y. S. 824. And see German-American Ins. Co. v. Hyman, 42 Colo. 156, 94 Pac. 27, 16 L. R. A. (N. S.) 77.

there to act upon the boiler, which, in course of time, would be burned out or warped, as the grate in the furnace would be, by the continued action of fire thereon. And if such results of the action of fire upon these materials, while in ordinary use, are not within the risk, it would be difficult to say upon what degree of heat or under what conditions, the liability under the policy would attach for injury caused by the action of fire while confined to the furnace, and producing no external ignition. If a person has his house insured against all loss or damage by fire, and he should make a fire in his grate or fireplace of such intense heat as to crack his chimney, or to warp or crack his mantel-pieces, it could hardly be contended that he could hold the insurance company liable for such damage, though the damage was unintentionally allowed to be produced by the action of fire. In such case the fire would not have extended beyond the proper limits within which it was intended to burn; but the heat emitted therefrom would have produced effects not intended by the insured. No doubt there are many instances where the insurer has been held liable for injury done to buildings and furniture by heat or smoke, without actual ignition, where the heat or smoke has proceeded from fire outside of and beyond the limits of the place where it was intended, by the contract of insurance, to burn. But that is a different question from that presented."[82]

§ 4217. **Proximate cause—Electric wires.**—In an action upon a policy insuring a building, machinery, dynamos and other electric fixtures of an electric company, it appeared that the fire produced a short circuit in the wires connecting with a part of the building remote from the fire, and that such short circuit caused such a strain on the machinery as to break it to pieces. The fire occurred in the wire tower of the building, through which the wires for electric lighting were carried from the building. It was extinguished without contact with other parts of the building, with but slight damage to the tower and its contents. It was held that the damage was "loss or damage by fire" within the meaning of the policy.[83] After considering the general rule that the

[82] American Towing Co. v. German Fire Ins. Co., 74 Md. 25, 21 Atl. 553.

[83] Lynn Gas & Electric Co. v. Meriden Fire Ins. Co., 158 Mass. 570, 33 N. E. 690, 20 L. R. A. 297, 35 Am. St. 540.

active, efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source, is the direct and proximate cause, the court said: "If this were an action against one who negligently set the fire in the tower, and thus caused the injury to the machinery, it is clear, on the theory of the plaintiff that the negligent act of setting the fire would be deemed the active efficient cause of the disruption of the machinery and the consequent injury to the building. It remains to inquire whether there is a different rule in an action on a policy of fire insurance. * * * In suits brought on policies of fire insurance, it is held that the intention of the defendants must have been to insure against losses where the cause insured against was a means or agency in causing the loss, even though it was entirely due to some other active, efficient cause which made use of it, or set it in motion, if the original efficient cause was not itself made a subject of separate insurance in the contract between the parties. For instance, where the negligent act of the insured, or of anybody else, causes a fire, and so causes damage, although the negligent act is the direct, proximate cause of the damage, through the fire, which was the passive agency, the insurer is held liable for a loss caused by the fire. * * * This is the only particular in which the rule in regard to remote and proximate causes is applied differently in actions on fire insurance policies from the application of it in other actions. A failure sometimes to recognize this rule as standing on independent grounds, and established to carry out the intention of the parties to contracts of insurance, has led to confusion of statement in some of the cases. The difficulty in applying the general rule in complicated cases has made the interpretation of some of the decisions doubtful; but on principle, and by the weight of authority in many well-considered cases, we think it clear that, apart from the single exception above stated, the question, What is the cause which creates a liability? is to be determined in the same way in actions on policies of fire insurance as in other actions. * * * In the present case, the electricity was one of the forces of nature,—a passive agent working under natural laws,—whose existence was known when the insurance policies

were issued. Upon the theory adopted by the jury, the fire worked through agencies in the building, the atmosphere, the metallic machinery, electricity, and other things; and working precisely as the defendants would have expected it to work if they had thoroughly understood the situation and the laws applicable to the existing conditions, it put a great strain on the machinery and did great damage. No new cause acting from an independent source intervened. The fire was the direct and proximate cause of the damage according to the meaning of the words 'direct and proximate cause,' as interpreted by the best authorities." Other decisions discussing the subject of proximate cause are cited below.[84]

§ 4218. **Agency—Authorization.**—A clause found in the standard policy in a number of states is that "in any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company."[85] This clause attempts to make a writing the only evidence of agency; but the insurer does not, by virtue of this provision of the standard policy, escape responsibility for acts of those who are in fact its agents, although they may not be able to show written authority. The rule established by the weight of authority, as stated by May, and quoted with approval by Richards,[86] is that: "It makes no difference that the policy declares the agent to be the agent of the assured, and not of the company. For whom a person is acting is a matter of law on the facts of every

[84] Davis v. Connecticut Fire Ins. Co., 158 Cal. 766, 112 Pac. 549, 32 L. R. A. (N. S.) 604n; Williamsburgh City Fire Ins. Co. v. Willard, 164 Fed. 404, 90 C. C. A. 392, 21 L. R. A. (N. S.) 103n; Fred J. Kiesel & Co. v. Sun Ins. Office, 88 Fed. 243, 31 C. C. A. 515; London & L. Fire Ins. Co. v. Crunk, 91 Tenn. 376, 23 S. W. 140; Ætna Fire Ins. Co. v. Boon, 95 U. S. 117, 24 L. ed. 395. See also, Case v. Hartford &c. Ins. Co., 13 Ill. 676.

[85] This provision is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Louisiana, Iowa, North Dakota, South Dakota and North Carolina. The provision is not found in the standard policies of Maine, New Hampshire, Wisconsin, Massachusetts and Minnesota. The Michigan policy provides that: "In matter relating to the procuring of this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company."

[86] Richards Ins., 171; Kausal v. Minnesota Farmers' Mut. Fire Ins. Assn., 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776; Allen v. German-American Ins. Co., 123 N. Y. 6, 25 N. E. 309; Knickerbocker Life Insurance Co. v. Norton, 96 U. S. 234, 24 L. ed. 689. See §§ 4165-4168, 4179-4185.

case. The application precedes the policy; and to hold that a provision in the after-coming policy, unknown to the assured at the time of the application, could turn the insurance agent into his agent, when he thought all the time he was dealing with him and accepting his advice as the agent of the company, would be an outrage." Any other rule would permit an insurance company to relieve itself from all responsibility for the mistakes or misconduct of its agents, by the simple device of sending them out without written authorization. The matter has been regulated by statute in some of the states, and this provision of the policy must be read in connection with such statutes. This clause may be regarded as notice to the insured that it is unsafe to deal with a person who cannot show written authority, but agency is a fact and may be proved by any competent evidence.

§ 4219. Application and survey—Application a part of the policy.—Another clause is as follows: "If an application, survey, plan or description of the property be referred to in this policy, it shall be a part of this contract and a warranty by the insured."[87] A reference in the policy to an application, survey, plan or description of the property makes it a part of the contract and warrants its correctness. The clause is not contained in the Massachusetts form, and in that state only such parts of the application as are set forth in the policy become a part of the contract. The language probably extends the established rule by making a mere reference sufficient, which was not enough under the earlier decisions.[88] But the reference must still be of such a character as to show an intention to incorporate the mat-

[87] This provision appears in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Wisconsin, Iowa, Louisiana, North Dakota, South Dakota, and North Carolina. Michigan adds the words, "as to material facts." The clause does not appear in the Maine, Massachusetts, and Minnesota standard policies. It does not appear in the New Hampshire standard policy, but chapter 170 of the Public Statutes of New Hampshire (1901), which is printed on the back of the policy and forms a part thereof, provides that: "Descriptions of property and statements concerning its value and the title of the insured thereto in an application for insurance or in an insurance policy shall not be treated as warranties."

[88] Vilas v. New York Cent. Ins. Co., 72 N. Y. 590, 28 Am. Rep. 186. Compare also note to Langdeau v. John Hancock Mut. Life Ins. Co., 194 Mass. 56, 80 N. E. 452, 18 L. R. A. (N. S.) 1190, and Spence v. Central Acc. Ins. Co., 236 Ill. 444, 86 N. E. 104, 19 L. R. A. (N. S.) 88, and note.

ter into the contract. Thus, the entire application is not made a part of the policy which contains this provision by a statement in the policy that the property is situated in a specified place, "as per diagram filed with application," where such diagram was put on the back of the application after it had been signed by the applicant.[89] The materiality of the matters thus warranted must be determined by general and statutory rules, which have already been considered.[90]

§ 4220. Misconduct of insured in procuring policy—Entirety of contract.—The clause in the standard policy relating to misconduct of the assured in procuring the policy,[91] clears up some of the confusion that formerly existed, although the decisions are not entirely harmonious even under this clause. Under the old forms there were many cases which held that an insurance contract was severable where distinct items were insured for separate amounts, although but one premium was paid.[92]

[89] La Belle v. Norwich Fire Ins. Soc., 34 N. B. (Can.) 515.

[90] See §§ 4096, 4106, 4110, 4119–4125. See also, Duncan v. Nat. Mut. Fire Ins. Co., 44 Colo. 472, 98 Pac. 634, 20 L. R. A. (N. S.) 340, and note.

[91] "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning the insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after the loss." This provision is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Wisconsin, Louisiana, Iowa, North Dakota, South Dakota, Michigan, and North Carolina. The following provision appears in the standard policies of Massachusetts, Minnesota, Maine, and New Hampshire: "This policy shall be void if any material fact or circumstance stated in writing has not been fairly represented by the insured, or if the insured shall make any attempt to defraud the company either before or after the loss." Nothing is said concerning a misrepresentation of interest.

[92] Taylor v. Anchor Mut. Fire Ins. Co., 116 Iowa 625, 88 N. W. 807, 57 L. R. A. 328, 93 Am. St. 261, and cases there cited; Republic County Mut. Fire Ins. Co. v. Johnson, 69 Kans. 146, 76 Pac. 419, 105 Am. St. 157; Merrill v. Agricultural &c. Ins. Co., 73 N. Y. 452; Schuster v. Dutchess County Ins. Co., 102 N. Y. 260, 6 N. E. 406. But compare Goorberg v. Western Assur. Co., 150 Cal. 510, 89 Pac. 130, 119 Am. St. 246, and note. The test seems to be whether the property is so situated that the risk on one item cannot be affected without affecting the risk on the other items, or is so situated that the risk on each item is separate and distinct so that what affects the risk on one does not affect the risk on others. Phœnix Ins. Co. v. Pickel, 119 Ind. 155, 21 N. E. 546, 12 Am. St. 393. Loomis v. Rockford Ins. Co., 77 Wis. 87, 45 N. W. 813, 8 L. R. A. 834, 20 Am. St. 96, and note; affd. 81 Wis. 366, 51 N. W. 564. As to the severability of contracts of insurance, see note to Wright v. London Fire Ins. Assn., 12 Mont. 474, 31 Pac. 87, 19 L. R. A. 211n.

The decisions are very conflicting.[93] Under this provision of the standard policy, however, there is comparatively little room for controversy. Where a policy which covered a barn and its contents contained a provision that under certain conditions "this entire policy and every part thereof shall be void," and there was a misdescription as to the amount of the incumbrances, the court said:[94] "Under forms of policies, quite different from the one in the case at bar, insuring specific amounts on separate items of property, contracts have been held severable. It is expressly stipulated, in this policy, that if either the real or personal property, or any part of it, be incumbered, it must be so represented to the company in the application, otherwise the entire policy and every part of it shall be void. This policy is quite different in its legal effect from those considered in the cases cited, it not being expressly provided in those policies, as in this, that a misrepresentation of the situation of one of the subjects insured should invalidate the insurance on all other property covered by the policy." Many other decisions also hold that the effect of such a clause is to render the contract indivisible notwithstanding a separate valuation of the items of property insured.[95] But in Missouri it was held that the clause making the "entire policy

[93] In Southern Fire Ins. Co. v. Knight, 111 Ga. 622, 36 S. E. 821, 52 L. R. A. 70, 78 Am. St. 216, after a review of many cases, the court said: "Our conclusion is that where an insurance policy is issued in consideration of a gross premium, and provides that the policy shall be void in the event of a breach of a certain condition therein named, and this condition is broken, no recovery can be had on the policy, though separate classes of property are therein insured, and though the stipulation violated relates solely to a matter which could have connection with but one of these classes."

[94] Geiss v. Franklin Ins. Co., 123 Ind. 172, 24 N. E. 99, 18 Am. St. 324; Smith v. Agricultural Ins. Co., 118 N. Y. 518, 23 N. E. 883. In Pratt v. Dwelling-House Mut. Fire Ins. Co., 130 N. Y. 206, 29 N. E. 117, the court said: "Whatever the rule may be elsewhere, it is settled in this state that where insurance is made on different kinds of property, each separately valued, the contract is severable, even if but one premium is paid, and the amount insured is the sum total of the valuations." See McQueeny v. Phœnix Ins. Co., 52 Ark. 257, 12 S. W. 498, 5 L. R. A. 744, 20 Am. St. 179; Loomis v. Rockford Ins. Co., 77 Wis. 87, 45 N. W. 813, 8 L. R. A. 834, 20 Am. St. 96, affd. 81 Wis. 366, 51 N. W. 564.

[95] Agricultural Ins. Co. v. Hamilton, 82 Md. 88, 33 Atl. 429, 30 L. R. A. 633, 51 Am. St. 457; Germania Fire Ins. Co. v. Schild, 69 Ohio St. 136, 68 N. E. 706, 100 Am. St. 663; McWilliams v. Cascade Fire & Marine Ins. Co., 7 Wash. 48, 34 Pac. 140. But see Dumas v. Northwestern Nat. Ins. Co., 12 App. D. C. 245, 40 L. R. A. 358; Herzog v. Palatine Ins. Co., 36 Wash. 611, 79 Pac. 287. See also, German Ins. Co. v. Reed, 9 Ky. L. 929.

void, in case of breach of condition in any respect," does not render the policy indivisible so as to preclude any recovery on it in case it is for convenience made to cover different kinds of property which are separately valued, although but one premium is paid. The court said:[96] "When this contract was made, then, it was the settled rule of decision in this state that such a contract as this was divisible or severable, although the policy had a clause which would avoid the whole contract. The addition of the word 'entire,' given its utmost latitude could not avoid any more than the whole policy, hence it added nothing to the policy." There are also other decisions to the same effect.[97] And a statement in

[96] Trabue v. Dwelling House Ins. Co., 121 Mo. 75, 25 S. W. 848, 23 L. R. A. 719, 42 Am. St. 523. In McGowan v. People's Mut. Fire Ins. Co., 54 Vt. 211, 41 Am. Rep. 843, however, it appeared that the policy covered both real and personal property. The real estate was conveyed in violation of a condition in the policy and it was claimed that this did not affect the insurance upon the personal property which was situated in the dwelling-house insured. The court said: "This is a question of great practical importance, as a large proportion of insurance contracts embrace more than one item of property insured. The decisions are apparently conflicting, but we think are easily reconciled by referring to the plain principles which should govern them. The general rule, 'void in part, void in toto,' should apply to all cases where the contract is affected by some all-pervading vice, such as fraud or some unlawful act, condemned by public policy or the common law; cases where the contract is entire and non-divisible; and all those cases where the matter that renders the policy void in part, and the result of its being so rendered void, affects the risk of the insurer upon the other items in the contract. Keeping these rules in mind, the leading cases upon this subject can all be reconciled. A recovery should be had in all those cases where the contract is divisible; the different properties insured for separate sums, and the risk upon the property, which is claimed to be valid, unaffected by the cause that renders the policy void in part. Such are the cases of Howard Fire & M. Ins. Co. v. Cornick, 24 Ill. 455; Hartford Fire Ins. Co. v. Walsh, 54 Ill. 164, 5 Am. Rep. 115; Clark v. New England Mut. Fire Ins. Co., 6 Cush. (Mass.) 342, 53 Am. Dec. 44; Date v. Gore Dist. Mut. Fire Ins. Co., 14 U. C. C. P. 548; Phœnix Ins. Co. v. Lawrence, 4 Metc. (Ky.) 9; Loehner v. Home Mut. Ins. Co., 17 Mo. 247; Koontz v. Hannibal Sav. & Ins. Co., 42 Mo. 126, 97 Am. Dec. 325; Cucullu v. Orleans Ins. Co., 6 Mar. (N. S.) (La.) 11. * * * The cases following have held the contract entire, indivisible, and no recovery could be had upon them. Hinman v. Hartford Fire Ins. Co., 36 Wis. 159; Associated Firemen's Ins. Co. v. Assum, 5 Md. 165; Bowman v. Franklin Fire Ins. Co., 40 Md. 620; Fire Assn. v. Williamson, 26 Pa. St. 196; Gottsman v. Pennsylvania Ins. Co., 56 Pa. St. 210, 94 Am. Dec. 55; Bleakley v. Niagara &c. Ins. Co., 16 Grant Ch. (U. C.) 198. In the case at bar the whole property was insured for eight hundred and seventy-two dollars, divided into specific items, but one premium was paid and one premium note given. We think the authorities justify us in holding that the contract was an entire one; separate and distinct only so far as to limit the extent of the risk assumed by the company on each kind of property."

[97] Sullivan v. Mercantile Ins. Co., 20 Okla. 460, 94 Pac. 676, 129 Am. St. 761; Arkansas Ins. Co. v. Cox, 21 Okla. 873, 98 Pac. 552, 20 L. R. A.

the application regarding the dimensions of the building insured has been held not to be warranted absolutely correct notwithstanding this provision in the policy.[98]

§ 4221. Concealment and misrepresentation.—This clause makes no changes in the general rules in most jurisdictions governing the effect of concealment and misrepresentation. It simply declares the existing law, and its main importance here is in connection with the evident intention that the contract shall not be treated as severable, but that the entire policy shall be rendered void by concealment or misrepresentation in connection with any material matter.[99] Under this clause, however, concealment by the applicant for insurance on a stock of goods of the existence of an outstanding unfiled chattel mortgage by answering a question in the application on that subject in the negative has been held to avoid the policy.[1]

§ 4222. Statement of interest.—In the absence of any provision requiring a statement of the interest of the insured, the extent and nature of such interest need not be disclosed, and it will usually be sufficient for him to show an insurable interest at the time of the loss.[2] The applicant may state simply that he is the owner if this is true in any substantial sense.[3] This clause does not require the applicant to state the value of his interest or whether it is subject to incumbrances or liable to be terminated.[4] The word "interest" is broader than title.[5]

(N. S.) 775n, 129 Am. St. 808. See also, Firemen's Fund Ins. Co. v. Barker, 6 Colo. App. 535, 41 Pac. 513; Kansas Farmers' Fire Ins. Co. v. Saindon, 53 Kans. 623, 36 Pac. 983; Kiernan v. Dutchess County Mut. Ins. Co., 150 N. Y. 190, 44 N. E. 698.

[98] Duncan v. Nat. Mut. Fire Ins. Co., 44 Colo. 472, 98 Pac. 634, 20 L. R. A. (N. S.) 340n.

[99] See ch. 121.

[1] Madsden v. Farmers' &c. Ins. Co., 87 Nebr. 107, 126 N. W. 1086, 29 L. R. A. (N. S.) 97. See also, Connecticut Fire Ins. Co. v. Manning, 160 Fed. 382, 87 C. C. A. 334; Milison v. Mut. Cash &c. Ins. Co., 24 S. Dak. 285, 123 N. W. 839, 140 Am. St. 788.

[2] See §§ 4059, et seq. Buffum v. Bowditch Mut. Fire Ins. Co., 10 Cush. (Mass.) 540. See also, Nat. Fire Ins. Co. v. Three States Lumber Co., 217 Ill. 115, 75 N. E. 450, 108 Am. St. 239, and note.

[3] Wainer v. Milford Mut. Fire Ins. Co., 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598. See also, Arkansas Ins. Co. v. Cox, 21 Okla. 873, 98 Pac. 552, 20 L. R. A. (N. S.) 775n, 129 Am. St. 808, and note.

[4] Dolliver v. St. Joseph &c. Ins. Co., 128 Mass. 315, 35 Am. Rep. 378; Carson v. Jersey City &c. Ins. Co., 43 N. J. L. 300, 39 Am. Rep. 584, affd. 44 N. J. L. 210.

[5] Lee v. Agricultural Ins. Co., 79 Iowa 379, 44 N. W. 683.

§ 4223. **Fraud and false swearing.**—The entire policy may be rendered void by fraud or false swearing either before or after the loss.[6] But mere mistake in the expression of an opinion, or an innocent misstatement, will not work a forfeiture under this provision. It must be false and fraudulent.[7] Thus, a false statement as to the value of the property will not invalidate the policy if given in good faith and as an honest expression of opinion.[8] But it has been held that the "padding" of an inventory of merchandise by false entries of articles not on hand will work a forfeiture where such entries cannot be explained on any reasonable theory of honest mistake.[9] A concealment or misstatement relative to the value of the property is sometimes held to be immaterial where the policy is not valued. Thus, in one case it was said: "By the terms of the policies it is expressly provided that the companies were not liable beyond the actual cash value of the property at the time of the loss. The policies were not valued but were open policies. The companies were liable only for the actual value of the property lost. In such a policy, an overvaluation of the property is immaterial. If such representation in a policy is not material to the risk, and does not increase the risk in any way, we fail to see any reason for saying that because the insured was at the time the company's agent such representation by him was material."[10] Overvaluation, however great, is not conclusive evidence of fraud. It is at the most merely presumptive evidence of fraudulent intent and is said to be strong in proportion to the excess.[11] Thus, where there was testimony that misstatements in the proof were made by mistake, it was

[6] This whole subject is elaborately treated in the note in 32 L. R. A. (N. S.) 453.

[7] Titus v. Glens Falls Ins. Co., 81 N. Y. 410, 8 Abb. N. Cas. (N. Y.) 315. See also, 3 Elliott Ev., § 2336; American Cent. Ins. Co. v. Ware, 65 Ark. 336, 46 S. W. 129; West Coast Lumber Co. v. State &c. Ins. Co., 98 Cal. 502, 33 Pac. 258; Atherton v. British America Assur. Co., 91 Maine 289, 39 Atl. 1006; Phœnix Ins. Co. v. Summerfield, 70 Miss. 827, 13 So. 253; Claflin v. Commonwealth Ins. Co., 110 U. S. 81, 28 L. ed. 76, 3 Sup. Ct. 307.

[8] Tubb v. Liverpool &c. Ins. Co., 106 Ala. 651, 17 So. 615; Commercial Ins. Co. v. Friedlander, 156 Ill. 595, 41 N. E. 183; Phenix Ins. Co. v. Pickel, 119 Ind. 155, 21 N. E. 546, 12 Am. St. 393; Baker v. State Ins. Co., 31 Ore. 41, 48 Pac. 699, 65 Am. St. 807.

[9] Alfred Hiller Co. v. Insurance Co. of North America, 125 La. Ann. 938, 52 So. 104, 32 L. R. A. (N. S.) 453n.

[10] Insurance Co. of North America v. Osborn, 26 Ind. App. 88, 59 N. E. 181.

[11] Insurance Co. of North America v. Coombs, 19 Ind. App. 331, 49 N. E. 471; Sturm v. Atlantic Mut. Ins. Co., 63 N. Y. 77. Compare Clark v. Phœnix Ins. Co., 36 Cal. 168.

held error to take the case from the jury, as the policy was only rendered void by wilful false swearing with the intent to defraud.[12] But, where the policy contained a warranty and provided that "false representations by the assured of the condition, situation, or occupancy of the property or any omission to make known any fact material to the risk, or an overvaluation or any misrepresentation whatever, either in the written application or otherwise," shall make the policy void, it appeared that there was a clear overvaluation, and thus a breach of warranty. The court said:[13] "The trial court erred in submitting the question of overvaluation simply as one of fraud or good faith, and in stating to the jury that if the applicant placed a value on the property which he honestly believed to be its legitimate value, it would not render the policy void, although larger than the value of the property as estimated by others. Doubtless a very slight variation should be disregarded, but I think the applicant must be held responsible for any substantial excess when he thus warrants the value." Under this provision of the standard policy it is held in Michigan that the contract is not necessarily avoided because of a false statement in the affidavit, given by the assured after the loss, that a sewing machine was burned, which he explained by saying that he thought it was burned at the time he made the affidavit, but subsequently found it was not in the building.[14] Where the policy contained a provision that any fraud or false swearing should forfeit all claims under it, and the plaintiff in his proofs of loss stated under oath that the building was occupied as a dwelling-house and for no other purpose, the words were held to mean a verified false assertion, fitted and likely to, and which does, deceive;[15] but, as it appeared that the defendant, through its agents and secretary, knew the facts, and as the words used, when charged with the meaning given them by the parties, were

[12] Petty v. Mutual Fire Ins. Co. of Des Moines, 111 Iowa 358, 82 N. W. 767.

[13] Carson v. Jersey Fire Ins. Co., 43 N. J. L. 300, 39 Am. Rep. 584, affd. 44 N. J. L. 210; Fowler v. Ætna Fire Ins. Co., 6 Cow. (N. Y.) 673, 16 Am. Dec. 460, and note; Boutelle v. Westchester Fire Ins. Co., 51 Vt. 4, 31 Am. Rep. 666.

[14] Knop v. National Fire Ins. Co., 107 Mich. 323, 65 N. W. 228. See also, Miller v. Firemen's Fund Assn., 6 Cal. App. 395, 92 Pac. 332; Newton v. Theresa Village Mut. Fire Ins. Co., 125 Wis. 289, 104 N. W. 107.

[15] Maher v. Hibernia Fire Ins. Co., 67 N. Y. 283.

not true as between them, it was held that there was no breach of the condition. The defendant could not be deceived by an assertion which to its own knowledge was false.[16] False swearing in the proofs of loss in regard to the burning of wearing apparel, which has been removed from the building insured before the loss, has been held, however, to render the policy void as to insurance on the house and household furniture as well as that on the wearing apparel.[17]

§ 4224. **Excluded risks—Invasion—Riot.**—The provision of the standard policy in regard to excluded risks[18] has often come before the courts. An invasion is the hostile entrance of an armed force into a certain territory, and any loss to the insured property of which the invasion is the efficient cause is not within the protection of the policy.[19] There can be no recovery in such case, although the commanding officer of the invading

[16] Shaw v. Scottish Commercial Ins. Co., 1 Fed. 761; Marion v. Great Republic Ins. Co., 35 Mo. 148; Springfield Fire & Marine Ins. Co. v. Winn, 27 Nebr. 649, 43 N. W. 401, 5 L. R. A. 841; Sleeper v. New Hampshire Fire Ins. Co., 56 N. H. 401. But compare, Dolloff v. Phœnix Ins. Co., 82 Maine 266, 19 Atl. 396, 17 Am. St. 482.

[17] Fowler v. Phœnix Ins. Co., 35 Ore. 559, 57 Pac. 421. See also, Dumas v. Northwestern Nat. Ins. Co., 12 App. D. C. 245, 40 L. R. A. 358; Dolloff v. Phœnix Ins. Co., 82 Maine 266, 19 Atl. 396, 17 Am. St. 482.

[18] "This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war, or commotion, or military, or usurped power, or by order of any civil authority, or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon. If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease. * * * Nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise." These provisions are found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Wisconsin, Louisiana, Iowa, North Dakota, South Dakota, Michigan and North Carolina. The standard policies of Massachusetts, Minnesota, Maine and New Hampshire insure "against all loss or damage by fire originating from any cause except invasion, foreign enemies, civil commotions, riots, or any military or usurped power whatever; the amount of said loss or damage to be estimated according to the actual value of the insured property at the time when such loss or damage happens, but not to include loss or damage caused by explosions of any kind unless fire ensues, and then to include that caused by fire only." They also provide that if the insured property shall be exposed to loss or damage by fire, the insured shall make all reasonable exertions to save and protect the same.

[19] Ætna Ins. Co. v. Boon, 95 U. S.

party did not order the property destroyed.[20] An insurrection is a "seditious rising against the government, * * * a rebellion; a revolt."[21] A riot is an unlawful act done or attempted to be done by three or more persons, either with or without common cause, or it may be a lawful act done in a violent or tumultuous manner. It is immaterial whether or not there is a previous unlawful assembly, or whether the rioters originally assembled for a lawful purpose. Force or violence, or some acts tending thereto, calculated to cause terror to one or more, are necessary in criminal law, although there may be a riot without actual violence. In insurance cases it is not necessary to first establish the fact of a riot by a judgment of a criminal court.[22] Lord Mansfield says that the words "civil commotion" were introduced in 1727, and are as general and untechnical as any that can possibly be used. He distinguishes between civil commotion and invasion by usurped military power and says: "I think a civil commotion is this: an insurrection of the people for general purposes, though it may not amount to a rebellion, where there is an usurped power."[23] "Usurped power" may mean an invasion from abroad or internal authority conducted by authority, and not the power of a common mob.[24] A loss caused by the burning of a bridge by the order of the military authorities to prevent the advance of an armed force of rebels is not excepted by the clause, "loss by fire occasioned by mobs and riots,"

117, 24 L. ed. 395; Portsmouth Ins. Co. v. Reynolds' Admx., 32 Grat. (Va.) 613. And see Royal Ins. Co. v. Martin, 192 U. S. 149, 48 L. ed. 385, 24 Sup. Ct. 247, as to when insured must show that the loss was not so occasioned.

[20] Barton v. Home Ins. Co., 42 Mo. 156, 97 Am. Dec. 329.

[21] Spruill v. North Carolina Mut. Life Ins. Co., 46 N. Car. 126.

[22] Joyce Ins., § 2581; Germania Fire Ins. Co. v. Deckard, 3 Ind. App. 361, 28 N. E. 868; Lycoming Fire Ins. Co. v. Schwenk, 95 Pa. St. 89, 40 Am. Rep. 629; State v. Dean, 71 Wis. 678, 38 N. W. 341. See also, Luckett-Wake Tobacco Co. v. Globe &c. Ins. Co., 171 Fed. 147; Spring Garden Ins. Co. v. Imperial Tobacco Co., 132 Ky. 7, 116 S. W. 234, 20 L. R. A. (N. S.) 277n, 136 Am. St. 164. But compare Straus v. Imperial Fire Ins. Co., 94 Mo. 182, 6 S. W. 698, 4 Am. St. 368.

[23] Langdale v. Mason, 2 Marsh. Ins. (ed. 1810) 791.

[24] Drinkwater v. London Assur. Co., 2 Wils. 363; Barton v. Home Ins. Co., 42 Mo. 156, 97 Am. Dec. 329; City Fire Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367, 34 Am. Dec. 258; Ætna Ins. Co. v. Boon, 95 U. S. 117, 24 L. ed. 395. In Straus v. Imperial Fire Ins. Co., 94 Mo. 182, 6 S. W. 698, 4 Am St. 368, the words "notorious resistance to lawful authority" were held to mean such an unusual and extraordinary state of affairs that the ordinary civil authorities were overpowered.

although it would be within other clauses of this provision.[25] A policy contained the provision that the company "shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power." A town in Missouri was attacked by a Confederate military force. An officer in command of the United States forces, after a battle had been in progress for some time, being unable to successfully defend the city, set fire to some military stores to prevent them from falling into the hands of the enemy. The fire spread through two intermediate buildings to the store containing the insured goods, and they were destroyed. The Connecticut court held that the clause did not refer to the lawful acts of military authorities, but only to the acts of persons in hostility to the lawful authorities, and that the act of the commander in ordering the firing of the building was a lawful act and not within the exception of the policy.[26] But the Supreme Court of the United States held that the fire which destroyed the goods was excepted from the risk assumed.[27] And so, where a fire was started by order of a board of supervisors, the loss was held to be within the exception as to loss occasioned by order of civil authority.[28]

[25] Harris v. York Mut. Ins. Co., 50 Pa. St. 341.

[26] Boon v. Ætna Ins. Co., 40 Conn. 575.

[27] Ætna Ins. Co. v. Boon, 95 U. S. 117, 24 L. ed. 395. Mr. Justice Strong said: "The general purpose of this proviso is clear enough, but there is a controversy respecting the extent of the exemption made by it. It has been very strenuously argued that the words 'military or usurped power' must be construed as meaning military and usurped power; that they do not refer to military power of the government, lawfully exercised, but to usurped military power, either that exerted by an invading foreign enemy or by an internal armed force in rebellion, sufficient to supplant the laws of the land and displace the constituted authorities. There is, it must be admitted, considerable authority, and no less reason, in support of this interpretation. In our view of the present case, however, we are not called upon to affirm positively that such is the true meaning of the words, in the connection in which they were used in the policy now under review; for, if it be conceded that it is, we are still of opinion that the fire which destroyed the premises of the plaintiffs below 'happened,' 'took place,' or occurred by means of a risk excepted in the policy. In other words, it was caused by invasion, and the usurped military power of a rebellion against the government of the United States, as the contracting parties understood the terms 'invasion' and 'military or usurped power.'"

[28] Conner v. Manchester Assur. Co., 130 Fed. 743, 65 C. C. A. 127, 70 L. R. A. 106.

§ 4225. **Excluded risks—Theft.**—This provision, which excepts loss by theft, is binding.[29] Where there is no such provision, an insurer against fire only is liable for goods stolen during their removal to avoid impending loss by fire. A clause to the effect that the company "will not be liable for any loss or damage to goods contained in the show window when the loss or damage is caused by the light in the window; nor shall the company be liable for loss by theft," however, applies only to theft from the windows, and not theft occurring while the property is necessarily being removed to avoid fire.[30] There are many cases in which the company has been held liable for loss by theft where the goods were being removed in order to save them from an impending fire.[31] Where it was provided that "in case of fire, or of loss or damage thereby, it shall be the duty of the insured to use their best endeavours for saving and preserving the property," it was held that the company was liable for the value of goods lost or stolen in the process of removal in accordance with this provision.[32] But, where the policy made it the duty of the insured to use all diligence in the removal and preservation of the property, and, in case of failure on his part so to do, the company would not be liable for loss or damage sustained in consequence of such neglect, and while complying with this provision there was a loss by theft, it was held that there was no liability on the part of the company for the loss under the provision that "this company shall not be liable to make good any loss by theft, or any loss or damage by fire which may happen or take place by means of any invasion insurrection, riot or civil commotion or any military or usurped power."[33]

[29] Liverpool, London & Globe Ins. Co. v. Creighton, 51 Ga. 95.

[30] Leiber v. Liverpool, L. & G. Ins. Co., 6 Bush (Ky.) 639, 99 Am. Dec. 695.

[31] See Talamon v. Home & Citizens' Mut. Ins. Co., 16 La. Ann. 426; Newmark v. Liverpool & L. Fire & Life Ins. Co., 30 Mo. 160, 77 Am. Dec. 608; American Ins. Co. v. Bryan, 26 Wend. (N. Y.) 563, 37 Am. Dec. 278; Independent Mutual Ins. Co. v. Agnew, 34 Pa. St. 96, 75 Am. Dec. 638; Sling v. Scottish Un. & Nat. Ins. Co., 7 Utah 441, 27 Pac. 170.

[32] Independent Mutual Ins. Co. v. Agnew, 34 Pa. St. 96, 75 Am. Dec. 638. See also, Newmark v. Liverpool & L. Fire & Life Ins. Co., 30 Mo. 160, 77 Am. Dec. 608; Tilton v. Hamilton Fire Ins. Co., 14 How. Pr. (N. Y.) 363, 14 N. Y. Super. Ct. 367.

[33] Webb v. Protection Ins. Co., 6 Ohio 456. See also, Fernandez v. Merchants' &c. Ins. Co., 17 La. Ann. 131; Witherell v. Maine Ins. Co., 49 Maine 200.

§ 4226. Excluded risks—Neglect to protect property.—Unless expressly provided to the contrary, a policy covers damage occasioned even by the negligence of the insured or his representatives. This provision imposes upon him the duty to use reasonable care to save and preserve the property at and after a fire, or when the property is endangered by fire existing in the neighborhood. In a case where the policy contained a similar provision, and it was alleged that the loss was occasioned by the "neglect to use all possible efforts by the plaintiffs to save and preserve the property when exposed to fire," it was held error to refuse a request that plaintiffs could not recover for any loss or damage occasioned by their or either of their neglect to use all possible efforts to save or preserve the property when on fire or exposed thereto.[34] But this clause applies only when the property is on fire or menaced thereby and not to some action by which the risk of taking fire might be increased.[35]

§ 4227. Excluded risks—Explosion.—There has been much conflict of authority as to the liability of the insurer for loss caused by a fire which results from an explosion. In the leading early case in New York the policy contained a condition that the insurer should not be liable for loss caused by the explosion of a steam boiler. As a result of explosion, fire was brought in contact with the insured property which was consumed. It was held that the loss was within the exception and that the company was not liable.[36] The same conclusion was reached in Ohio under

[34] Ellsworth v. Ætna Ins. Co., 89 N. Y. 186. See also and compare 3 Elliott Ev., § 2331; Port Blakely Mill Co. v. Springfield Fire &c. Ins. Co., 59 Wash. 501, 110 Pac. 36, 28 L. R. A. (N. S.) 596n, 140 Am. St. 863.

[35] Siemers v. Meeme Mut. &c. Ins. Co., 143 Wis. 114, 126 N. W. 669, 139 Am. St. 1083.

[36] St. John v. American Mut. Fire &c. Ins. Co., 11 N. Y. 516. See also, Hustace v. Insurance Co., 175 N. Y. 292, 67 N. E. 592, 62 L. R. A. 651. In Hayward v. Liverpool &c. Ins. Co., 3 Keyes (N. Y.) 456, affg. 20 N. Y. Super. Ct. 385, the policy expressly excepted liability for subsequent fire. In Briggs v. North American &c. Ins. Co., 53 N. Y. 446, under a policy which contained the standard clause, it appeared that vapor from the works came in contact with the flame of a lamp, and an explosion ensued which nearly destroyed the building and machinery. A fire resulted which caused some damage, slight when compared with that caused by the explosion, and it was held that the company was not liable for the loss caused by the explosion. It was suggested, however, that if the building had been on fire and an explosion had occurred in the course of the conflagration, the rule might have been different. So in Mitchell v. Potomac Ins. Co., 183 U. S. 42, 46

slightly different form of policy. It appeared that an inflammable vapor was formed in the course of the business of rectifying spirits, which came in contact with an ordinary gas jet and resulted in an explosion, which was followed by fire.[37] A later case in the same state would seem to be in conflict, but the court attempts to make a distinction between the two cases.[38] So, the United States Supreme Court held that under a similar exemption there was no liability where the explosion took place in a building across the street resulting in an extensive fire, which destroyed several blocks of buildings, including the warehouse in which the insured property was stored. The court said:[39] "The only question to be decided in the case is, whether the fire * * * happened or took place by means of the explosion; for if it did, the defendant is not liable by the express terms of the contract." The contrary rule has been established in Illinois[40] and Pennsylvania,[41] and some other states.[42] Where the policy excluded liability for damages caused by explosion, it was held that there was no liability when powder in another building was struck by lightning and the insured house was destroyed.[43] "In no case which has come under our observation," said the court, "and we have examined a great many, has a liability been found to attach where

L. ed. 74, 22 Sup. Ct. 22, a lighted match which came in contact with a vapor and caused an explosion was not a "fire" within the meaning of a policy which excludes liability for explosion. See also, Cabalero & Basualdo v. Insurance Co., 15 La. Ann. 217; Montgomery v. Firemen's Insurance Co., 16 B. Mon. (Ky.) 427.

[37] United Life, Fire & Marine Ins. Co. v. Foote, 22 Ohio St. 340, 10 Am. Rep. 735.

[38] Boatman's Fire & Marine Ins. Co. v. Parker, 23 Ohio St. 85, 13 Am. Rep. 228. Compare however, German Fire Ins. Co. v. Roost, 55 Ohio St. 581, 45 N. E. 1097, 36 L. R. A. 236, 60 Am. St. 711.

[39] Louisiana Mutual Ins. Co. v. Tweed, 7 Wall. (U. S.) 44, 19 L. ed. 65.

[40] Commercial Ins. Co. v. Robinson, 64 Ill. 265, 16 Am. Rep. 557; Heuer v. Northwestern Nat. Ins. Co., 144 Ill. 393, 33 N. E. 411, 19 L. R. A. 594n. See also, Commercial Ins. Co. v. Robinson, 64 Ill. 265, 16 Am. Rep. 557.

[41] Heffron v. Kittanning Ins. Co., 132 Pa. St. 580, 20 Atl. 698, where the court said: "Careful examination of the question convinces me that the exception covered by this section is to be restricted to losses arising from explosions, rather than extended to the much broader ground of losses by fire originating from explosions."

[42] See where building falls from explosion and goods are injured by fire: Leonard v. Orient Ins. Co., 109 Fed. 286, 48 C. C. A. 369, 54 L. R. A. 706; Phenix Ins. Co. v. Leonard, 121 Fed. 1021, 57 C. C. A. 680; John Davis & Co. v. Insurance Co. of North America, 115 Mich. 382, 73 N. W. 393.

[43] German Fire Ins. Co. v. Roost, 55 Ohio St. 581, 45 N. E. 1097, 36 L. R. A. 236, 60 Am. St. 711. See also, Everett v. Assurance Co., 115 E. C. L. 126; Hall & Hawkins v. National

there was a provision excluding liability for loss by explosion, and the loss was caused by fire, or as here, by lightning, taking effect in a distant building, and the damage being wrought to the insured property by an explosion, produced by fire or lightning without either of the latter agencies coming in contact with the property." The standard form provides for liability for damages occasioned by fire which results from explosion, and exempts the insurer from liability for damages caused by the explosion itself. The loss by explosion must be distinguished from that caused by the subsequent fire.[44] Under this provision the insurer is liable for the loss where the explosion is the result of an antecedent fire.[45] Damage to property resulting immediately from an explosion of gunpowder, caused by the application of fire, is within the provision of the policy which exempts the company from liability for loss caused by explosion unless fire ensues, and then only for loss or damage by fire.[46]

§ 4228. **Lightning.**—Under the standard policy it seems that a company is not responsible for damages caused by lightning when not assumed by specific agreement attached to or indorsed on the policy, unless fire results from the lightning, and then the responsibility is limited to the damages occasioned by the fire. Under a policy which insured a building generally against loss by fire, which contained a separate clause declaring the insurer should be liable for fire by lightning, the company was held not liable where it appeared that the building was struck by lightning and destroyed but there was no ignition or combustion.[47] And,

Fire Ins. Co., 115 Tenn. 513, 92 S. W. 402, 112 Am. St. 870.

[44] Briggs v. North British &c. Ins. Co., 66 Barb. (N. Y.) 325, affd. 53 N. Y. 446; Briggs v. North American &c. Ins. Co., 53 N. Y. 446. See generally, Transatlantic Fire Ins. Co. v. Dorsey, 56 Md. 70, 40 Am. Rep. 403; Smiley v. Citizens' Fire &c. Ins. Co., 14 W. Va. 33; Waldeck v. Springfield &c. Ins. Co., 53 Wis. 129, 10 N. W. 88, 56 Wis. 96, 14 N. W. 1.

[45] Transatlantic Ins. Co. v. Dorsey, 56 Md. 70, 40 Am. Rep. 403; Dows v. Faneuil Hall Ins. Co., 127 Mass. 346, 34 Am. Rep. 384, and note; Wheeler v. Phenix Ins. Co., 203 N. Y. 283, 96 N. E. 452, Ann. Cas. 1913A, 1297; Washburn v. Miami Valley Ins. Co., 2 Flip. (U. S.) 664, 2 Fed. 633. See Waters v. Merchants' Louisville Ins. Co., 11 Pet. (U. S.) 213, 9 L. ed. 691. But compare, Phœnix Ins. Co. v. Greer, 61 Ark. 509, 33 S. W. 840.

[46] Phœnix Ins. Co. v. Greer, 61 Ark. 509, 33 S. W. 840. See Mitchell v. Potomac Ins. Co., 183 U. S. 42, 46 L. ed. 74, 22 Sup. Ct. 22; Vorse v. Jersey Plate Glass Ins. Co., 119 Iowa 555, 93 N. W. 569, 60 L. R. A. 838, 97 Am. St. 330; Home Lodge Assn. v. Queen Ins. Co., 21 S. Dak. 165, 110 N. W. 778.

[47] For an elaborate discussion of the subject of liability for damage caused by lightning, see Babcock v.

where lightning struck a powder magazine across the street and caused an explosion which wrecked the insured property, the explosion and not the lightning was held to be the direct cause of the loss.[48]

§ 4229. **Fall of building.**—Relative to this clause it has been said:[49] "The manifest intent and purpose of the clause inserted in each of these policies, by which it is provided that, 'if the building shall fall except as the result of a fire, all insurance by this corporation on it or its contents shall immediately cease and determine,' is that the insurance, whether upon the building or upon its contents, should continue only while the building remains standing as a building, and shall cease when the building has fallen and become a ruin. When substantially all the floors and the roof of a building used as a storehouse fall, leaving nothing standing but the outer walls and perhaps a staircase, or an elevator, the building must be deemed to have fallen. When several buildings or the goods therein are insured by the same policy, the fall of one building terminates the policy, at least on that building or its contents." Before the company can be held liable it must appear that the building fell as a result of fire, not that the fire resulted from the fall of the building.[50] But, in many cases,

Montgomery &c. Ins. Co., 4 N. Y. 326. See also, Kenniston v. Merrimack County Mut. Ins. Co., 14 N. H. 341, 40 Am. Dec. 193; Beakes v. Phœnix Ins. Co., 143 N. Y. 402, 38 N. E. 453, 26 L. R. A. 267. But compare Spensley v. Lancashire Ins. Co., 54 Wis. 433, 11 N. W. 894, where the insurance was against "any loss or damage caused by lightning." Where the policy indemnified against loss from any accidental damage "excepting only damage or destruction by fire or lightning," it was held to cover damage resulting from a "sudden rise of water" or a flood. Hey v. Guarantors' Liability Indemnity Co., 181 Pa. St. 220, 37 Atl. 402, 59 Am. St. 644.

[48] German Fire Ins. Co. v. Roost, 55 Ohio St. 581, 45 N. E. 1097, 36 L. R. A. 236, 60 Am. St. 711.

[49] Huck v. Globe Ins. Co., 127 Mass. 306, 34 Am. Rep. 373.

[50] Transatlantic Fire Ins. Co. v. Dorsey, 56 Md. 70, 40 Am. Rep. 403. See also, Nichols v. Sun Mut. Ins. Co., 71 Miss. 326, 14 So. 263, 42 Am. St. 465, and compare Fountain v. Connecticut Fire Ins. Co., 158 Cal. 760, 112 Pac. 546, 139 Am. St. 214. But the company was held liable where only about three-fourths of the building fell, and what was left was afterward destroyed by fire which was communicated from the adjoining building. Breuner v. Liverpool &c. Ins. Co., 51 Cal. 101, 21 Am. Rep. 703. See also, Clayburgh v. Agricultural Ins. Co., 155 Cal. 708, 102 Pac. 812; Ermentrout v. Girard &c. Ins. Co., 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. 481; London & L. Fire Ins. Co. v. Crunk, 91 Tenn. 376, 23 S. W. 140. See also, Fireman's Fund Ins. Co. v. Congregation Rodeph Sholom, 80 Ill. 558, where it was held that the building had not fallen when by a windstorm it had been moved partly from the posts upon

the company has been held liable where the fire commenced before the fall.[51] A policy covered loss or damage on a building by fire originating from any cause, with the reservation that "if a building shall fall except as a result of a fire, all insurance by the company on it or its contents shall immediately cease and determine." The insured claimed that the explosion was caused by an antecedent fire, and the company that the explosion was the destroying agency, followed by fire. It was held that, whether ignition of the explosive substance was by a negligent or unlawful fire, or by an innocent fire not having in itself a destructive tendency, the scientific fact must be recognized that such explosions are preceded by ignition and accompanied by intense heat, and that it could not be said as a matter of law that the loss was not covered by the policy.[52] But it has been held that there is no liability for loss in case the building is blown down by wind before the fire has reached the insured goods, although the building is on fire at the time.[53] Where the policy describes the premises as a "two-story and basement, frame, gravel roof, iron-clad building, foundations and all permanent fixtures," and provides that if the building or any part thereof fall except as a result of fire, all insurance shall immediately cease, the insured cannot recover for the destruction of the basement by fire after the building was blown down by a wind storm, on the theory that the basement or any part of it did not fall except as a result of fire.[54] Under this provision there can be no recovery where fire breaks out in the debris after the collapse of the structure.[55] In

which it had rested and so far rendered unfit for occupancy that the most of the furniture had been removed. In Huck v. Globe Ins. Co., 127 Mass. 306, 34 Am. Rep. 373, it was held that the building had fallen; since nothing remained standing but the outer walls, and an elevator five feet square in one corner. See also, Foster v. Home Ins. Co., 143 Fed. 307, 74 C. C. A. 445; Nelson v. Traders' Ins. Co. of Chicago, 181 N. Y. 472, 74 N. E. 421; Home Mut. Ins. Co. v. Tomkies, 96 Tex. 187, 71 S. W. 814.

[51] Davis v. Connecticut Fire Ins. Co., 158 Cal. 766, 112 Pac. 549, 32 L. R. A. (N. S.) 604n; Ermentrout v. Girard Fire &c. Ins. Co., 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. 481; London & L. Fire Ins. Co. v. Crunk, 91 Tenn. 376, 23 S. W. 140.

[52] Renshaw v. Fireman's Ins. Co. of Baltimore, 33 Mo. App. 394.

[53] Fred J. Kiesel & Co. v. Sun Ins. Office, 88 Fed. 243, 31 C. C. A. 515.

[54] Teutonia Ins. Co. v. Beard, 74 Ill. App. 496. See also, Teutonia Ins. Co. v. Bonner, 81 Ill. App. 231.

[55] Huck v. Globe Ins. Co., 127 Mass. 306, 34 Am. Rep. 373; Nave v. Home &c. Ins. Co., 37 Mo. 430, 90 Am. Dec. 394; Liverpool & London & Globe Ins. Co. v. Ende, 65 Tex. 118.

a case where, after the fall of a part of the building, the remainder was destroyed by fire, the court said:[56] "We cannot say that the fall of two-fifths of the icehouse leaving the other three separate compartments standing intact, was a fall of the building within the terms of the condition. Otherwise there is no halting point short of the proposition, that the fall of any substantial part of the building puts the condition in operation, and terminates the risk."

§ 4230. Earthquake—City ordinance preventing repair.—A provision against liability for loss by earthquake is also contained in some policies, along with the explosion and lightning provision, and the company has generally been held liable for loss caused by fire which in turn was occasioned by an earthquake,[57] but this may depend upon the language of the provision in the particular policy in question.[58] It has been held that the parties are presumed to contract in view of city ordinances, and where a building is partly destroyed, and the application to repair is refused by the city authorities, it will be deemed a total loss,[59] but the last provision of the clause under consideration limits the loss, in ordinary cases, to the actual value destroyed by fire.

§ 4231. Excluded property—Exceptions and limitations.—Certain articles are expressly excepted from the contract of insurance, and the only questions left are those of construction.[60]

[56] Security Ins. Co. v. Mette, 27 Ill. App. 324. See also, Breuner v. Liverpool &c. Ins. Co., 51 Cal. 101, 21 Am. Rep. 703; Leonard v. Orient Ins. Co., 109 Fed. 286, 48 C. C. A. 369, 54 L. R. A. 706.

[57] Pacific Heating &c. Co. v. Williamsburgh City Fire Ins. Co., 158 Cal. 367, 111 Pac. 4; Davis v. Connecticut Fire Ins. Co., 158 Cal. 766, 112 Pac. 549, 32 L. R. A. (N. S.) 604n; Williamsburgh City Fire Ins. Co. v. Willard, 164 Fed. 404, 90 C. C. A. 392, 21 L. R. A. (N. S.) 103n; Commercial Union Assur. Co. v. Pacific Union Club, 169 Fed. 776, 95 C. C. A. 242; McEvoy v. Security Fire Ins. Co., 110 Md. 275, 73 Atl. 157, 22 L. R. A. (N. S.) 964, 132 Am. St. 428n.

[58] See Fountain v. Connecticut Fire Ins. Co., 158 Cal. 760, 112 Pac. 546, 139 Am. St. 214; Henry Hilp Tailoring Co. v. Williamsburgh City Fire Ins. Co., 157 Fed. 285; Richmond Coal Co. v. Commercial Union Assur. Co., 159 Fed. 985. Compare also, Baker & Hamilton v. Williamsburgh City Fire Ins. Co., 157 Fed. 280; Board of Education v. Alliance Ins. Co., 37 Ins. L. J. 530.

[59] Hamburg-Bremen Fire Ins. Co. v. Garlington, 66 Tex. 103, 18 S. W. 337, 59 Am. Rep. 613.

[60] "This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes or securities, nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns,

After it appears that there has been a loss by fire, the burden has been held to be upon the insurer to show that certain articles fall within the exceptions.[61] If the articles thus excepted are included in the description of the property insured, the written provision controls. Thus, "patterns" are excluded by this clause, but under a policy insuring "fixed and movable machinery, engine, lathes and tools," wooden patterns which from their size and shape admitted of being managed and applied by the hands of one man were held covered.[62] Furniture and movables are not "fixtures,"[63] but it may be shown that there is a well-settled custom by which the words "store fixtures" in a policy are understood to include tools, furniture and all movable articles in shops which are necessary and used in the ordinary course of trade.[64] The words "store fixtures" in a policy insuring buildings and additions occupied as stores and shoe factory should be given their popular meaning of fixed furniture peculiarly adapted to a room or store. They were thus held not to refer to the fixtures of a factory, and not to include partitions, doors, windows, boiler fixtures, elevator, machinery, steam heating apparatus, gas-piping and speaking tubes.[65] Where the exception was of "fences and other yard fixtures, sidewalks, store furniture and fixtures," it was held that the shelving in a house and office inclosed in a railing in one corner of the interior were store fixtures within the meaning of the exception.[66] Furniture stored in a hotel to

pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; * * * nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described." This provision is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Wisconsin, Louisiana, Iowa, North Dakota, South Dakota, Michigan and North Carolina. The following provision appears in the standard policies of Massachusetts, Minnesota, Maine and New Hampshire: "Bills of exchange, notes, accounts, evidences and securities of property of every kind, books, wearing apparel, plate, money, jewels, medals, patterns, models, scientific cabinets and collections, paintings, sculpture and curiosities are not included in said insured property, unless specially mentioned." The articles enumerated differ somewhat in different standard forms.

[61] Portsmouth Ins. Co. v. Reynold's Admx., 32 Grat. (Va.) 613.

[62] Lovewell v. Westchester Fire Ins. Co., 124 Mass. 418, 26 Am. Rep. 671.

[63] Holmes v. Charlestown Mut. Fire Ins. Co., 10 Metc. (Mass.) 211, 43 Am. Dec. 428.

[64] Whitmarsh v. Conway Fire Ins. Co., 16 Gray (Mass.) 359, 77 Am. Dec. 414.

[65] Thurston v. Union Ins. Co., 17 Fed. 127.

[66] Commercial Fire Ins. Co. v. Allen, 80 Ala. 571, 1 So. 202.

be used in the business of the hotel is not within this exception.[67] The word "storage" means safe custody, and as here used applies only to the storing of merchandise for trade purposes when storing is the principal object of the deposit.[68] Thus, it does not apply to goods kept merely for sale, raw material kept on hand for the purpose of being manufactured,[69] or to goods temporarily left in a storeroom.[70] Silver forks and tea and table spoons are not "plate," and are not excluded by a clause excluding "plate" and other articles.[71]

§ 4232. **Plate glass, frescoes and decorations.**—These articles are not excepted from the contract of insurance, as this clause merely provides that in case of loss the amount of recovery shall not be any greater proportion of their value than the policy bears to the whole insurance on the building described.[72]

[67] Continental Ins. Co. v. Pruitt, 65 Tex. 125; Home Ins. Co. v. Gwathmey, 82 Va. 923, 1 S. E. 209. As to plate and paintings, see Moadinger v. Mechanics' Fire Ins. Co., 2 Hall (N. Y.) 490.

[68] New York Equitable Ins. Co. v. Langdon, 6 Wend. (N. Y.) 623.

[69] Vogel v. People's Mut. Life Ins. Co., 9 Gray (Mass.) 23.

[70] Hynds v. Schenectady County Mut. Ins. Co., 11 N. Y. 554.

[71] Hanover Fire Ins. Co. v. Mannasson, 29 Mich. 316.

[72] Moadinger v. Mechanics' Fire Ins. Co., 2 Hall (N. Y.) 490.

CHAPTER CXXVI.

PROVISIONS OF THE STANDARD POLICY RELATING TO INTEREST AND CARE OF PROPERTY.

§ 4240. Other insurance.
4241. Definition—Different interests.
4242. Whether valid or invalid.
4243. Where the words "valid or invalid" do not appear.
4244. Consent of the company—Waiver.
4245. Policy covering part of the property.
4246. Operation of manufacturing establishment.
4247. Running over hours.
4248. Increase of risk.
4249. Changes in adjoining property.
4250. Effect of increase of hazard.
4251. Repairs—Employment of mechanics.
4252. Ownership.
4253. Encumbrances.
4254. Illustrations.
4255. Illustrations of breach of condition.
4256. Building on leased ground.
4257. Encumbrance by chattel mortgage.
4258. Foreclosure proceedings.
4259. Generation of illuminating gas.
4260. Change in interest, title or possession—Scope of provision.
4261. Transfer of part interest.
4262. Executory contract of sale.
4263. Mortgages on premises.
4264. Defeasible conveyances.
4265. Invalid conveyances or encumbrances.
4266. Sale with purchase-money mortgage.
4267. Conveyance to the wife or insured.
§ 4268. Transfers by and between partners.
4269. Transfers between joint owners.
4270. Legal process or judgment.
4271. By judgment.
4272. By partition.
4273. Assignment and bankruptcy proceedings.
4274. Transfer by death.
4275. Change of possession.
4276. Lease of the property.
4277. Assignment of policy.
4278. Use of property—Prohibited articles.
4279. Prohibited articles.
4280. Vacancy—In general.
4281. Construction.
4282. "Vacant" and "unoccupied" not synonymous.
4283. Construction when applied to dwelling house.
4284. Building—Contents—Vacancy.
4285. Illustrations of construction of this provision.
4286. Building in process of construction.
4287. Authorized change of location.
4288. Renewal of contract—In general.
4289. Illustrations.
4290. Reformation of the policy.
4291. Cancelation of policy—In general.
4292. Authority of agent to cancel.
4293. Return of premium.
4294. What amounts to a cancelation.
4295. Waiver—Limitations upon power to waive.

§ 4240. **Other insurance.**—Standard forms of policies contain also provisions relating to the interest in the property and the care of the property and providing that the policy shall be void

if there is other insurance or contract therefor, unless consented to, which consent is usually required to be indorsed on the policy.[1] The provision in regard to other insurance is reasonable and valid,[2] and has for its object the prevention of an increase of the moral hazard without knowledge of the company.[3] "Those insurance policies which provide for the nullity of contract in event

[1] The most common clause is as follows: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering, or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee-simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; * * * or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein." This clause, at least so far as it relates to other insurance, is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Wisconsin, Louisiana, Iowa, North Dakota, South Dakota, Michigan, and North Carolina. The following provision is found in the standard policies of Massachusetts, Minnesota and Maine: "This policy shall be void * * * if the assured now has or shall hereafter make any other insurance on the said property without the assent in writing or in print of the company." The New Hampshire policy provides that: "The policy shall be void * * * if the insured, at the time of any loss, has any other insurance on said property, without the assent in writing or in print of the company." It is held in a recent case that a provision in or indorsed on a policy that "the insured may obtain $—— additional insurance" does not permit unlimited additional insurance, but, on account of the blank is without force of any kind, the same as if the clause had been entirely omitted. Fountain v. Standard Fire Ins. Co. (Iowa), 134 N. W. 1090. See also, Miller v. St. Paul Fire & Marine Ins. Co., 26 S. Dak. 454, 128 N. W. 609.

[2] Commercial Union Assur. Co. v. Norwood, 57 Kans. 610, 47 Pac. 529; [citing Union Nat. Bank v. German Ins. Co., 71 Fed. 473, 18 C. C. A. 203; Funke v. Minnesota Farmers' Mut. Fire Ins. Assn., 29 Minn. 347, 13 N. W. 164, 43 Am. Rep. 216; Allen v. German &c. Ins. Co., 123 N. Y. 6, 25 N. E. 309; Bard v. Penn. &c. Ins. Co., 153 Pa. St. 257, 25 Atl. 1124, 34 Am. St. 704]; Barnard v. National Fire Ins. Co., 27 Mo. App. 26; Northern Assur. Co. v. Grand View Bldg. Assn., 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. 133. In Georgia Home Ins. Co. v. Rosenfield, 95 Fed. 358, 37 C. C. A. 96, it was held that the fact that a short term policy taken in violation of this provision expires before the loss will not reinstate the policy.

[3] Queen Ins. Co. v. Young, 86 Ala. 424, 5 So. 116, 11 Am. St. 51; O'Leary v. Merchants' & Bankers' Mut. Ins. Co., 100 Iowa 173, 66 N. W. 175, 69 N. W. 420, 62 Am. St. 555. It has been intimated that concealment of the existence of other insurance in no way tends to show fraud. German &c. Ins. Co. v. Paul, 2 Ind. Ter. 625, 53 S. W. 442.

of other insurance being effected upon the same property, without the assent of the company, have never been held to be absolutely null when the contract was all regular upon its face, but merely voidable at the option of the insurer. The object of such clauses in an insurance policy is to prevent overinsurance, and the consequent temptation to burn, or lessen the precautions against fire."[4] In a Wisconsin case the court said:[5] "There is no pretense of any such agreement indorsed thereon, or otherwise, and such prior insurance and chattel mortgage are admitted in the complaint. Such being the facts, it follows, from the authorities cited, that the policy was void in its inception, unless the condition was waived by the company." It has also been held that a provision requiring the insured to give notice of "any other insurance effected" refers to prior as well as subsequent insurance,[6] and that under such a provision failure to notify the soliciting agent of prior insurance avoids the insurance even though the applicant was ignorant thereof.[7]

§ 4241. **Definition — Different interests.** — The words "other," "double" and "overinsurance" are used indiscriminately to describe the obtaining of two or more policies upon the same interest, against the same risk and for the benefit of the same person.[8] Although it must be upon the same interest it need not be in the same name.[9] The provision is not violated by the exist-

[4] Saville v. Ætna Ins. Co., 8 Mont. 419, 20 Pac. 646, 3 L. R. A. 542. See also, Stevenson v. Phœnix Ins. Co., 83 Ky. 7, 6 Ky. L. 196, 4 Am. St. 120.

[5] Wilcox v. Continental Ins. Co., 85 Wis. 193, 55 N. W. 188; O'Brien v. Home Ins. Co., 79 Wis. 399, 48 N. W. 714; Bosworth v. Merchants' Fire Ins. Co., 80 Wis. 393, 49 N. W. 750. Where a policy is issued upon property on which there is already $3,000 insurance and contains the words "total concurrent insurance $4,000," the insured may take $1,000 additional insurance without the consent of the company. East Texas Fire Ins. Co. v. Blum, 76 Tex. 653, 13 S. W. 572.

[6] Warwick v. Monmouth County Mut. Fire Ins. Co., 44 N. J. L. 83, 43 Am. Rep. 343. But see, where the provision is only as to "insurance hereafter obtained" and the prior insurance policy has become void on its face, Stevens v. Citizens' Ins. Co., 69 Iowa 658, 29 N. W. 769.

[7] Phœnix Ins. Co. v. Copeland, 86 Ala. 551, 6 So. 143, 4 L. R. A. 848. As to what is sufficient notice or knowledge, see Union Ins. Co. v. Murphy, 1 Sad. (Pa.) 570, 4 Atl. 352; New Orleans Ins. Assn. v. Griffin, 66 Tex. 232, 18 S. W. 505.

[8] Ætna Fire Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90; Lebanon &c. Ins. Co. v. Kepler, 106 Pa. St. 28; Clarke v. Western Assur. Co., 146 Pa. St. 561, 23 Atl. 248, 15 L. R. A. 127, 28 Am. St. 821; California Ins. Co. v. Union Compress Co., 133 U. S. 387, 33 L. ed. 730, 10 Sup. Ct. 365.

[9] Godin v. London Assur. Co., 1

ence of a prior policy in which the insured has no interest and from which he can receive no benefit.[10] An insurance by a partner of his undivided interest is not a breach of the condition.[11] It follows that different interests may be insured;[12] such as that of the owner of the land and a person holding under a contract for a deed,[13] or a mortgagor and mortgagee.[14] But where the policy is in the name of the mortgagor, and is made payable to the mortgagee as his interest may appear, a subsequent policy obtained by the mortgagor is within the provision.[15] A mortgagee to whom loss in a policy is made payable, and who accepts and retains a policy which shows on its face that the mortgagor is insured, cannot say that he is not affected by the imputed knowledge of the mortgagor as to the issuance of the policy, for the purpose of avoiding the effect of other insurance procured by the latter.[16] But invalid insurance taken by the owner of the property in violation of this provision cannot be considered in determining the right of the mortgagee when the policy provides that his interest shall not be invalidated by any act of the owner.[17] Contemporaneous insurance is within this provision.[18] So, a provision is broken by a prior policy existing in the name of the joint owner of the property.[19]

Burr. 489; Perkins v. New England Marine Ins. Co., 12 Mass. 214; DeWitt v. Agricultural Ins. Co., 157 N. Y. 353, 51 N. E. 977.

[10] Copeland v. Phœnix Ins. Co., 96 Ala. 615, 11 So. 746, 38 Am. St. 134.

[11] Hall v. Concordia Fire Ins. Co., 90 Mich. 403, 51 N. W. 524.

[12] Nussbaum v. Northern Ins. Co., 37 Fed. 524, 1 L. R. A. 704; Mitchell v. Home Ins. Co., 32 Iowa 421; Herkimer v. Rice, 27 N. Y. 163; Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527, 23 L. ed. 868. See also, City Five Cents Sav. Bank v. Pennsylvania Ins. Co., 122 Mass. 165.

[13] Ætna Fire Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385.

[14] Wheeler v. Watertown Fire Ins. Co., 131 Mass. 1; Guest v. New Hampshire Fire Ins. Co., 66 Mich. 98, 33 N. W. 31. See also, Woodbury Sav. Bank & Bldg. Assn. v. Charter Oak Fire & Marine Ins. Co., 31 Conn. 517.

[15] Sias v. Roger Williams Ins. Co., 8 Fed. 187; Gillett v. Liverpool &c. Ins. Co., 73 Wis. 203, 41 N. W. 78, 9 Am. St. 784.

[16] Holbrook v. Baloise Fire Ins. Co., 117 Cal. 561, 49 Pac. 555.

[17] Eddy v. London Assur. Corp., 143 N. Y. 311, 38 N. E. 307, 25 L. R. A. 686.

[18] United Firemen's Ins. Co. v. Thomas, 92 Fed. 127, 34 C. C. A. 240, 47 L. R. A. 450. A provision against other insurance in the same company was held to be waived in Monahan v. Mutual Life Ins. Co., 103 Md. 145, 63 Atl. 211, 5 L. R. A. (N. S.) 759, by receipt of premiums on the new policy, the company being held chargeable with knowledge of its own records showing the prior insurance. See also, Emlaw v. Travelers' Ins. Co., 108 Mich. 554, 66 N. W. 469. But compare Wilkinson v. Travelers' Ins. Co. (Tex.), 72 S. W. 1016.

[19] Horridge v. Dwelling-House Ins. Co., 75 Iowa 374, 39 N. W. 648. In Pitney v. Glens Falls Ins. Co., 65 N.

The insured is not affected by a subsequent policy procured by a stranger without his knowledge and consent,[20] although he may become bound by ratifying such acts or accepting benefits under the insurance. Thus, previous insurance taken out by an unauthorized agent, and of which the insured had no knowledge until after the loss, does not avoid the policy.[21] But where, without the knowledge of the insured, his wife procured additional insurance upon the property covered by the policy, and after the loss he received the benefits of the additional insurance, it was held that by thus accepting the benefits of the unauthorized act he ratified the same.[22]

§ 4242. Whether valid or invalid.—These words were added for the purpose of avoiding controversy as to the effect of subsequent insurance under a policy which contains a provision which renders it void or voidable by the existence of another policy. Such a provision has been generally sustained, although some courts have attempted to construe it away.[23] Thus, in New Hampshire, it was held that as a subsequent void policy is a mere nullity it can have no effect upon existing rights.[24] So, in Indiana, it was held that there was a breach only when it was necessary to offer extrinsic evidence to show that the subsequent policy was invalid.[25] Where the same conditions are contained in a policy, it is held in Michigan[26] that the subsequent policy is

Y. 6, it was held that where property owned in common was insured, a subsequent policy effected by one of the owners without mentioning the joint ownership was other insurance.

[20] Carpenter v. Providence Washington Ins. Co., 16 Pet. (U. S.) 495, 10 L. ed. 1044. See Phœnix Ins. Co. v. Michigan Southern & Northern I. R. Co., 28 Ohio St. 69.

[21] Cowart v. Capital City Ins. Co., 114 Ala. 356, 22 So. 574; Hughes v. Insurance Co. of North America, 40 Nebr. 626, 59 N. W. 112; McKelvy v. German-American Ins. Co., 161 Pa. St. 279, 28 Atl. 1115.

[22] German Ins. Co. v. Emporia Mut. Loan &c. Assn., 9 Kans. App. 803, 59 Pac. 1092.

[23] Phœnix Ins. Co. v. Copeland, 90 Ala. 386, 8 So. 48; Bigler v. New York Ins. Co., 22 N. Y. 402; Sugg v. Hartford Fire Ins. Co., 98 N. Car. 143, 3 S. E. 732.

[24] Gee v. Cheshire County Mut. Fire Ins. Co., 55 N. H. 65, 20 Am. Rep. 171.

[25] Phœnix Ins. Co. v. Lamar, 106 Ind. 513, 7 N. E. 241, 55 Am. Rep. 764.

[26] Keyser v. Hartford Fire Ins. Co., 66 Mich. 664, 33 N. W. 756. It is generally so held where extraneous evidence is necessary to avoid the prior policy. Stephenson v. Phœnix Ins. Co., 83 Ky. 7, 6 Ky. L. 196, 4 Am. St. 120; Carpenter v. Providence Washington Ins. Co., 16 Pet. (U. S.) 495 10 L. ed. 1044.

void, and in North Carolina[27] that it affects the prior policy. In Massachusetts it was held that in an action on a policy containing a condition against other insurance, the fact that the other policies were issued by other companies either before or after the one in suit, without the consent of the company, or that suit is pending thereon, is no defense where such policies contain the same provisions. Each policy contained a rider, similar to that on the policy on which the action was brought, which contained the words: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."[28] "It is clear," said the court, "under our decisions, that neither of these policies affords any defense to the action. If the policy of the Citizens' Company was issued before the policy in suit, it became void by its terms when the defendant issued its policy. * * * If it was issued subsequently, as was the policy of the Security Company, for the same reason, neither it nor the policy of the latter company took effect." And, in an Iowa case, where the prior policy had become void by breach of condition before the issuance of the policy in question, which contained the "valid or invalid" clause, it was held that there was no breach of condition.[29]

§ 4243. **Where the words "valid or invalid" do not appear.** —There has been much controversy over the effect of subsequent insurance which, by its terms, is rendered void or voidable by the existence of prior insurance. The importance of cases discussing this question has, however, been considerably decreased by the adoption of the standard form. In a case in Maryland it was said:[30] "The doctrine laid down by the highest tribunals of Massachusetts, Pennsylvania and other states is, that the subsequent insurance being invalid at the time of the loss, by reason of the breach of the condition therein, the prior insurance is good

[27] Sugg v. Hartford Fire Ins. Co., 98 N. Car. 143, 3 S. E. 732.

[28] Hayes v. Milford Mut. Fire Ins. Co., 170 Mass. 492, 49 N. E. 754, citing earlier cases.

[29] Stevens v. Citizens' Ins. Co., 69 Iowa 658, 29 N. W. 769.

[30] Sweeting v. Mutual Fire Ins. Co., 83 Md. 63, 34 Atl. 826, 32 L. R. A. 570.

and the first underwriter is liable on the policy issued by it.[31] * * * On the other hand, it has been held elsewhere, that a subsequent policy, whether legally enforcible or not, or whether voidable on its face or voidable for extrinsic matter, works a forfeiture of the prior policy.[32] * * * There is still an intermediate view taken by the Supreme Court of Iowa[33] * * * to the effect that the question of the validity of the prior policy turns upon whether the subsequent policy has in fact been avoided. If the second policy is recognized by the insurer issuing it to be a valid policy any breach of condition being waived, this makes it a valid insurance and avoids the first policy; but if the subsequent policy has been rescinded for condition broken, there is no other insurance so as to invalidate the prior policy. The obvious and insuperable objection to this latter view lies in the fact that it makes the validity of the contract between the parties under the first policy depend, not upon their own agreement, nor the effect of

[31] Rising Sun Ins. Co. v. Slaughter, 20 Ind. 520 (explained in American Ins. Co. v. Replogle, 114 Ind. 1, 15 N. E. 810, affd. 132 Ind. 360, 31 N. E. 947, where the question as to whether the policy constitutes other insurance is made to depend on its being valid on its face and requiring extrinsic evidence to avoid it or void on its face); Philbrook v. New England Mut. Fire Ins. Co., 37 Maine 137; Lindley v. Union Farmers' &c. Ins. Co., 65 Maine 368, 20 Am. Rep. 701; Thomas v. Builders' &c. Ins. Co., 119 Mass. 121, 20 Am. Rep. 317; Jackson v. Massachusetts Mut. Fire Ins. Co., 23 Pick. (Mass.) 418, 34 Am. Dec. 69; Clark v. New England Mut. Fire Ins. Co., 6 Cush. (Mass.) 342, 53 Am. Dec. 44; Hardy v. Union Mut. Fire Ins. Co., 4 Allen (Mass.) 217; Gale v. Belknap County Ins. Co., 41 N. H. 170; Gee v. Cheshire County Mut. Fire Ins. Co., 55 N. H. 65, 20 Am. Rep. 171; Jersey City Ins. Co. v. Nichol, 35 N. J. Eq. 291, 40 Am. Rep. 625; Schenck v. Mercer County Mut. Fire Ins. Co., 24 N. J. L. 447; Firemen's Ins. Co. v. Holt, 35 Ohio St. 189, 35 Am. Rep. 601; Knight v. Eureka Fire & Marine Ins. Co., 26 Ohio St. 664, 20 Am. Rep. 778; Stacey v. Franklin Fire Ins. Co., 2 Watts & S. (Pa.) 506; Allison v. Phœnix Ins. Co., 3 Dill. (U. S.) 480, Fed. Cas. No. 252. In St. Paul Fire & Marine Ins. Co. v. Knickerbocker Steam Towage Co., 93 Fed. 931, 36 C. C. A. 19, it was held that a provision making the policy void upon taking other insurance, so that the entire amount on the policy shall exceed a certain sum, is not violated by additional insurance to be valid only in case of deficiency of the prior policies below the amount so named, although the combined face value of the policies exceeds the amount so limited.

[32] Lackey v. Georgia Home Ins. Co., 42 Ga. 456; Stevenson v. Phœnix Ins. Co., 83 Ky. 7, 6 Ky. L. 196, 4 Am. St. 120; Allen v. Merchants' &c. Ins. Co., 30 La. Ann. 1386, 31 Am. Rep. 243; Funke v. Minnesota Farmers' Mut. Fire Ins. Assn., 29 Minn. 347, 13 N. W. 164, 43 Am. Rep. 216; Bigler v. New York &c. Ins. Co., 22 N. Y. 402; Somerfield v. State Ins. Co., 8 Lea (Tenn.) 547, 41 Am. St. 662; Carpenter v. Providence Washington Ins. Co., 16 Pet. (U. S.) 495, 10 L. ed. 1044.

[33] Hubbard v. Hartford Fire Ins. Co., 33 Iowa 325, 11 Am. Rep. 125; Behrens v. Germania Fire Ins. Co., 64 Iowa 19, 19 N. W. 838.

that agreement, nor upon their own acts, or the acts of either of them, but upon what another person—the second underwriter—a stranger to the first contract, may voluntarily do with respect to affirming or repudiating a totally different and distinct contract of insurance, without the slightest reference to any judicial inquiry as to the validity or invalidity of the second policy, or its resultant legal effect upon the first." The court further said: "Giving to the words of the contract of insurance set forth in the first policy their obvious meaning, and bearing in mind that they do not, as do those used in the second policy, relate to or specifically designate invalid insurance, the only tenable conclusion is, that the intention of both the contracting parties was to strike down the first policy only on condition that the second was valid and binding. And this is the conclusion reached by the best considered cases. If the 'other insurance' does not mean such a contract of insurance as is legally enforcible, then no certain tests can be applied and we abandon all legal guides." So, in a case in Illinois,[34] it was held that there could be no existing insurance upon property within the meaning of this clause unless such insurance was valid and in full force and capable of being legally enforced in case of loss. Hence, if one takes a policy of insurance containing a provision that it shall be void in case of other insurance on the same property without the consent of the company indorsed on the policy, and at the same time the insured has another policy on the property not consented to by indorsement on the latter policy, this will render the last policy inoperative so long as the prior policy is in force, but the latter will attach and become operative on the expiration of the prior policy.

§ 4244. **Consent of the company—Waiver.**—By the terms of the provision under consideration, the consent of the company to other insurance must be obtained and indorsed upon the policy; hence a mere oral permission to the insured by the local agent who issued the policy to take out additional insurance is not binding upon the company and does not prevent a forfeiture, in the absence of some element of estoppel or waiver, where the policy contains a provision that no agent shall have power to waive any

[34] Germania Fire Ins. Co. v. Klewer, 129 Ill. 599. 22 N. E. 489.

provisions or conditions except by writing attached to the policy.[35] This provision has even been held effective against the act of the secretary and general agent of the company where there is no proof that he had authority to act for the company.[36] But it is usually a mere question of authority.[37] In one case, where additional insurance was obtained with the knowledge and consent of the agent who issued the policy, it was left to the jury to determine whether the consent of the company had been given.[38] Evidence that notice of additional insurance was mailed to the company, where its receipt is denied, has been held not sufficient to show compliance with a provision requiring that notice of all additional insurance shall be given to the company.[39]

A provision forbidding additional insurance is for the benefit of the company and may be waived by it.[40] The company is charged with knowledge of facts known to its agent at the time the policy is issued, and if the agent then knew of existing insurance the company is generally held estopped thereafter to claim a forfeiture for breach of condition against other insurance.[41] It has been held that the company is under an obligation to take some affirmative action after it learns of the violation of this condition against additional insurance, and that if it fails to do

[35] Lippman v. Ætna Ins. Co., 108 Ga. 391, 33 S. E. 897, 75 Am. St. 62; Hutchinson v. Western Ins. Co., 21 Mo. 97, 64 Am. Dec. 218; Carpenter v. Providence Washington Ins. Co., 16 Pet. (U. S.) 495, 10 L. ed. 1044; Northern Assur. Co. v. Grand View Bldg. Assn., 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. 133, revg. 101 Fed. 77, 41 C. C. A. 207. See also, Carleton v. Patrons' &c. Ins. Co. (Maine), 82 Atl. 649. Where the policy does not require the notice to be in writing, although it requires the consent of the company to be in writing, the notice may be by parol. Kenton Ins. Co. v. Shea, 6 Bush (Ky.) 174, 99 Am. Dec. 676.

[36] O'Leary v. Merchants' & Bankers' Mut. Ins. Co., 100 Iowa 173, 66 N. W. 175, 69 N. W. 420, 62 Am. St. 555.

[37] See Hartford Fire Ins. Co. v. Small, 66 Fed. 490, 14 C. C. A. 33; Cleaver v. Traders' Ins. Co., 71 Mich. 414, 39 N. W. 571, 15 Am. St. 275.

[38] Grubbs v. Virginia Fire &c. Ins. Co., 110 N. Car. 108, 14 S. E. 516.

[39] Fairfield Packing Co. v. Southern Mut. Ins. Co., 193 Pa. St. 184, 44 Atl. 317.

[40] Bigelow v. Granite &c. Ins. Co., 94 Maine 39, 46 Atl. 808; Kahn v. Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. 47.

[41] Strauss v. Phenix Ins. Co., 9 Colo. App. 386, 48 Pac. 822; Northern Assur. Co. v. Grand View Bldg. Assn., 101 Fed. 77, 41 C. C. A. 207 (but this case was reversed in 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. 133); Swain v. Macon Fire Ins. Co., 102 Ga. 96, 29 S. E. 147; Quigley v. St. Paul Title Insurance & Trust Co., 60 Minn. 275, 62 N. W. 287; Hackett v. Philadelphia Underwriters, 79 Mo. App. 16; McBryde v. South Carolina Mutual Ins. Co., 55 S. Car. 589, 33 S. E. 729, 74 Am. St. 769. See also, note to Gish v. Insurance Co. of N. A., in 13 L. R. A. (N. S.) 826; Leisen v. St. Paul Fire &c.

so within a reasonable time after notice it waives the stipulation.[42] But in a case where the policy also contained a clause authorizing the company to terminate at any time at its option by giving notice and refunding a ratable proportion of the premium, and there was evidence tending to show that notice of additional insurance was communicated to the company's agent at the time of or before the fire, the court said:[43] "The provision in the policy authorizing the company to terminate the contract at any time, at its option, bore no special relation to that concerning other insurance. By the plain terms of the policy, other insurance without the consent of this company would ipso facto avoid the contract; and in the case of a contract thus avoided, it would not be obligatory upon the insurer to repay any of the unearned premium; nor would he be required to give notice that he should insist upon and avail himself of the proper legal effect of the agreement. It required no affirmative act of election on the part of the company to make operative the clause avoiding the contract whenever the specified conditions should occur."

§ 4245. **Policy covering part of the property.**—By the weight of authority, where the contract is entire, subsequent insurance upon even a part of the property will defeat the entire policy. Thus, where a part of the insurance is apportioned to the building and a part to household goods and furniture therein, the taking of subsequent insurance upon the building alone has often been held to avoid the entire policy.[44] But in Penn-

Ins. Co., 20 N. Dak. 316, 127 N. W. 837, 30 L. R. A. (N. S.) 539. But compare Carleton v. Patrons' &c. Ins. Co. (Maine), 82 Atl. 649.

[42] Alabama State Mut. Assur. Co. v. Long &c. Co., 123 Ala. 667, 26 So. 655.

[43] Johnson v. American Fire Ins. Co., 41 Minn. 396, 43 N. W. 59. See also, Robinson v. Fire Assn., 63 Mich. 90, 29 N. W. 521.

[44] In Havens v. Home Ins. Co., 111 Ind. 90, 12 N. E. 137, 60 Am. Rep. 689, it is said: "In order therefore to give effect to the condition, according to the intent and purpose of the contract," said the court, "it follows necessarily that where the property covered by one policy, although consisting of separate items, appears to be so situate as to constitute substantially one risk, then even though separate amounts of insurance be apportioned to each separate item or class of property, if the consideration for the contract, and the risk, are both indivisible, the contract must be treated as entire nevertheless. To such a policy the principles governing entire and indivisible contracts are applicable, for the reason that the matter which renders the policy void as to part affects the risk of the insurer in respect to other items in the same manner as it affects those items in respect to which the contract is

sylvania it was held that where one policy covers a building and a subsequent policy in another company covers the building, machinery, shafting, etc., it is not a case of double insurance and not within the meaning of the clause.[45] So, where the first policy covered "electric lamps, shades, wires, and all other electric fixtures and appurtenances," and a subsequent policy covered household goods and "fixtures of every description," there was no apportionment of the risk between the different kinds of property insured, and it was held that there was not a case of double insurance.[46] In Iowa, under a policy which contained the words, "other concurrent insurance permitted," in the absence of any limitations in amount, it was held that the latter policy need not exactly concur in covering all of the period of the time of insurance.[47]

§ 4246. Operation of manufacturing establishment.— Where the subject of the insurance is a manufacturing establishment, and it is operated in whole or in part at night later than ten o'clock, or if it ceases to be operated for more than ten consecutive days without consent of the company indorsed on the policy,

avoided. In such a case the only effect of the apportioning of the amount of the insurance upon separate items of property specified in the policy is to limit the extent of the company's liability to some specified sum upon each item or class of property insured." Illinois Mut. Fire Ins. Co. v. Fix, 53 Ill. 151, 5 Am. Rep. 38; Carleton v. Patrons' &c. Ins. Co. (Maine), 82 Atl. 649; Liscom v. Boston Mut. F. Ins. Co., 9 Metc. (Mass.) 205; Pitney v. Glens Falls Ins. Co., 65 N. Y. 6; Phœnix Ins. Co. v. Michigan Southern & Northern I. R. Co., 28 Ohio St. 69; Quarrier v. Peabody Ins. Co., 10 W. Va. 507, 27 Am. Rep. 582. Compare also, Goorberg v. Western Assur. Co., 150 Cal. 510, 89 Pac. 130, 10 L. R. A. (N. S.) 876, and note, 119 Am. St. 246; Carleton v. Patrons &c. F. Ins. Co. (Me.), 82 Atl. 649; Parsons v. Lane, 97 Minn. 98, 106 N. W. 485, 4 L. R. A. (N. S.) 231, and note.

[45] Sloat v. Royal Ins. Co., 49 Pa. St. 14, 88 Am. Dec. 477.

[46] See 3 Joyce Ins., §§ 2472, 2473; Clarke v. Western Assur. Co., 146 Pa. St. 561, 23 Atl. 248, 15 L. R. A. 127, 28 Am. St. 821; Wicks v. Scottish Union & National Ins. Co., 107 Wis. 606, 83 N. W. 781.

[47] Washburn-Halligan Coffee Co. v. Merchants' Brick Mut. Fire Ins. Co., 110 Iowa 423, 81 N. W. 707, 80 Am. St. 311, where the court said: "The authorities determining when insurance is double throw little light on the question. Besides, these are in conflict; the Supreme Court of Pennsylvania holding that policies, in order to constitute double insurance, must cover identically the same property (Clarke v. Western Assur. Co., 146 Pa. St. 561, 23 Atl. 248, 15 L. R. A. 127, 28 Am. St. 821), while that of New York, in overruling an earlier case, has adjudged it double insurance if one policy includes only part of the property covered by the other (Ogden v. East River Ins. Co., 50 N. Y. 388, 10 Am. Rep. 492)."

the entire contract is rendered invalid.[48] It has been held that a breach of this condition renders the policy immediately void,[49] and the fact that a watchman is employed on the premises during the time so that there is no increase of risk, is immaterial.[50] Where the insured goods are exclusively personal property, such as machinery and merchandise, and the policy provides that if the property is "a manufacturing establishment" the nonoperation of the establishment will avoid the policy, such nonoperation will not avoid the policy on the machinery.[51] A description of the insured property as a distillery is not a representation that it is being operated as such.[52] This provision is not broken by a temporary suspension of business, as the contract must be construed in the light of the customary method of conducting a manufacturing establishment.[53] Thus, a policy upon a sawmill run by water is not invalidated by delays and interruptions incident to the business caused by low water, diminished custom, or derangement of machinery.[54] So, within this rule, the temporary cessation of the op-

[48] This provision is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Wisconsin, Louisiana, Iowa, North Dakota, South Dakota, Michigan and North Carolina. The policies of Massachusetts, Minnesota and Maine provide that: "This policy shall be void * * * if it (the subject of the insurance) be a manufacturing establishment, running in whole or in part extra time, except that such establishments may run in whole or in part extra hours not later than nine o'clock P. M., or if such establishments shall cease operation for more than thirty days without permission in writing indorsed hereon." The New Hampshire policy provides that: "This policy shall be void and inoperative during the existence or continuance of the acts or conditions of things stipulated against, as follows: * * * if it (the subject of the insurance) be a manufacturing establishment in which the works or machinery are operated more than the customary or legal working hours, or all night, without the written or printed assent of this company thereto; except that permission is hereby given to operate machinery extra hours, not later than 10 o'clock P. M., for the purpose of equalizing work, a competent man, other than the regular watchman, being kept in charge of those rooms in which shafting and belts are running, but where the machinery is not at work; or if such establishment shall cease operation for more than thirty days without permission in writing indorsed hereon."

[49] Cronin v. Fire Assn. of Philadelphia, 123 Mich. 277, 82 N. W. 45.

[50] Dover Glass Works Co. v. American Fire Ins. Co., 1 Marv. (Del.) 32, 29 Atl. 1039, 65 Am. St. 264.

[51] Phenix Ins. Co. v. Holcombe, 57 Nebr. 622, 78 N. W. 300, 73 Am. St. 532; Halpin v. Ætna Fire Ins. Co., 120 N. Y. 70, 23 N. E. 988, 8 L. R. A. 79.

[52] Louck v. Orient Ins. Co., 176 Pa. St. 638, 35 Atl. 247, 33 L. R. A. 712.

[53] Lebanon &c. Ins. Co. v. Leathers, 5 Sad. (Pa.) 226, 8 Atl. 424, 20 Wkly. Notes Cas. 107.

[54] Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19, 54 Am. Dec. 309; Luce v. Dorchester Mut. Fire Ins. Co., 105 Mass. 297, 7 Am. Rep. 522; Rosencrans v. North American Ins. Co., 66 Mo. App. 352; Whitney v. Black River Ins. Co., 72 N. Y.

eration of the machinery of a sawmill during the illness of the sawyer, the other business going on as usual, does not violate the condition.[55] And even the closing of a mill for forty-two days without notice to the insurers, occasioned by the want of logs, which are daily expected but detained by low water, will not avoid a policy conditioned to become void "if a mill or manufactory, it shall cease to be operated (unless shut down for repairs), without a notice to and consent of this company."[56] In another case, where the insurance was upon a tannery, it appeared that for some time prior to the fire the insured had not done any tanning in the shops connected with the property because of want of material, and he was negotiating with parties for hides and stocks, and had given orders, but they had not been filled when the fire occurred. But during all the time the property was occupied and used as a

117, 28 Am. Rep. 116. In one case the court defined the meaning of the words, "ceased to be operated," as follows: "'The operation of a large manufacturing establishment means doing everything necessary for its successful and profitable management. It would necessarily be the work of many hands, and the operation would be multiplied many fold. The duties of the many employés would be quite dissimilar and entirely independent of each other, but all necessary to either the profitable or successful operation of the factory. * * * The ceasing to perform any one thing, for the time being, of the many required to be done, would certainly not be to cease to operate the factory.' Any one might be temporarily suspended and yet the factory be said to be in successful operation. * * * The operating of an extensive factory does not mean it shall be kept employed in all its various departments every day; that is, all the time. * * * It may properly be closed down over Sundays and all legal holidays, or for any cause that a prudent manager of such an establishment would deem prudent and best for the interest of the owners. On the same principle, one department may be kept in operation and others cease temporarily. It might be, the fabrics manufactured might be in excess of the sales or the demands of the trade, and for that reason a prudent superintendent might deem it best to stop the spindles and the looms for a season, or sales might be in excess of the supplies, and for that reason no goods would be contracted for a time. Would any one say that such a partial stoppage would be a violation of the contract of insurance contained in the policy in suit? So narrow a construction would make the contract of no value to the assured, and to observe it would render the usual and ordinary management of such an establishment impracticable." It was further held that the temporary suspension of a large portion of the works was permissible within the terms of the contract. American Fire Ins. Co. v. Brighton Cotton Mfg. Co., 125 Ill. 131, 17 N. E. 771.

[55] Ladd v. Ætna Ins. Co., 147 N. Y. 478, 42 N. E. 197.

[56] City Planing & Shingle Mill Co. v. Merchants', &c. Mut. Fire Ins. Co., 72 Mich. 654, 40 N. W. 777, 16 Am. St. 552 and note. The court said: "It must mean a closing with the intention of ceasing operation, not a shutting down for a few days or weeks because of the happening of events incident to the conducting of a mill in that locality, and which might be reasonably expected." See also, note to Moore V. Phœnix Ins. Co., 10 Am. St. 390.

tannery, bark was purchased, prepared and placed in the sheds, liquors were kept in the vats ready for use, and the machinery and tools all remained on the premises. It was held that the mere temporary suspension of the business for the purpose of repairing and for the want of a supply of material was not "ceasing to operate the establishment" within the meaning of the policy.[57] But a sawmill which has stopped running for the winter is "shut down," although men are employed in and about the premises in shipping lumber.[58] Where the policy contained a condition that "should any mill insured in the company be shut down or remain idle, from any cause whatever, more than twenty days continuously," it should be void, it was held that shutting down for the purpose of making necessary repairs suspended the policy, as this language included and covered any and every cause that might have the effect of stopping the operation of the mill.[59] So, under the Massachusetts policy, which provides for forfeiture if the establishment ceases operation for more than thirty days, it was held that the stoppage of the machinery for four months and the discharge of the employés forfeited the policy on the building and machinery, although the company knew that it was usual thus to stop business in the dull season.[60] But it has been held that a manufacturing establishment had not ceased to be operated within the meaning of this provision where, after the operation of the machinery ceased, and while the premises were occupied by a foreman who was engaged in putting together and selling engines and other articles belonging to the estate, the policy was renewed at the request of the assignees for the benefit of the insured's creditors.[61]

§ 4247. **Running over hours.**—The provision which prohibits the operation of the establishment after ten o'clock at night without the consent of the company may, of course, be waived by the insurance company. Thus, an agent of a fire insurance com-

[57] American Fire Ins. Co. v. Brighton &c. Mfg. Co., 125 Ill. 131, 17 N. E. 771; Lebanon Mut. Ins. Co. v. Leathers, 5 Sad. (Pa.) 226, 8 Atl. 424, 20 Wkly. Notes Cas. 107.

[58] McKenzie v. Scottish Union & National Ins. Co., 112 Cal. 548, 44 Pac. 922.

[59] Brighton Mfg. Co. v. Reading Fire Ins. Co., 33 Fed. 232; Day v. Mill Owners' Mut. Fire Ins. Co., 70 Iowa 710, 29 N. W. 443.

[60] Stone v. Howard Ins. Co., 153 Mass. 475, 27 N. E. 6, 11 L. R. A. 771.

[61] Bole v. New Hampshire Fire Ins. Co., 159 Pa. St. 53, 28 Atl. 205.

pany agreed to insure a factory, and after having knowledge that it was operated at night after ten o'clock, as well as in the day, delivered the policy containing this condition, it was held, even though it also contained a provision that no agent of the company should have power to waive any of the provisions except by means of a written agreement indorsed on the policy, that by issuing the policy with this knowledge the provision was waived.[62] And where the prohibition is merely against running extra hours the policy is not rendered void because the mill is sometimes run at night.[63] A permit to operate the establishment over hours for a certain designated time expires by the expiration of the time, and it is not necessary that the company should do anything for the purpose of reviving the condition. A policy was upon a building described as occupied principally for the making of certain articles, and stated that in consideration of the sum named and "extra premium," permission was given to work nights for four months from date. There was a printed condition to the effect that if the property insured "be a manufacturing establishment, running in whole or in part over or extra time, or running at night without special agreement, indorsed on this policy," the policy shall be void. The building was destroyed by fire while the factory was being operated in the night time after the expiration of the four months from the date of the policy, and it was held that an action could not be maintained.[64]

§ 4248. **Increase of risk.**—The provision that if the hazard be increased by any means within the control or knowledge of the insured,[65] the policy shall be void is said to be merely a recognition

[62] Improved Match Co. v. Michigan Mut. Fire Ins. Co., 122 Mich. 256, 80 N. W. 1088.

[63] German-American Ins. Co. v. Steiger, 109 Ill. 254. For the construction of similar provisions, see North Berwick Co. v. New England Fire & Marine Ins. Co., 52 Maine 336; Bilbrough v. Metropolitan Ins. Co., 12 N. Y. Super. Ct. 587.

[64] Reardon v. Faneuil Hall Ins. Co., 135 Mass. 121; Betcher v. Capital Fire Ins. Co., 78 Minn. 240, 80 N. W. 971.

[65] This provision is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Louisiana, Wisconsin, Michigan, North Dakota, South Dakota, Iowa, and North Carolina. The New Hampshire clause is as follows: "This policy shall be void and inoperative during the existence or continuance of the acts or conditions of things stipulated against, as follows: * * * if, without such assent, the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause

of a general principal of insurance which arises out of the nature of the contract.[66] Increased risk may be caused by actual changes in the physical structure or use of the property, or by the introduction of new customs or methods of doing business, or by the discontinuance of certain precautions which were understood by the insured to be in use, such as the keeping of a watchman.[67] Where the provision is violated the contract is avoided or suspended without reference to the actual cause of the loss.[68] Only such changes as increase the risk violate the condition, and the question of increase of hazard has been held for the determination of the jury.[69] Thus, whether the erection of a grocery store by another party near the property of the insured creates such a substantial increase of the risk as to avoid the policy is for the jury.[70] But the court will take judicial notice of the fact that the storing of fireworks in a building increases the risk.[71] The provision must be given a reasonable construction. It is not broken by every act which in any degree increases the risk. It refers to an alteration or change of a durable nature, not to a

an increase of such risk." The Maine and Massachusetts forms are as follows: "This policy shall be void * * * if, without such assent (in writing or in print) the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency or consent of the insured, be so altered as to cause an increase of such risks." The Minnesota form is as follows: "The policy shall be void * * * if, without such assent, the situation or circumstances affecting the risk, shall, by or with the knowledge, advice, agency or consent of insured, be so altered as to cause an increase of such risks." The Iowa policy provides further that: "Unless otherwise provided by agreement of this company this policy shall be void * * * if any change other than by death of the insured, whether by legal proceedings, judgment, voluntary act of the insured or otherwise, take place in the interest, title, possession or use of the subject of insurance, if such change in the possession or use makes the risk more hazardous; or * * * if the property insured or any part thereof (as to the part so removed) be removed to any other building or location than that specified in the policy."

[66] Hoffecker v. New Castle County Mut. Ins. Co., 5 Houst. (Del.) 101; Boatwright v. Ætna Ins. Co., 1 Strob. (S. Car.) 281. See also, Moore v. Protection Ins. Co., 29 Maine 97, 48 Am. Dec. 514; Long v. Beeber, 106 Pa. St. 466, 51 Am. Rep. 532.

[67] Houghton v. Manufacturers' Mut. Fire Ins. Co., 8 Metc. (Mass.) 114, 41 Am. Dec. 489; Diehl v. Adams County Mut. Ins. Co., 58 Pa. St. 443, 98 Am. Dec. 302. As to whether failure to keep watchman is a breach of warranty, see Whealton Packing Co. v. Ætna Ins. Co., 185 Fed. 108, 107 C. C. A. 113, 34 L. R. A. (N. S.) 563, with note.

[68] Martin v. Capital Ins. Co., 85 Iowa 643, 52 N. W. 534; Howell v. Baltimore Equitable Soc., 16 Md. 377.

[69] Pool v. Milwaukee Mechanics' &c. Ins. Co., 91 Wis. 530, 65 N. W. 54, 51 Am. St. 919.

[70] Jauvrin v. Rockingham Farmers' Mut. Fire Ins. Co., 70 N. H. 35, 46 Atl. 686.

[71] Betcher v. Capital Fire Ins. Co., 78 Minn. 240, 80 N. W. 971.

casual change of a temporary character, such as the careless use of kerosene in starting a fire in a stove,[72] or a mere temporary use of a threshing machine for a few hours on the premises where the insured property is located.[73] And the same has been held as to the use of a steam engine to cut ensilage.[74] Starting a fire near the insured building for the purpose of burning some rubbish, which fire is communicated to the building, is not such an increase of the risk or hazard as will avoid the contract where there was no design to burn the building.[75] So, a clause with reference to storing hazardous goods is intended to prevent a building from being used for the ordinary deposit of such articles, and not for their casual introduction for a temporary purpose, such as the making of reasonable repairs.[76]

The question of materiality is ordinarily determined by its effect upon the rate of premium, but this is not conclusive.[77] Thus, it has been held that the mere fact that the rate on property used in the restaurant business is higher than that on the same property when used in the confectionery and ice cream business is not conclusive that a change from the latter to the former business is an increase of the hazard.[78]

Changes in the form of an existing lien do not, as a matter of law, amount to an increase of hazard. Thus, if the property against which mechanics' liens have been filed is insured, a forfeiture of the liens and the sale of the property under execution does not, in the absence of other evidence, show an increase of

[72] Angier v. Western Assur. Co., 10 S. Dak. 82, 71 N. W. 761, 66 Am. St. 685. See also, Clute v. Clintonville Mut. Fire Ins. Co., 144 Wis. 638, 129 S. W. 661, 32 L. R. A. (N. S.) 240n.

[73] Adair v. Southern &c. Ins. Co., 107 Ga. 297, 33 S. E. 78, 45, L. R. A. 204, 73 Am. St. 122; Leggett v. Ætna Ins. Co., 10 Rich. L. (S. Car.) 202.

[74] Siemers v. Meene Mut. Home Protection Ins. Co., 143 Wis. 114, 126 N. W. 669, 139 Am. St. 1083.

[75] Des Moines Ice Co. v. Niagara Fire Ins. Co., 99 Iowa 193, 68 N. W. 600.

[76] O'Niel v. The Buffalo Fire Ins. Co., 3 N. Y. 122; Mears v. Humboldt Ins. Co., 92 Pa. St. 15, 37 Am. Rep. 647; Fraim v. National Fire Ins. Co., 170 Pa. St. 151, 32 Atl. 613, 50 Am. St. 753; Faust v. American Fire Ins. Co. of Philadelphia, 91 Wis. 158, 64 N. W. 883, 30 L. R. A. 783, 51 Am. St. 876. See also, Sumter Tobacco Warehouse Co. v. Phœnix Ins. Co., 76 S. Car. 76, 56 S. E. 654, 10 L. R. A. (N. S.) 736 note, 121 Am. St. 941. But compare Kyte v. Commercial Union Assur. Co., 149 Mass. 116, 21 N. E. 361, 3 L. R. A. 508; Hill v. Middlesex Mut. Fire Assur. Co., 174 Mass. 542, 55 N. E. 319.

[77] See note to Collins v. Merchants' & Bankers' Mut. Ins. Co., 95 Iowa 540, 64 N. W. 602, 58 Am. St. 438.

[78] Sun Mutual Ins. Co. v. Tufts, 20 Tex. Civ. App. 147, 50 S. W. 180.

the hazard.[79] The provision may be violated by the introduction of an invention which materially increases the risk.[80] It has been held that increase of hazard must be presumed from the erection of a wooden building but a few feet distant from the insured premises, but in this case the contract contained a continuing warranty that there was no exposure of the building on that side by any structure or occupancy within one hundred feet, which was considered as an agreement that such nonexposure was material to the risk, and should continue during the life of the policy.[81] The use of a building insured as a dwelling-house, for the illegal sale of intoxicating liquors, does not, as a matter of law, increase the risk.[82] It was held in Michigan that the burning off of paint from a building with a gasoline torch, according to the custom of painters, does not, as a matter of law, increase the hazard.[83] But in Massachusetts the same acts were held to be an alteration in "the situation or circumstances affecting the risk," and hence invalidated the policy.[84] Where there are two or more changes, and one increases the risk, it is immaterial that the other diminishes it.[85] A sale by one partner to the other of his interest in the property is not a violation of this provision.[86]

§ 4249. **Changes in adjoining property.**—This provision of the policy does not in terms refer to alterations in adjacent buildings. Such premises are not under the control of the insured, although if he has knowledge of material changes, he should inform the insurer of the facts. But the erection of a building on a lot adjoining that on which the insured building is located,

[79] Greenlee v. North British &c. Ins. Co., 102 Iowa 427, 71 N. W. 534, 63 Am. St. 455.

[80] Washington Mut. Ins. Co. v. Merchants' & Manufacturers' Mut. Ins. Co., 5 Ohio St. 450. See as to destruction of property by insured when insane, Bindell v. Kenton County Assessment Fire Ins. Co., 128 Ky. 389, 108 S. W. 325, 17 L. R. A. (N. S.) 189n, 129 Am. St. 303.

[81] Straker v. Phœnix Ins. Co., 101 Wis. 413, 77 N. W. 752.

[82] Martin v. Capital Ins. Co., 85 Iowa 643, 52 N. W. 534.

[83] Smith v. German Ins. Co., 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368.

[84] First Cong. Church v. Holyoke Mut. Fire Ins. Co., 158 Mass. 475, 33 N. E. 572, 19 L. R. A. 587, 35 Am. St. 508.

[85] Albion Lead Works v. Williamsburg &c. Ins. Co., 2 Fed. 479.

[86] Powers v. Guardian Fire & Life Ins. Co., 13 Mass. 108, 49 Am. Rep. 20. See also, Schloss v. Westchester Fire Ins. Co., 141 Ala. 566, 37 So. 701, 109 Am. St. 58.

which belongs to another party, and is in no manner under the control of the insured, is not within the provision in the policy that it shall be void if the risk is increased in any manner, except by the erection and use of ordinary outbuildings.[87] A policy which was payable to a mortgagee contained a provision that it should be void, in case of " 'increase of hazard' by the erection of neighboring buildings." By the terms of a mortgage clause in the policy, the mortgagee's interest was not to be invalidated by any act or neglect of the mortgagor. The renewal clause in the policy provided that "in case there shall have been any increase of hazard, it must be made known to the company by the assured at the time of renewal, otherwise this policy shall be void." After the contract by its terms expired, a loss occurred, and it was claimed that there had been a renewal. It appeared that during the life of the original policy the insured erected a building near the one insured, which increased the hazard, and that the agent who obtained the alleged renewal for the owner and mortgagee knew of this fact, but failed to disclose it. It was held that the knowledge of the agent was chargeable to his principal, that his failure to disclose the hazard rendered the policy void, and that the clause in the mortgage protecting the mortgagee against any act or neglect of the mortgagor or owner did not apply, as it was the mortgagee's own act which rendered the policy void.[88]

§ 4250. **Effect of increase of hazard.**—Some courts hold that a violation of the condition against an increase of hazard renders the policy void, while others hold that the effect is merely to suspend the contract during the time the risk is increased.[89] Thus, in Illinois it is said to be the settled law that, under a provision that the policy shall be void in case of a change made in the property increasing the hazard, if such changes are made,

[87] German Ins. Co. v. Wright, 6 Kans. App. 611, 49 Pac. 704.

[88] Mechanics' Ins. Co. v. Hodge, 149 Ill. 298, 37 N. E. 51; Cole v. Germania Fire Ins. Co., 99 N. Y. 36, 1 N. E. 38. Compare however, Reed v. Firemen's Ins. Co., 81 N. J. L. 523, 80 Atl. 462, 35 L. R. A. (N. S.) 343.

[89] See Sumter Tobacco Warehouse Co. v. Phœnix Assurance Co., 76 S. Car. 76, 56 S. E. 654, 10 L. R. A. (N. S.) 736 and note, 121 Am. St. 941. As to effect of breach of conditions, see §§ 4199, 4255, et seq.

and the policy has not been declared forfeited, and the changed conditions cease to exist, leaving the risk no more hazardous than before, the policy again becomes in force.[90] A recovery may thus be had for loss subsequently occurring to which the more hazardous use did not contribute. But many courts hold that a violation of this condition renders the policy void. In a Massachusetts case it appeared that the hazard had been increased by the use of the building for the illegal sale of intoxicating liquors with the knowledge and consent of the insured.[91] The court said: "We think an increase of risk entitles the insurer to avoid the policy absolutely. The contract of insurance depends essentially upon an adjustment of the premium to the risk assumed. If the assured by his voluntary act increases the risk, and the fact is not known, the result is that he gets an insurance for which he has not paid. In its effect upon the company, it is not much different from a misrepresentation of the condition of the property. If the provision stood alone, that in case of any material misrepresentation as to the risk or any voluntary increase of risk afterward the policy should be void, it could hardly be doubted that the words should be taken in their natural, obvious meaning. * * * An increase of risk which is substantial, and which is continued for a considerable period of time, is a direct and certain injury to the insurer, and changes the basis upon which the contract of insurance rests; and since there is a provision that, in case of an increase of risk which is consented to or known by the insured, and not disclosed and the assent of the insurer obtained, the policy shall be void, we do not feel at liberty to qualify the meaning of these words by holding that the policy is only suspended during the continuance of such increase of risk." It has been held that expert evi-

[90] Traders' Ins. Co. v. Catlin, 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595; New England Fire & Marine Ins. Co. v. Wetmore, 32 Ill. 221. See also, North British Mercantile Ins. Co. v. Union Stock Yds. Co., 120 Ky. 465, 27 Ky. L. 852, 87 S. W. 285; Williams v. New England Mut. Fire Ins. Co., 31 Maine 219; Silver v. London Assur. Corp, 61 Wash. 593, 112 Pac. 666.

[91] Kyte v. Commercial Union Assur. Co., 149 Mass. 116, 21 N. E. 361, 3 L. R. A. 508. See Concordia Fire Ins. Co. v. Johnson, 4 Kans. App. 7, 45 Pac. 722; Mead v. Northwestern Ins. Co., 7 N. Y. 530. As to the effect of the temporary use of the premises, see Hinckley v. Germania Fire Ins. Co., 140 Mass. 38, 1 N. E. 737, 54 Am. Rep. 445; Jennings v. Chenango County Mut. Ins. Co., 2 Denio (N. Y.) 75.

dence cannot be received for the purpose of showing that leaving a dwelling-house unoccupied for a considerable length of time increases its liability to be destroyed or injured by fire, but persons who are familiar with the business of insurance may testify whether such conditions affect the rate of premium.[92]

§ 4251. Repairs—Employment of mechanics.—When a building is insured it is implied that it will be used in the ordinary way in which similar buildings are used and not set apart and wholly devoted to being kept safely. One of the incidents of such use is that of making ordinary repairs, and the general right to make such repairs is not questioned when the policy contains no special provision upon the subject.[93] A clause similar to that in the standard policy was held in an old case not to apply to ordinary and necessary repairs, as it would be unreasonable to assume that in order to protect a building from fire it was the intention to provide for its destruction by the other elements.[94] The clause is rendered more definite and reasonable by a time limit, and when it appeared that mechanics had been employed in making repairs for more than fifteen days the policy was held invalid without reference to whether such changes contributed to the loss.[95] Painters employed in repainting a building are not mechanics within this provision.[96] In a case decided by the Supreme Court of the United States the policy was to be void and of no effect if, without notice to the company and permission in writing indorsed thereon, "mechanics are employed in building, altering, or repairing the premises named herein, except in dwelling-houses, where not exceeding five days in any one year are allowed for repairs." The insurance was upon a courthouse, and it was held invalidated by the employment of mechanics altering or repairing the building, although the fire did not occur in conse-

[92] Luce v. Dorchester Mut. F. Ins. Co., 105 Mass. 297, 7 Am. Rep. 522.

[93] Townsend v. Northwestern Ins. Co., 18 N. Y. 168.

[94] Franklin Fire Ins. Co. v. Chicago Ice Co., 36 Md. 102, 11 Am. Rep. 469.

[95] Chamberlain v. British-American Assur. Co., 80 Mo. App. 589; Newport Improvement Co. v. Home Ins. Co., 163 N. Y. 237, 57 N. E. 475.

[96] Smith v. German Ins. Co., 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368. See First Cong. Church v. Holyoke Mut. Fire Ins. Co., 158 Mass. 475, 33 N. E. 572, 19 L. R. A. 587, 35 Am. St. 508.

quence of such alterations and repairs. The court said:[97] "Being a separate and valid stipulation of the parties, its violation by the assured terminated the contract of the insurer, and it could not be thereafter made liable on the contract, without having waived that condition, merely because in the opinion of the court and the jury the alterations and repairs of the building did not, in fact, increase the risk. The specific thing described in the last condition as avoiding the policy, if done without consent, was one which the insurer had a right, in its own judgment, to make a material element of the contract, and, being assented to by the assured, it did not rest in the opinion of other parties, court or jury, to say that it was immaterial, unless it actually increased the risk." A policy contained a provision that the "working of carpenters, roofers, gas-fitters, plumbers and other mechanics, in building, altering or repairing any building or buildings covered by this policy, will cause a forfeiture of all claim under this policy, without the written consent of this company indorsed hereon;" also, that the policy should be void if the risk were increased by any means within the control of the insured. At the time it was issued the building was occupied as a grocery store by a tenant. Some time thereafter the insured executed a lease to other tenants, who contemplated changing the business to that of drying fruit. This required extensive alterations in the character of the building, and it was held that there was a deliberate attempt to change the character and occupation of the insured building from a comparatively safe to a hazardous one, and that such substantial alterations by carpenters invalidated the policy.[98] This provision is not found in the Massachusetts form, and the subject of repairs falls under the general clause relating to the increase of the risk. In that state it is not necessary for the risk to be permanently increased. Where the lower floors of the premises were changed from two tenements into flats, new floors laid, doors changed and the stairs removed to the outside of the building, it was held that the fact that the alterations were com-

[97] Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. 379.

[98] Mack v. Rochester German Ins. Co., 106 N. Y. 560, 13 N. E. 343. In this case the fire which destroyed the building occurred while the alterations were being made. But see Lebanon County v. Franklin F. Ins. Co., (Pa.) 85 Atl. 419.

pleted before the loss occurred did not prevent the company from avoiding the policy because of such breach.[99] Where a condition of the policy was that it should be void if "the building shall be altered, enlarged, or appropriated to any other purposes than those herein mentioned, or the risk otherwise increased," it was held that a deliberate and considerable alteration of the building, not incidental to the ordinary use of the property, made by the tenant with the knowledge of the insured extending over three weeks, which, while it lasted, increased the risk, invalidated the policy, although it did not permanently increase the risk or cause the fire.[1] Where the policy was upon a "mill building and additions, including flumes, * * * and automatic sprinkler equipment complete," and permission was given to make alterations, additions and repairs to the building and machinery, it was held that the insured might remove the sprinkler equipment for the purpose of putting in a more complete one, without violating this condition of the policy.[2] Placing and operating an engine fifty feet away from the insured building is not an alteration of the insured property, nor does it violate the condition against an increase of the risk unless expressly so provided in the policy.[3]

§ 4252. **Ownership.**—If the interest of the insured is other than unconditional and sole ownership of the property, the fact must be disclosed to the company.[4] This is a reasonable provision and is binding upon the insured.[5] In discussing this provision it has been said:[6] "Now it must be observed that it is not

[99] Hill v. Middlesex Mut. Fire. Assur. Co., 174 Mass. 542, 55 N. E. 319.

[1] Lyman v. State Mut. F. Ins. Co., 14 Allen (Mass.) 329.

[2] Firemen's Ins. Co. v. Appleton Paper & Pulp Co., 161 Ill. 9, 43 N. E. 713.

[3] Schaeffer v. Farmers' Mut. Fire Ins. Co., 80 Md. 563, 31 Atl. 317, 45 Am. St. 361.

[4] This is found in the standard policies of New Jersey, Connecticut, Rhode Island, North Carolina, Louisiana, Iowa, North Dakota, New York, South Dakota, Wisconsin and Michigan. It is not found in the standard policies of Massachusetts, Minnesota, Maine and New Hampshire. That such a provision may be waived, see Siemers v. Meene Mut. Home Protection Ins. Co., 143 Wis. 114, 126 N. W. 669, 139 Am. St. 1083; Metcalf v. Mut. Fire Ins. Co., 132 Wis. 67, 112 N. W. 22, and cases cited.

[5] Groce v. Phœnix Ins. Co., 94 Miss. 201, 48 So. 298, 22 L. R. A. (N. S.) 732; Barnard v. National &c. Ins. Co., 27 Mo. App. 26.

[6] Hartford Fire Ins. Co. v. Keating, 86 Md. 130, 63 Am. St. 499; Dupreau v. Hibernia Ins. Co., 76 Mich. 615, 43 N. W. 585, 5 L. R. A. 671; Ætna Fire Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90; Imperial Fire Ins. Co. v. Dunham, 117 Pa. St. 460, 2 Am. St. 668; Pennsylvania Fire Ins. Co. v. Dougherty, 102 Pa. St. 568; Oshkosh Gas-Light Co. v. Ger-

title, but interest that is spoken of in the clause. Title and interest are entirely different things. It was undoubtedly competent for the parties to have contracted as to the title, * * * but in this case they have chosen to limit the provisions of the clause to the condition of the interest, either legal or equitable. The question therefore presented to us now is, Was the 'interest' (legal or equitable) of D, 'unconditional and sole?' As to the meaning of these words when used in the present connection, there seems to be a concurrence of authority. To be 'unconditional and sole' the interest must be completely vested in the assured, not contingent or conditional, nor for years or life only, nor in common, but of such a nature that the insured must sustain the entire loss if the property is destroyed; and this is so whether the tile is legal or equitable." This provision of the policy does not necessarily distinguish between the legal and equitable title. If the title is conditional or contingent, if it is for years only or for life, or in common, it is not an entire, unconditional and sole ownership; but the interest is the same as it affects the contract of insurance, whether the title of the insured be legal or equitable. "The purpose of this provision is, to prevent a party who holds an undivided or contingent but insurable interest in property, from appropriating to his own use the proceeds of a policy, taken upon the valuation of the entire and unconditional title, as if he were the sole owner, and to remove from him the temptation to perpetrate fraud or crime. For without this, a person might thus be able to exceed the measure of an actual indemnity. But where the entire loss, if the property is destroyed by fire, must fall upon the party insured, the reason and purpose of this provision does not seem to exist; and in the absence of any particular inquiry as to the specific nature of the title, or of any express stipulation in the policy that the insured held the legal or equitable title, either being available to secure an entire, unconditional and sole ownership, the pro-

mania Fire Ins. Co., 71 Wis. 454, 37 N. W. 819, 5 Am. St. 233. In Rochester German Ins. Co. v. Schmidt, 162 Fed. 447, 89 C. C. A. 333, quoting 2 Clement on Insurance 152, it is said: "An insured's ownership is sole when no one else has any interest in the property as owner, and is unconditional when the quality of the estate is not limited or affected by any condition."

vision referred to can, we think, have no force to defeat the plaintiff's recovery in this case."[7] It is said to be enough if the insured be the substantial equitable owner of the property insured.[8] Where the reason for such a general condition in a printed form of a policy of insurance does not exist in a particular case, the condition itself becomes meaningless and inoperative. Thus, a person owned individually and in common with others a certain number of barrels of petroleum, which had been placed for transportation and storage in a certain pipe line. To protect himself from loss in case of fire, he took out a policy of insurance for a fixed sum on the petroleum "his own, or held by him in trust for others;" and a condition in the policy provided that "if the insured is not the sole, absolute and unconditional owner of the property insured," then the policy would be void. It was held that the condition was not, under the circumstances, applicable, and that the company was liable to the extent of the policy upon all the oil destroyed in which the insured had any interest whatever, but not for the loss of oil in which he had no interest and which the owners had in writing requested him to insure before the issuing of the policy.[9] This provision must not be construed in a technical sense. It merely requires that the insured shall be the actual and substantial owner. Where the interest of the insured was acquired by devise "to be his forever for his own proper use," subject only to restriction and alienation until he attains a certain age, having yet thirteen years to run, it was held that he was the owner of the property within the meaning of the policy.[10] So, the interest of a purchaser of property which he has unqualifiedly agreed to buy and the former owner has absolutely contracted to sell to him on definite terms is held a "sole and unconditional ownership,"[11] and the same has been held as to the vendee in pos-

[7] Imperial Fire Ins. Co. v. Dunham, 117 Pa. St. 460, 12 Atl. 668.

[8] Lebanon Mut. Ins. Co. v. Erb, 112 Pa. St. 149, 4 Atl. 8; Martin v. State Ins. Co., 44 N. J. L. 485, 6 N. J. L. J. 28, 43 Am. Rep. 397. See also, note in 38 L. R. A. (N. S.) 427.

[9] Grandin v. Rochester German Ins. Co., 107 Pa. St. 26.

[10] Barnard v. National Fire Ins. Co., 27 Mo. App. 26; Yost v. McKee, 179 Pa. St. 381, 36 Atl. 317, 57 Am. St. 604.

[11] Phenix Ins. Co. v. Kerr, 129 Fed. 723, 64 C. C. A. 251, 66 L. R. A. 596; Phenix Ins. Co. v. Hilliard, 59 Fla. 590, 52 So. 799, 138 Am. St. 171. And see Loventhal v. Home Ins. Co., 112 Ala. 108, 20 So. 419, 33 L. R. A. 258, 57 Am. St. 17; Arkansas

session of a cotton gin under a binding contract of purchase notwithstanding he has not paid all of the purchase-price.[12] The weight of authority perhaps supports the view that the insured, by accepting the policy, is charged with knowledge of its contents. Thus, it was held in Missouri that the acceptance of a policy which contained this provision, although issued on an oral application which made no statement as to title, amounts to a declaration that the title is absolute,[13] but in Michigan this is not regarded as conclusive upon the insured.[14] Where there are no special provisions in the policy requiring an exact disclosure of the entire quantity and quality of title, it is sufficient to describe it in general terms. Thus, where the true title was called for, it was held sufficient where the property was described as "his" and unencumbered, although it appeared that two mortgages had been given upon the property by previous owners, and the former owner's equity of redemption had been sold on execution to another person before the plaintiff acquired his title. But as the plaintiff at the time of the insurance had the right to redeem the equity of redemption and then to remove the other encumbrances and thus make his title absolute, it was held that there was no misrepresentation of title.[15]

§ 4253. **Encumbrances.**—A condition in a policy that it shall be void in case the interest of the insured be other than sole and unconditional ownership refers to the quality of the estate

Ins. Co. v. Cox, 21 Okla. 873, 98 Pac. 552, 129 Am. St. 808; Baker v. State Ins. Co., 31 Ore. 41, 48 Pac. 699, 65 Am. St. 807. But, as elsewhere shown, an executor's contract to convey has often been held not to operate as a forfeiture under such a clause. See Garner v. Milwaukee Mechanics' Ins. Co., 73 Kans. 127, 84 Pac. 717, 4 L. R. A. (N. S.) 654, 117 Am. St. 460, and cases cited in opinion. See as to interest in party-wall and easement of support, Nelson v. Continental Ins. Co., 182 Fed. 783, 105 C. C. A. 215, 31 L. R. A. (N. S.) 598.

[12] Lancaster v. Southern Ins. Co., 153 N. Car. 285, 69 S. E. 214, 138 Am. St. 665. But see where furniture is to be paid for on the instalment plan, Dow v. National Assur. Co., 26 R. I. 379, 58 Atl. 999, 67 L. R. A. 479, 106 Am. St. 728; and post, § 4255, n. 41.

[13] Overton v. American Cent. Ins. Co., 79 Mo. App. 1.

[14] Miotke v. Milwaukee Mechanics' Ins. Co., 113 Mich. 166, 71 N. W. 463. See also, Wyandotte Brewing Co. v. Hartford Fire Ins. Co., 144 Mich. 440, 108 N. W. 393, 6 L. R. A. (N. S.) 852, 115 Am. St. 458; Dooly v. Hanover Fire Ins. Co., 16 Wash. 155, 47 Pac. 507, 58 Am. St. 26.

[15] Buffum v. Bowditch &c. Ins. Co., 10 Cush. (Mass.) 540. See also, Nance v. Oklahoma Fire Ins. Co., 31 Okla. 208, 120 Pac. 948, 38 L. R. A. (N. S.) 426, and note.

or interest, and is not broken by encumbrances existing on the property when the insurance is effected.[16] The insured is therefore under no obligation to disclose the fact that there are mortgages or other encumbrances upon the property unless it is required by some other provision of the policy.[17] A vendor's lien

[16] Morotock Ins. Co. v. Rodefer, 92 Va. 747, 24 S. E. 393, 53 Am. St. 846; Caplis v. American Fire Ins. Co., 60 Minn. 376, 62 N. W. 440, 51 Am. St. 535.

[17] Ellis v. Insurance Co. of North America, 32 Fed. 646; Clay Fire & Marine Stock Ins. Co. v. Beck, 43 Md. 358; Bowditch &c. Ins. Co. v. Winslow, 3 Gray (Mass.)) 415; Dolliver v. St. Joseph Fire & Marine Ins. Co., 128 Mass. 315, 35 Am. Rep. 378; Judge v. Connecticut Fire Ins. Co., 132 Mass. 521. Policies often contain provisions requiring the insured to disclose existing encumbrances. In Seal v. Farmers' & Merchants' Ins. Co., 59 Nebr. 253, 80 N. W. 807, it was held that a misrepresentation as to the amount of the encumbrance upon the property insured, where the policy is conditioned that it will be void if the property be mortgaged or otherwise encumbered without notice to and consent of the company indorsed thereon, will, in the absence of a waiver, avoid the policy. The fact that such mortgage was paid before the loss occurred, does not alter the legal effect of a breach of the requirement. Insurance Co. of North America v. Wicker (Tex.), 54 S. W. 300, affd. 93 Tex. 390, 55 S. W. 740. In Collins v. Merchants' & Bankers' Mut. Ins. Co., 95 Iowa 540, 64 N. W. 602, 58 Am. St. 438, it was held that the provision that the policy should be void if the property be in any manner encumbered, "and such fact be not stated in this policy or the insured's application for insurance," is a stipulation against an encumbrance existing when the contract is made and not against future encumbrances. The court said: "If the statement in the policy was that it should be void if the property be in any manner encumbered or in litigation, then, no doubt, it should be so construed as to cover future as well as existing encumbrances, Mallory v. Farmers' Ins. Co., 65 Iowa 450; but the policy contains more than this." In Kansas Farmers' Fire Insurance Co. v. Saindon, 53 Kans. 623, 36 Pac. 983, it was held that the policy will be avoided if a subsequent encumbrance is created, or if an encumbrance existing at the time of the application for insurance be materially increased by a new or additional debt. But the mere subsequent renewal of a prior lien or mortgage with the accrued interest, is not an increase of such pre-existing indebtedness or the creation of a new or additional encumbrance. In Koshland v. Home Mut. Ins. Co., 31 Ore. 321, 49 Pac. 864, 50 Pac. 567, it appeared that the policy was issued with the knowledge that there was an encumbrance upon the property. The policy contained a clause rendering it invalid if the property should be encumbered in the future without the knowledge and consent of the company, and it was held that the provision was not invalidated by the making of a new mortgage for the purpose of discharging the old. In Cagle v. Chillicothe Town Mut. Fire Ins. Co., 78 Mo. App. 215, where the policy contained a stipulation that "any encumbrance shall avoid the policy, unless written consent of the secretary is obtained," and the application, which was a part of the contract, did not mention certain unsatisfied mortgages, it was held that the policy was void, although the local agent knew of the existence of the mortgages; since the secretary alone could consent to the encumbrances. But in Seal v. Farmers' & Merchants' Ins. Co., 59 Nebr. 253, 80 N. W. 807, it was held where the application was oral and no inquiry was made as to the character and condition of the title, a failure to disclose the existence of encumbrances would not, in the absence of fraud, avoid the policy. In Flournoy v.

for part of the purchase-money of land is not inconsistent with the entire unconditional and sole ownership within the meaning of the provision avoiding the insurance if the interest of the insured be other than such sole ownership.[18] A lease of the premises is not an encumbrance within the meaning of a condition rendering the policy void if the property is encumbered by a future mortgage or lien.[19]

§ 4254. **Illustrations.**—As already noted, there is a distinction between the words "title" and "interest" as used in insurance policies. Thus, a provision that a policy shall be void if the interest of the insured is not an entire, unconditional and sole ownership of the property means, where the interest of a mortgagee is insured, that the interest insured, namely, the mortgage lien, is an unconditional interest belonging to the mortgagee, and not a conditional or speculative one.[20] A person in whom the entire legal title is vested is the sole and unconditional owner within the meaning of the policy, although he has made a lease or bill of sale of the property, reserving title until the considera-

Traders' Ins. Co., 80 Mo. App. 655, the agent issued the policy knowing of the encumbrances on the property, and it was held that the company thereby waived the stipulation against such encumbrance, notwithstanding the further stipulation that such agent was not authorized to waive, as such stipulation applied only to acts subsequent to the issuing of the policy and not to those preceding it. In Arthur v. Palatine Ins. Co., 35 Ore. 27, 57 Pac. 62, 76 Am. St. 450, it was held that where the policy was issued on an oral application and no inquiry was made as to encumbrances, and no representations were made with reference thereto, and the insured did not know that if a mortgage existed the company would not take the risk, or that the policy contained a provision making it void if there were existing encumbrances, the insured was held to assume the risk of encumbrances. In Insurance Co. of North America v. Wicker (Tex.), 54 S. W. 300, affd. 93 Tex. 390, 55 S. W. 740, it was held that a failure to give notice of the existence of a mortgage on the property insured when required by the terms of the policy is not waived by the insurer's knowledge of a mortgage subsequently given on the property to secure money with which to pay a mortgage existing at the time the policy was issued. See also, McKibban v. Des Moines Ins. Co., 114 Iowa 41, 86 N. W. 38. And compare, Parker v. Otsego County Farmers' Co-operative Fire Ins. Co., 47 App. Div. (N. Y.) 204, 62 N. Y. S. 199, affd. 168 N. Y. 655, 61 N. E. 1132.

[18] Boulden v. Phœnix Ins. Co., 112 Ala. 422, 20 So. 587; Insurance Co. of North America v. Pitts, 88 Miss. 587, 41 So. 5, 7 L. R. A. (N. S.) 627, 117 Am. St. 756, and note with other authorities. See also, Phœnix Ins. Co. v. Fleenor (Ark.), 148 S. W. 650.

[19] Read v. State Ins. Co., 103 Iowa 307, 72 N. W. 665, 64 Am. St. 180. See also, Phœnix Ins. Co. v. Fleenor (Ark.), 148 S. W. 650.

[20] Hanover Fire Ins. Co. v. Bohn, 48 Nebr. 743, 67 N. W. 774, 58 Am. St. 719.

tion is fully paid.[21] A person who owns the fee of property subject to a mortgage and lease for a term of years has the entire, unconditional and sole ownership of the property.[22] It is well settled that an outstanding lease does not affect the matter of ownership within this provision.[23] Where no written application was made and no questions were asked concerning the title, it was held that the insurance was valid, although the policy contained a condition declaring it to be void if the interest of the insured was other than unconditional and sole ownership, although it appeared that he did not own the legal title and had merely purchased the property and paid therefor without having received a conveyance.[24] A vendee in possession without a deed, with an equitable right to the entire, unencumbered title is the owner of the property.[25] So, the owner of an estate in fee on a condition subsequent, who is in possession with no conditions broken, is the sole and unconditional owner of the property.[26] One who has received a deed from a married man in which his wife has not joined is the owner of the property, as the wife has no claim on the realty before the death of the husband;[27] and a man is not divested of the sole and unconditional ownership by a decree of divorce awarding possession thereof temporarily to his wife and reserving the question of division for future determination;[28] but it is held that a man who marries a widow having dower in lands, although he makes repairs or builds a house thereon, is not an unconditional or sole owner.[29] Where the plaintiff paid a portion of the purchase-price and took possession of certain personal property

[21] Burson v. Fire Assn., 136 Pa. St. 267, 20 Atl. 401, 20 Am. St. 919, and note; Johannes v. Standard Fire Office, 70 Wis. 196, 35 N. W. 298, 5 Am. St. 159, and note. See also, National Fire Ins. Co. v. Three States Lumber Co., 217 Ill. 115, 75 N. E. 450, 108 Am. St. 239.

[22] Dolliver v. St. Joseph Fire & Marine Ins. Co., 128 Mass. 315, 35 Am. Rep. 378.

[23] Lycoming Fire Ins. Co. v. Haven, 95 U. S. 242, 24 L. ed. 473.

[24] Dooly v. Hanover Fire Ins. Co., 16 Wash. 155, 47 Pac. 507, 58 Am. St. 26.

[25] Bonham v. Iowa &c. Ins. Co., 25 Iowa 328.

[26] Davis v. Pioneer Furniture Co., 102 Wis. 394, 78 N. W. 596.

[27] Ohio Farmers' Ins. Co. v. Bevis, 18 Ind. App. 17, 46 N. E. 928.

[28] Hix v. Sun Ins. Co., 94 Ark. 485, 127 S. W. 737, 140 Am. St. 138.

[29] McIntosh v. North State Fire Ins. Co., 152 N. Car. 50, 67 S. E. 45, 136 Am. St. 818. See also, Tyree v. Virginia &c. Ins. Co., 55 W. Va. 63, 46 S. E. 706, 66 L. R. A. 657, 104 Am. St. 983.

under an agreement that after a certain time he would either pay the balance or resell or convey the property to the vendor, it was held that he took an absolute title, and in case of fire was entitled to collect the insurance on a policy conditioned that it was void if the interest of the insured was other than sole and unconditional.[30] The fact that the property was conveyed to the insured without consideration for the purpose of placing it beyond the reach of the grantor's creditors is not a defense under this provision.[31] A married man has been held to have such an interest in the household furniture owned by his wife before marriage as constitutes him its sole and unconditional owner.[32] The fact that the legal title to the property was in another has also been held not to defeat a recovery where the insured was the beneficial owner at the time the policy was issued.[33] A married woman is the owner of her property, although her husband has a homestead interest therein.[34] So, the owner of a farm is the sole and unconditional owner of hay produced on the farm, where the hay is produced at his expense, and he owns two-thirds of it absolutely, under a contract with a laborer to credit him with the proceeds of the other one-third and charge him with the cost of production.[35] Where the property was insured in the name of a firm of which the insured was a member, but which had been dissolved before the issuance of the policy, it was held that the policy was valid although it contained the condition under consideration.[36] The words "as interest may appear" in a policy indicate uncertainty not only as to the extent, but as to the quality and character of the interest; and where it appeared that the insured, although not the owner, had an insurable interest, it was held that there was no breach of condition in the policy forfeiting it in case the interest of the insured is not truly stated in the policy,

[30] Stowell v. Clark, 47 App. Div. (N. Y.) 626, 62 N. Y. S. 155, affd. 171 N. Y. 673, 64 N. E. 1125.

[31] Rochester Loan & Banking Co. v. Liberty Ins. Co., 44 Nebr. 537, 62 N. W. 877, 48 Am. St. 745, and note.

[32] Georgia Home Ins. Co. v. Brady (Tex.), 41 S. W. 513.

[33] McCoy v. Iowa State Ins. Co., 107 Iowa 80, 77 N. W. 529.

[34] Sun Insurance Office v. Beneke (Tex.), 53 S. W. 98.

[35] Manchester Fire Assur. Co. v. Abrams, 89 Fed. 932, 32 C. C. A. 426.

[36] Delaware Ins. Co. v. Bonnet, 20 Tex. Civ. App. 107, 48 S. W. 1104.

or if the interest is less than an absolute ownership.[37] It has also been held that a condition in a policy issued to a husband and wife that it shall be void if the subject of the insurance is a building on ground not owned by the insured in fee-simple is not broken by the fact that the fee-simple of the land is in the wife alone, as there must be an ownership in some other person than the insured to violate the condition.[38] In another case the applicant stated that she was the owner of the land upon which the building stood, and it appeared that she was a widow, and that her only title was a life estate under the will of her husband, which contained no disposition of the remainder. Her husband left two children not named in the will, and they had not during the twelve years that had elapsed since the probate of the will, of which six had passed before the application for the insurance was made, claimed the share to which they would have been entitled if he had died intestate. It was held that the answer was a sufficient description of her interest.[39]

§ 4255. Illustrations of breach of condition.—On the other hand, one who owns an undivided one-half of the insured property has not the entire, unconditional and sole ownership.[40] Nor has one who has purchased property on the instalment plan, the title remaining in the vendor.[41] Where the insured states in his application that he is the sole owner of the property, and it is stipulated that if his answer is untrue, or his interest other than a perfect legal and equitable ownership, the policy shall be void; there is a breach of condition where the property is owned by his wife.[42] The holder of a quitclaim deed from a second mortgagee is not the unconditional and sole owner of the property,[43]

[37] Dakin v. Liverpool &c. Ins. Co., 77 N. Y. 600. See also, Peerless Mineral Springs Co. v. German Am. Ins. Co. (Wis.), 138 N. W. 1023.

[38] Mascott v. First Nat. Fire Ins. Co., 69 Vt. 116, 37 Atl. 255.

[39] Allen v. Charlestown &c. Ins. Co., 5 Gray (Mass.) 384.

[40] Sisk v. Citizens' Ins. Co., 16 Ind. App. 565, 45 N. E. 804.

[41] Dumas v. Northwestern Nat. Ins. Co., 12 App. D. C. 345, 40 L. R. A. 358; Geiss v. Franklin Ins. Co., 123 Ind. 172, 24 N. E. 99, 18 Am. St. 324; Dow v. National Assur. Co., 26 R. I. 379, 58 Atl. 999, 106 Am. St. 728. See also, Phœnix Ins. Co. v. Quinette (Okla.), 128 Pac. 722.

[42] Planters' Mut. Ins. Co. v. Loyd, 67 Ark. 584, 56 S. W. 44, 77 Am. St. 136; Trott v. Woolwich &c. Ins. Co., 83 Maine 362, 22 Atl. 245; Bacot v. Phœnix Ins. Co., 96 Miss. 223, 50 So. 729, 25 L. R. A. (N. S.) 1226n, Ann. Cas. 1912B 262, and note on this general subject.

[43] Southwick v. Atlantic Fire & Marine Ins. Co., 133 Mass. 457.

nor is a vendor after the vendee has gone into possession and paid the purchase-price;[44] nor is a surviving partner the sole owner of property belonging to the undivided partnership estate.[45] It has also been held that a partnership does not, within the meaning of this provision, own property contributed as a partner's share of the capital, but which has not been deeded to the partnership.[46] This condition is broken where the insured is the owner only of an undivided one-half interest in the property, although at the time the insurance was issued he thought he was the sole owner by virtue of an executory contract of the other owners to convey to him.[47] A person who has purchased property at a judicial sale, but whose bid has not been ratified, or the sale confirmed by the court, has not an unconditional and sole ownership of the property. In one case the court said:[48] "We have been referred to cases, where it is held that when the insured is in possession under a contract of purchase and the legal title has not passed by a conveyance, the ownership is not unconditional until the purchase-money has been wholly paid.[49] * * * But it may be doubted whether such cases are in line with the current of authority." Where the insured had received a deed of the property, upon which there was a mortgage, from her son, but failed to record it, and the mortgage had been foreclosed and the property sold, and she was not made a party to the foreclosure suit, and failed to redeem from the sale under the judgment within the time allowed by statute, it was held that she was not the sole and unconditional owner of the property within the meaning of the policy.[50] So, one who has given his bond for a debt secured by a mortgage on the premises, and is the holder of another mortgage, is not the sole and unconditional owner of the property.[51] A person who owns all the stock of a corporation is not the owner of the property of the corporation within the meaning of this

[44] Clay Fire &c. Ins. Co. v. Huron Salt &c. Co., 31 Mich. 346.

[45] Crescent Ins. Co. v. Camp, 64 Tex. 521.

[46] Citizens' Fire Ins. &c. Co. v. Doll, 35 Md. 89, 6 Am. Rep. 360.

[47] Liverpool & London & Globe Ins. Co. v. Cochran, 77 Miss. 348, 26 So. 932, 78 Am. St. 524.

[48] Hartford Fire Ins. Co. v. Keating, 86 Md. 130, 63 Am. St. 499.

[49] Farmers' & Drovers' Ins. Co. v. Curry, 13 Bush (Ky.) 312, 26 Am. Rep. 194.

[50] Breedlove v. Norwich &c. Ins. Soc., 124 Cal. 164, 56 Pac. 770.

[51] Ordway v. Chace, 57 N. J. Eq. 478, 42 Atl. 149.

provision.[52] A tenant for life cannot recover on a policy which provides that there shall be no liability "if the interest of the assured in the property is not one of absolute and sole ownership."[53] A policy of insurance issued to one whose only interest in the property is by virtue of a land contract which he holds as collateral security for money advanced to the purchaser has been held void in its inception where it provides that it shall be void unless otherwise provided, if the interest of the insured be other than unconditional and sole ownership, or if the subject of the insurance be a building on ground not owned by the insured in fee-simple, although the recitals that the insured held the property under a land contract might protect him if he had been the absolute owner of the contract.[54] This provision, like others inserted for its benefit, may be waived by the company, and it is generally held that it cannot dispute the validity of the policy on the ground that the insured's interest in the property was not an unconditional and sole ownership when the limited interest was fully and correctly disclosed to the agent of the company when the policy was taken out.[55]

§ 4256. **Building on leased ground.**—The provision that "the entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the subject of the insurance be a building on ground not owned by the insured in fee-simple,"[56] is valid, and its breach will invali-

[52] Syndicate Insurance Co. v. Bohn, 65 Fed. 165, 12 C. C. A. 531, 27 L. R. A. 614.

[53] Collins v. St. Paul Fire &c. Ins. Co., 44 Minn. 440, 46 N. W. 906. See also, Davis v. Iowa State Ins. Co., 67 Iowa 494, 25 N. W. 745; Garver v. Hawkeye Ins. Co., 69 Iowa 202, 28 N. W. 555.

[54] Clapp v. Farmers' Mut. Fire Ins. Assn., 126 N. Car. 388, 35 S. E. 617; Gettelman v. Commercial Union Assur. Co., 97 Wis. 237, 72 N. W. 627.

[55] Porter v. Orient Ins. Co., 72 Conn. 519, 45 Atl. 7; London &c. Ins. Co. v. Gertenson, 106 Ky. 815, 21 Ky. L. 471, 51 S. W. 617; Teutonic Insurance Co. v. Howell, 21 Ky. L. 1245, 54 S. W. 852; Westchester Fire Ins. Co. v. Wagner, 24 Tex. Civ. App. 140, 57 S. W. 876. See also, Sharp v. Scottish Union & Nat. Ins. Co., 136 Cal. 542, 69 Pac. 253, 615; Miotke v. Milwaukee Mechanics' Ins. Co., 113 Mich. 166, 71 N. W. 463; Conley v. Northwestern F. & M. Ins. Co. (Okla.), 127 Pac. 424. An insurer, which, knowing that the title of the insured is less than a fee-simple, issues a policy providing that it shall be void if the title of the insured is less than a fee-simple, unless otherwise provided by agreement indorsed on or annexed to the policy, thereby waives such provision, whether or not it intended to do so. Schultz v. Caledonian Ins. Co., 94 Wis. 42, 68 N. W. 414.

[56] Richardson Ins. Law, see Iowa code (Supp. 1907), § 1758b.

date the policy.[57] It is violated where the applicant is the owner in fee of only an undivided interest in the land.[58] The possession of a life estate in real estate is not a compliance with this provision.[59] It has been held that one who has the equitable right to a fee-simple title is within the provision.[60] Where no questions were asked and no representations made, it was held that one who had paid the full purchase-price for the property, but had not received his deed, was the owner of the ground in fee-simple within the meaning of this provision.[61] So, it has been held that a provision avoiding the policy, if the subject of the insurance is a building on "ground not owned by the insured," is not broken if a part of the building stands on ground not owned by the insured.[62] The provision does not apply where the policy is issued on a leasehold interest.[63] And where the company knew that the building was on leased property when the policy was issued, and no indorsement showing such fact was made on the policy, it was held that it could not defeat a recovery for breach of this condition.[64] The condition has been held broken where the deed is delivered to a third person to hold until certain conditions are performed.[65]

[57] Ben Franklin Ins. Co. v. Weary, 4 Ill. App. 74; Dowd v. American Fire Ins. Co., 41 Hun (N. Y.) 139, 3 N. Y. St. 793. As to buildings on leased ground generally, see Fletcher v. Commonwealth Ins. Co., 18 Pick. (Mass.) 419; Fowle v. Springfield Fire &c. Ins. Co., 122 Mass. 191, 23 Am. Rep. 308; Lycoming Fire Ins. Co. v. Haven, 95 U. S. 242, 24 L. ed. 473. Such a provision is a warranty and cannot be disregarded. East Texas Fire Ins. Co. v. Brown, 82 Tex. 631, 18 S. W. 713. When the insured property is described as located on a military reservation it is sufficient notice to the company that the insured does not own the title in fee, and the provision is inoperative. Broadwater v. Lion F. Ins. Co., 34 Minn. 465, 26 N. W. 455.

[58] Scottish Union & National Ins. Co. v. Petty, 21 Fla. 399.

[59] Garver v. Hawkeye Ins. Co., 69 Iowa 202, 28 N. W. 555. But see, Haden v. Farmers' & Mechanics' Fire Assn., 80 Va. 683.

[60] Lewis v. New England F. Ins. Co., 29 Fed. 496; Pennsylvania Fire Ins. Co. v. Dougherty, 102 Pa. St. 568; Elliott v. Ashland Mut. Fire Ins. Co., 117 Pa. St. 548, 12 Atl. 676, 2 Am. St. 703; Swift v. Vermont &c. Ins. Co., 18 Vt. 305.

[61] Dooly v. Hanover Fire Ins. Co., 16 Wash. 155, 47 Pac. 507, 58 Am. St. 26. See also, where building was on leased premises, Wyandotte Brewing Co. v. Hartford Fire Ins. Co., 144 Mich. 440, 108 N. W. 393, 6 L. R. A. (N. S.) 852, 115 Am. St. 458.

[62] Haider v. St. Paul Fire & Marine Ins. Co., 67 Minn. 514, 70 N. W. 805.

[63] Philadelphia Tool Co. v. British-American Assur. Co., 132 Pa. St. 236, 19 Atl. 77, 19 Am. St. 596.

[64] Cowell v. Phœnix Ins. Co., 126 N. Car. 684, 36 S. E. 184. See also, Clawson v. Citizens' Mut. Fire Ins. Co., 121 Mich. 591, 80 N. W. 573, 80 Am. St. 538; Berry v. American &c. Ins. Co., 132 N. Y. 49, 30 N. E. 254, 28 Am. St. 548; Farley v. Spring Garden Ins. Co., 148 Wis. 622, 134 N. W. 1054.

[65] Pangborn v. Continental Ins. Co.,

§ 4257. **Encumbrance by chattel mortgage.**—The policy is rendered void if a chattel mortgage is placed upon the property without the consent of the insurer.[66] In the absence of this provision it seems that the execution of a chattel mortgage is not a violation of the provision relating to an increase of the risk, or a change in the title, interest or possession of the property.[67] But there are some authorities to the contrary. Thus, it was held that a chattel mortgage was a violation of the clause relating to the "alterations in the ownership,"[68] and that it was an "alienation of the property in part."[69] So, in Michigan it has been held that the execution of a chattel mortgage by a partner on the partnership chattels insured for the benefit of the firm, is such a change in the subject of the insurance as will render the policy void.[70] This provision in the standard policy is valid and binding,[71] and the same is true of one which provides that the policy shall be void if, at the time of the execution of the policy, the property is covered by a chattel mortgage.[72] Such conditions apply, however, only to voluntary liens and levies and not to involuntary encumbrances, such as tax liens and payments procured in invitum, though it is said, that a violation of such condition does not render a policy absolutely void, but merely voidable at the elec-

62 Mich. 638, 29 N. W. 475. See also, Watts v. Phenix Ins. Co., 134 Ga. 717, 68 S. E. 479; Excelsior Foundry Co. v. Western Assur. Co., 135 Mich. 467, 98 N. W. 9, 3 Am. & Eng. Ann. Cas. 707.

[66] This clause is found in the standard forms of the following states: New Jersey, Connecticut, Rhode Island, Wisconsin, Louisiana, North Dakota, South Dakota, New York, North Carolina and Michigan. The Iowa form add the words, "judgment, mechanic's lien, or any other lien, or be or become liable in any way to any lienholder." The clause does not appear in the standard forms of Massachusetts, Minnesota, Maine, and New Hampshire. As to what is necessary to show consent of insurer, see Atlas Reduction Co. v. New Zealand Ins. Co., 138 Fed. 497, 71 C. C. A. 21, 9 L. R. A. (N. S.) 433.

[67] Wytheville Ins. & Banking Co. v. Stultz, 87 Va. 629, 13 S. E. 77.

[68] Edmands v. Mutual Safety Fire Ins. Co., 1 Allen (Mass.) 311, 79 Am. Dec. 746.

[69] Abbott v. Hampden &c. Ins. Co., 30 Maine 414; Judge v. Connecticut Fire Ins. Co., 132 Mass. 521.

[70] Olney v. German Ins. Co., 88 Mich. 94, 50 N. W. 100, 13 L. R. A. 684, 26 Am. St. 281, and note.

[71] Brown v. Westchester F. Ins. Co., 9 Kans. App. 526, 58 Pac. 276; Webster v. Dwelling House Ins. Co., 53 Ohio St. 558, 42 N. E. 546, 30 L. R. A. 719, 53 Am. St. 658. See also, Traders' Ins. Co. v. Cassell, 24 Ind. App. 238, 56 N. E. 259.

[72] Crikelair v. Citizens' Ins. Co., 168 Ill. 309, 48 N. E. 167, 61 Am. St. 119. See also, Wierengo v. American Fire Ins. Co., 98 Mich. 621, 57 N. W. 833; Wilcox v. Continental Ins. Co., 85 Wis. 193, 55 N. W. 188.

tion of the insurer.[73] The provision in the standard policy seems to refer only to the common, ordinary chattel mortgage and instruments of that general nature, use and purpose, and it is held that it does not, therefore, apply to a covenant in a lease which provides that the lessor shall have a first lien on all the buildings for any unpaid rents or taxes, as such a covenant is not a chattel mortgage in the ordinary sense of the term.[74] But it does apply to a trust deed to secure the payment of money which is in legal effect practically the same as that of a chattel mortgage with power of sale.[75] In Nebraska and Iowa the cancelation or discharge of a mortgage on the insured chattels, given in violation of this condition before the loss occurs, revives the contract from the date of the cancelation or discharge.[76] But in Arkansas such an encumbrance has been held to avoid the contract, although it is paid before the loss occurs.[77] When a policy insuring both real and personal property provided that if "the property shall thereafter become mortgaged or encumbered," the policy should be void, and also declared it would be forfeited if other insurance was taken out on any of such property, it was held that since the provision for forfeiture for mortgaging did not provide a forfeiture for mortgaging "any" of the property, but treated "the property" as a whole, the policy would not be forfeited by a mortgage given on the part of the property only.[78] A statute requiring every insurer, before

[73] Dover Glass Works Co. v. American Fire Ins. Co., 1 Marv. (Del.) 32, 29 Atl. 1039, 65 Am. St. 264.

[74] Caplis v. American Fire Ins. Co., 60 Minn. 376, 62 N. W. 440, 51 Am. St. 535. See also, Phœnix Ins. Co. v. Fleenor (Ark.), 148 S. W. 650. But compare Lancaster v. Southern Ins. Co., 153 N. Car. 285, 69 S. E. 214, 138 Am. St. 665.

[75] Hunt v. Springfield Fire & Marine Ins. Co., 196 U. S. 47, 49 L. ed. 381, 25 Sup. Ct. 179.

[76] Born v. Home Ins. Co., 110 Iowa 379, 81 N. W. 676, 80 Am. St. 300; Kimball v. Monarch Ins. Co., 70 Iowa 513, 30 N. W. 862; Home Fire Ins. Co. v. Johansen, 59 Nebr. 349, 80 N. W. 1047; State Ins. Co. v. Schreck, 27 Nebr. 527, 43 N. W. 340, 6 L. R. A. 524, 20 Am. St. 696.

[77] In German-American Ins. Co. v. Humphrey, 62 Ark. 348, 35 S. W. 428, 54 Am. St. 297, the court said: "If it be said that, where the mortgage is paid off, there is no longer an encumbrance and increase of risk, still as to whether or not the mortgage has been paid off would be the question, and one that often could not be settled without expensive litigation. * * * without some such provision in the policy, the unscrupulous would have an inviting opportunity, after a loss, to divide the spoils, at the expense of the insurer Doubtless some such considerations as these prompted the clause in the policy under consideration."

[78] Born v. Home Ins. Co., 110 Iowa 379, 81 N. W. 676, 80 Am. St. 300.

issuing a policy, to examine the building or structure to be insured and fix the insurable value thereof, and providing that recovery may be had notwithstanding any subsequent change not affecting the risk, applies only to the condition of the building and structure, and does not impair or affect any condition in the policy against the making of any subsequent encumbrance without notice to and consent of the company.[79] Where the policy provided that it should become void if the property "be or become encumbered by chattel mortgage," and no written application was made and no questions asked regarding encumbrances, it was held that the condition was broken by the existence of a chattel mortgage, although it was of record at the time the policy was issued. It was said that the great weight of authority is to the effect that where the policy contains such a stipulation, and the property at the time of the execution of the policy is covered by a mortgage, no recovery can be had unless it appears that there was a waiver or estoppel by which the company is precluded from relying on the contract.[80] A mortgage which has been paid, though not satisfied, at the time the policy is issued, is not within this provision.[81] But a chattel mortgage, good as between the parties, seems to be included.[82]

§ 4258. **Foreclosure proceedings.**—The clause making the policy void if, with the knowledge of the insured, foreclosure proceedings are commenced or notice given of the sale of the property covered by the policy by virtue of any mortgage or trust

[79] Webster v. Dwelling House Ins. Co., 53 Ohio St. 558, 42 N. E. 546, 30 L. R. A. 719, 53 Am. St. 658. See also, Sun Fire Office v. Clark, 53 Ohio St. 414, 42 N. E. 248, 38 L. R. A. 562.

[80] Crikelair v. Citizens' Ins. Co., 168 Ill. 309, 48 N. E. 167, 61 Am. St. 119. It was so expressly held in Wilcox v. Continental Ins. Co., 85 Wis. 193, 55 N. W. 188. See also, Fitchburg Sav. Bank v. Amazon Ins. Co., 125 Mass. 431; Wierengo v. American F. Ins. Co., 98 Mich. 621, 57 N. W. 833; Smith v. Columbia Ins. Co., 17 Pa. St. 253, 55 Am. Dec. 546; Pennsylvania Ins. Co. v. Gottman's Admrs., 48 Pa. St. 151. The principle upon which these decisions rest was recognized and applied in Reaper City Ins. Co. v. Brennan, 58 Ill. 158, 11 Am. Rep. 54, and Hebner v. Sun Ins. Co., 157 Ill. 144, 41 N. E. 627. See also, Phœnix Ins. Co. v. Overman, 21 Ind. App. 516, 52 N. E. 771; Traders' Ins. Co. v. Cassell, 24 Ind. App. 238, 56 N. E. 259.

[81] Laird v. Littlefield, 164 N. Y. 597, 58 N. E. 1089.

[82] Rhea v. Planters' Mut. Ins. Assn., 77 Ark. 57, 90 S. W 850; Madsen v. Farmers' &c. Ins. Co., 87 Nebr. 107, 126 N. W. 1086, 29 L. R. A. (N. S.) 97, Ann. Cas. 1912A 985.

deed,[83] is peculiar to the New York form and would seem to indicate that the giving of a mortgage need not be communicated to the insurer until foreclosure proceedings are commenced.[84] As said in New York:[85] "The defendant might have been willing, for the premium charged, to insure this barn with the mortgage upon it, and yet not willing to insure it in case of proceedings to foreclose the mortgage. * * * Before commencing the foreclosure the plaintiff should have obtained the assent of the defendant. It might have examined the circumstances and granted such assent without any conditions, or it might have required an additional premium for the increased risk. It might have refused altogether, and in that case the plaintiff could have delayed his foreclosure until the end of the year, or surrendered the policy and procured insurance elsewhere. Even if the provision were found to be very inconvenient and embarrassing, there is no help for it. There it is, and we cannot take it out of the policy by construction." This provision relates only to the future, and therefore the policy is not rendered void by the fact that foreclosure proceedings are pending when the policy is issued, although such fact was not disclosed to the insurer.[86] If a policy upon mortgaged property expressly provides that it shall become absolutely void upon the commencing of proceedings for foreclosure of the mortgage without the written consent of the insurer, and the mortgage by its terms is subject to foreclosure if the taxes upon the property are permitted to become delinquent, it is invalidated when the property is advertised for sale or account of such default.[87] To

[83] This clause is found in the standard policies in use in the states of New Jersey, Connecticut, Rhode Island, Wisconsin, Louisiana, North Dakota, New York, North Carolina, South Dakota and Michigan. The Iowa clause is slightly different. The clause is not found in the standard policies of Massachusetts, Minnesota, Maine or New Hampshire.

[84] Bishop v. Clay &c. Ins. Co., 45 Conn. 430; Smith v. Monmouth Mut. Fire Ins. Co., 50 Maine 96; Judge v. Connecticut Fire Ins. Co., 132 Mass. 521; Shepherd v. Union Mut. Fire Ins. Co., 38 N. H. 232; Richards Ins. § 146 (citing Conover v. Mutual Ins. Co., 1 Comst. (N. Y.) 290); Byers v. Farmers' Ins. Co., 35 Ohio St. 606, 35 Am. Rep. 623. But see, Western Massachusetts Ins. Co. v. Riker, 10 Mich. 279.

[85] Titus v. Glens Falls Ins. Co., 81 N. Y. 410, 8 Abb. N. Cas. (N. Y.) 315; Quinlan v. Providence Washington Ins. Co., 133 N. Y. 356, 31 N. E. 31, 28 Am. St. 645.

[86] Orient Ins. Co. v. Burrus, 23 Ky. L. 656, 63 S. W. 453.

[87] Springfield Steam Laundry Co. v. Traders' Ins. Co., 151 Mo. 90, 52 S. W. 238, 74 Am. St. 521. See also,

render the policy void for violation of this provision it is not necessary to restore any part of the premium, as this is to be done only when the policy is returned for cancelation.[88] Under this provision and a provision that no condition of the policy can be waived except by writing thereon, such foreclosure, without an indorsement on the policy, has been held to avoid it, although notice of the foreclosure is given to the agent who issued the policy.[89] Where a policy insuring a mortgagee's interest was excepted from the condition that it should be void if foreclosure proceedings should be commenced against the property without the knowledge of the mortgagee, it was held that the policy was not invalidated as to him by the foreclosure of a judgment lien against the property by a third party.[90] A provision to the effect that the "entry of a foreclosure of a mortgage * * * shall be deemed an alienation of the property" does not necessarily mean a complete foreclosure.[91] Where the policy contained a provision that it should be void "if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice of sale given of any property covered by this policy, by virtue of any mortgage," it was held that where the mortgagors and another party gave the assignee of the mortgage a personal judgment note for the balance due on the mortgage, a judgment thereafter entered on the note was not a foreclosure of the mortgage within the meaning of the provision.[92] And an illegal foreclosure sale made without the consent of the insured will not cause a forfeiture of the policy.[93] Where there is a foreclosure sale, and the order of confirmation is thereafter set aside

Horton v. Home Ins. Co., 122 N. Car. 498, 29 N. E. 944, 65 Am. St. 717, and note.

[88] Norris v. Hartford Fire Ins. Co., 55 S. Car. 450, 33 S. E. 566, 74 Am. St. 765.

[89] Woodside Brewing Co. v. Pacific Fire Ins. Co., 159 N. Y. 549, 54 N. E. 1095. See also, Delaware Ins. Co. v. Greer, 120 Fed. 916, 57 C. C. A. 188, 61 L. R. A. 137.

[90] Sun Ins. Office v. Beneke (Tex.), 53 S. W. 98.

[91] McIntire v. Norwich Fire Ins. Co., 102 Mass. 230, 3 Am. Rep. 458. In Pennsylvania the mere issuance of a scire facias on the property does not invalidate the policy. Weiss v. American F. Ins. Co., 148 Pa. St. 349, 23 Atl. 991.

[92] Collins v. London Assur. Corp., 165 Pa. St. 298, 30 Atl. 924. See also, Southern Ins. Co. v. Estes, 106 Tenn. 472, 62 S. W. 149, 52 L. R. A. 915, 82 Am. St. 892, as to institution of proceedings to foreclose vendor's lien.

[93] Niagara F. Ins. Co. v. Scammon, 144 Ill. 490, 28 N. E. 919, 32 N. E. 914, 19 L. R. A. 114; Richland Coun-

for irregularity, the interest of the mortgagor remains and is protected by the policy.[94]

§ 4259. **Generation of illuminating gas.**—The prohibition as to the generation of gas or vapor, is upon its generation and not upon its use for lighting the building. Where the policy contained a clause prohibiting, unless by special agreement indorsed on the policy, "the generating or evaporating within the building or contiguous thereto of any substance for a burning gas, or the use of gasoline for lighting," and the plaintiffs constructed works fifty feet from the building for the manufacture of gas from gasoline which was conducted to the building through pipes, it was held that the gas works were not contiguous to the building within the meaning of the policy.[95]

§ 4260. **Change in interest, title or possession—Scope of provision.**—It is commonly provided that: "This entire policy shall be void * * * if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise."[96] This clause is very broad, and provides that notice of all such changes must be given to the company in order that it may cancel the policy if it desires so to do. But under it only material changes avoid the policy,[97] and it is said that the word "interest"

ty Mut. Ins. Co. v. Sampson, 38 Ohio St. 672; Georgia Home Ins. Co. v. Kinnier's Admx., 28 Grat. (Va.) 88.

[94] In Richland County Mut. Ins. Co. v. Sampson, 38 Ohio St. 672, the question was whether before the fire the insured had lost all insurable interest.

[95] Arkell v. Commerce Ins. Co., 69 N. Y. 191, 25 Am. Rep. 168. See also, Lebanon County v. Franklin F. Ins. Co. (Pa.), 85 Atl. 419. A condition in a policy of insurance upon goods "contained in the brick building situate," against "lighting the same (the premises insured) by camphine or spirit-gas," held to be good and to preclude the use of spirit-gas as a means of lighting in and about the goods at the place where they were described to be. Stettiner v. Granite Ins. Co., 5 Duer (N. Y.) 594.

[96] This clause is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Wisconsin, Louisiana, North Dakota, South Dakota, Michigan and North Carolina. The standard forms of Massachusetts, Minnesota and Maine provide that the policy shall be void if, "without such assent, the said property be sold, or this policy assigned."

[97] Barnes v. Union &c. Ins. Co., 51 Maine 110, 81 Am. Dec. 562, and note. See notes in 59 Am. Dec. 307 and 28 Am. Dec. 154. As to the effect of

means less than title and has no application where the insured owns the title.[98] The mere appointment of a receiver is not such a change in the title or possession of the property as to avoid a policy which contains the provision that "if any change takes place in the title or possession of the property, whether by sale or judicial decree, without notice to the company and its consent indorsed thereon, then the policy shall be void;"[99] nor is a change of receivers such a change of possession or title as will invalidate the policy.[1] Where, after the sale of property under foreclosure and before the expiration of the time to redeem, property is insured for the benefit of a mortgagee, as its interest may appear, and the mortgagee pays the premium, the nonredemption from the mortgage sale by the owner of the property does not work an alienation of the property so as to defeat the policy.[2] And where a policy is originally issued to a mortgagee the fact that he subsequently acquires the title and thus increases his interest is not considered a breach of the provision in question,[3] but there is more conflict among the decisions as to the rule in such a case

a temporary alienation, see Hill v. Middlesex Mut. Fire Assur. Co., 174 Mass. 542, 55 N. E. 319. Where the insurer consented to the transfer it was held that the provision was violated by a retransfer without the consent of the company. St. Onge v. Westchester Fire Ins. Co., 80 Fed. 703. A change which increases the interest of the insured is not such a change of ownership as requires notice to be given to the company, under the terms of a subrogation contract which provides that the mortgagee shall notify the company of any change in the interest. Dodge v. Hamburg-Bremen Fire Ins. Co., 4 Kans. App. 415, 46 Pac. 25.

[98] Garner v. Milwaukee Mechanics' Ins. Co., 73 Kans. 127, 84 Pac. 717, 4 L. R. A. (N. S.) 654, 117 Am. St. 460.

[99] Small v. Westchester Fire Ins. Co., 51 Fed. 789; Lancashire Ins. Co. v. Boardman, 58 Kans. 339, 49 Pac. 92, 62 Am. St. 621; Farmers' Fire Ins. Co. v. Baker, 94 Md. 545, 51 Atl. 184; Southern Pants Co. v. Rochester &c. Ins. Co. (N. Car.), 74 S. E. 812; Georgia Home Ins. Co. v. Bartlett, 91 Va. 305, 21 S. E. 476, 50 Am. St. 832. See also, Union Bank v. Kansas City Bank, 136 U. S. 223, 34 L. ed. 341, 10 Sup. Ct. 1013. And compare, Herman v. Katz Bros., 101 Tenn. 118, 47 S. W. 86, 41 L. R. A. 700. But it is held otherwise in a recent case where the receiver took actual possession and control. Bronson v. New York Fire Ins. Co., 64 W. Va. 494, 63 S. E. 283, 19 L. R. A. (N. S.) 643n.

[1] Thompson v. Phenix Ins. Co., 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. 1019. Where a policy is made to an estate the execution by the administrator of an executory contract to sell the property to pay debts is held not to avoid the policy in Zeitler v. Concordia F. Ins. Co., 169 Mich. 555, 135 N. W. 332.

[2] Washburn Mill Co. v. Fire Assn. of Philadelphia, 60 Minn. 68, 61 N. W. 828, 51 Am. St. 500. See also, Pioneer Sav. & Loan Co. v. St. Paul Fire & Marine Ins. Co., 68 Minn. 170, 70 N. W. 979.

[3] Michigan Fire & Marine Ins. Co. v. Wich, 8 Colo. App. 409, 46 Pac. 687; Esch v. Home Ins. Co., 78 Iowa 334, 43 N. W. 229, 16 Am. St. 443; Heaton v. Manhattan Fire Ins. Co.,

where the policy was issued to the mortgagor, and a number of decisions will be found to the effect that the transfer of title to the mortgagee is a violation of the provision.[4] An agreement between the owners of the property and another person to represent to the creditors of the owner, for the purpose of preventing a levy and attachment, that the property had been sold to such other person, does not avoid the policy.[5] Like other provisions for the benefit of the insurer, this provision against alienation may be waived.[6] It has also been held that the notice may be given to the person who signed the policy, as the agent of the company, when the insured has no notice that such person has ceased to be an agent.[7]

§ 4261. **Transfer of part interest.**—Where the prohibition is merely upon the sale or conveyance of the property it is held that it is not violated by the sale of anything less than the entire interest of the insured.[8] The general rule seems to be that such a condition refers only to an absolute transfer of the entire interest of the insured which completely divests him of his insurable interest, and any sale or transfer short of this is not within the scope of such a condition.[9] But a provision to the effect that the

7 R. I. 502; Bailey v. Am. Cent. Ins. Co., 4 McCrary (U. S.) 221, 13 Fed. 250.

[4] Brunswick Sav. Inst. v. Commercial Un. Ins. Co., 68 Maine 313, 28 Am. Rep. 56; Boston Co-operative Bank v. American Cent. Ins. Co., 201 Mass. 350, 87 N. E. 594, 23 L. R. A. (N. S.) 1147n; Foote v. Hartford Fire Ins. Co., 119 Mass. 259. See also, Scania Ins. Co. v. Johnson, 22 Colo. 476, 45 Pac. 431; Brecht v. Law Union & Crown Ins. Co., 160 Fed. 339, 87 C. C. A. 351, 18 L. R. A. (N. S.) 197, and note; McKinney v. Western Assur. Co., 97 Ky. 474, 17 Ky. L. 325, 30 S. W. 1004. But compare to contrary effect, Dodge v. Hamburg-Bremen Fire Ins. Co., 4 Kans. App. 415, 46 Pac. 25; Ft. Scott Bldg. &c. Assn. v. Palatine Ins. Co., 74 Kans. 272, 86 Pac. 142; Bragg v. New England Mut. F. Ins. Co., 25 N. H. 289; Washington Ins. Co. v. Hayes, 17 Ohio St. 432, 93 Am. Dec. 628.

[5] Orrell v. Hampden Fire Ins. Co., 13 Gray (Mass.) 431.

[6] Stuart v. Reliance F. Ins. Co., 179 Mass. 434, 60 N. E. 929.

[7] Whitney v. American Ins. Co. (Cal.), 56 Pac. 50. A breach of this condition renders the policy ipso facto void. Farmers' Mut. Ins. Assn. v. Price, 112 Ga. 264, 37 S. E. 427. As elsewhere noted, in some states the effect is to suspend the policy. Provisions forbidding a change of title without the consent of the insurer are reasonable and have always been enforced. Cummins v. National Fire Ins. Co., 81 Mo. App. 291.

[8] Cowan v. Iowa State Ins. Co., 40 Iowa 551, 20 Am. Rep. 583; Scanlon v. Union Fire Ins. Co., 4 Biss. (U. S.) 511, Fed. Cas. No. 12436. See also, Stetson v. Massachusetts Mut. Fire Ins. Co., 4 Mass. 330, 3 Am. Dec. 217.

[9] Clinton v. Norfolk Mut. Fire Ins. Co., 176 Mass. 486, 57 N. E. 998, 50 L. R. A. 833, 79 Am. St. 325, and

policy shall be void if there is a sale, transfer or change of title of the insured property, has been held broken by a conveyance of undivided interest in the property, although the remaining interest of the insured exceeds in value the amount of the policy.[10]

§ 4262. **Executory contract of sale.**—There is some conflict among the decisions, but it seems that the execution of a contract of sale, by the terms of which the title is to remain in the vendor until the purchaser pays the deferred payments, is not a violation of the condition which forbids any change in the title of the insured property.[11] So, it has been held that the condition is not broken by a contract of sale and the part payment of the purchase-money with a provision for the giving of possession at a future date, where the loss occurs before that time.[12] But where, under a contract for the sale of real estate, the purchaser has taken possession, and nothing remains to be done but to make the deed and pay the balance of the purchase-price, there is a breach of condition, although the contract provides that it is to become of no effect if default is made in the payments at the stipulated time.[13] It has also been held in some jurisdictions that the condition is broken by the execution of a written contract of sale passing the equitable title and beneficial interest.[14]

cases there cited. See note to Lane v. Maine &c. Ins. Co., 12 Maine 44, 28 Am. Dec. 150.

[10] Western Massachusetts Ins. Co. v. Riker, 10 Mich. 279.

[11] Home Ins. Co. v. Bethel, 142 Ill. 537, 32 N. E. 510; Garner v. Milwaukee Mechanics' Ins. Co., 73 Kans. 127, 84 Pac. 717, 4 L. R. A. (N. S.) 654, 117 Am. St. 460, and note. See also, Arkansas Fire Ins. Co. v. Wilson, 67 Ark. 553, 55 S. W. 933, 48 L. R. A. 510, 77 Am. St. 129; Pringle v. Des Moines Ins. Co., 107 Iowa 742, 77 N. W. 521; Grable v. German Ins. Co., 32 Nebr. 645, 49 N. W. 713. Contra, Skinner & Sons Ship Bldg. Dry Dock Co. v. Houghton, 92 Md. 68, 48 Atl. 85, 84 Am. St. 485; Grunauer v. Westchester Fire Ins. Co., 72 N. J. L. 289, 62 Atl. 418, 3 L. R. A. (N. S.) 107. A condition prohibiting any sale or transfer, or any change in the possession of the property, does not apply to a mere executory contract for a sale without change of possession. Browning v. Home Ins. Co., 71 N. Y. 508, 27 Am. Rep. 86; Forward v. Continental Ins. Co., 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637. And it is held that the sale must be such as to pass title. International Wood Co. v. National Assur. Co., 99 Maine 415, 59 Atl. 544, 105 Am. St. 288. See also, Zeitler v. Concordia Fire Ins. Co., 169 Mich. 555, 135 N. W. 332.

[12] Kempton v. State Ins. Co., 62 Iowa 83, 17 N. W. 194.

[13] Davidson v. Hawkeye Ins. Co., 71 Iowa 532, 32 N. W. 514, 60 Am. Rep. 818, and last note to this section. A transfer from a mortgagor to a mortgagee before the fire, which is not accepted until the day after the fire, will not avoid the policy. Pioneer Sav. & Loan Co. v. Providence Washington Ins. Co., 17 Wash. 175, 49 Pac. 231, 38 L. R. A. 397.

[14] Cottingham v. Fireman's Fund

Where the policy contains a provision invalidating it "if any change take place in the interest, title, or possession of the subject of insurance," it is not invalidated by an agreement to exchange the insured property, which was to take effect on a specified date in the future, but which was never in fact executed. The court said that, "It was a simple agreement to, in the future, make such a change, which was never done. It is true that the policy stipulates against a change of interest, or a change of title, or a change of possession. There was not a change of either."[15] A contract for the sale of the insured property does not violate this condition where the property is not passed to the purchaser, although a portion of the purchase-money is paid.[16] The word "interest" is said to be broader than the word "title," and includes both legal and equitable rights, so that where the policy provides that it shall be void if any change takes place in the interest of the insured, whether by voluntary act of the insured or otherwise, an executory agreement to convey the insured premises under which the vendee takes possession and pays part of the purchase-price is a breach of the condition.[17]

§ 4263. **Mortgages on premises.**—The weight of authority supports the view that the execution of a mortgage on the insured

Ins. Co., 90 Ky. 439, 12 Ky. L. 409, 14 S. W. 417, 9 L. R. A. 627. See also, Grunauer v. Westchester Fire Ins. Co., 72 N. J. L. 289, 62 Atl. 418, 3 L. R. A. (N. S.) 107. Confirmation of an administrator's sale has been held sufficient in Washington. Moller v. Niagara F. Ins. Co., 54 Wash. 439, 103 Pac. 449, 24 L. R. A. (N. S.) 807n, 132 Am. St. 1115.

[15] Erb v. German American Ins. Co., 98 Iowa 606, 67 N. W. 583, 40 L. R. A. 845. See also, Washington Fire Ins. Co. v. Kelly, 32 Md. 421, 3 Am. Rep. 149; Home Mut. Ins. Co. v. Tomkies, 96 Tex. 187, 30 Tex. Civ. App. 404, 71 S. W. 812, affd. 96 Tex. 187, 71 S. W. 814.

[16] Boston & Salem Ice Co. v. Royal Ins. Co., 12 Allen (Mass.) 381, 90 Am. Dec. 151.

[17] Gibb v. Philadelphia Fire Ins. Co., 59 Minn. 267, 61 N. W. 137, 50 Am. St. 405; Trumbull v. Portage, &c. Ins. Co., 12 Ohio 305. As to meaning of the word "interest," see Walradt v. Phœnix Ins. Co., 136 N. Y. 375, 32 N. E. 1063, 32 Am. St. 752. In Skinner & Son Ship Building Dry Dock Co. v. Houghton, 92 Md. 68, 48 Atl. 85, 85 Am. St. 485, it was held that a contract for the sale of the insured premises was a breach of a condition which provided that the policy should be void if any change take place in the interest, title or possession of the property, whether by legal process or by voluntary act of the insured. See also, Phenix Ins. Co. v. Kerr, 129 Fed. 723, 64 C. C. A. 251, 66 L. R. A. 569; Insurance Co. of North America v. Erickson, 50 Fla. 419, 39 So. 495, 2 L. R. A. (N. S.) 512; Hamilton v. Dwelling House Ins. Co., 98 Mich. 535, 57 N. W. 735, 22 L. R. A. 527; Rosenstock v. Mississippi Home Ins. Co., 82 Miss. 674, 35 So. 309.

premises is not a breach of the condition against a change of title, interest or possession.[18] Nor is this provision violated by the existence of a mortgage on the property at the time the policy was issued, as the condition refers only to subsequent changes.[19] But policies sometimes contain conditions requiring the disclosure of existing encumbrances, and rendering the contract void if this is not done. Of course the execution of a mortgage for the purpose of paying off a mortgage which was in existence at the time the policy was executed is not a breach of this provision against the creation of a future encumbrance.[20] Some authorities, however, hold that the execution of a mortgage results in a change of the title or interest of the mortgagor. Thus, in Texas it was held that the execution of a mortgage on the insured property is a breach of the condition against any change in the interest of the insured, "whether by sale, transfer, or conveyance."[21] So, the giving of a mortgage with a power of sale has been held a violation of the condition against alienation.[22] The execution of a chattel mortgage on partnership property by one of the partners to secure a personal debt violates a condition which provides that if any change takes places in the interest, title, or possession of the property, the policy shall be void.[23] A mortgage on the insured property by a person who holds

[18] Commercial Ins. Co. v. Spankneble, 52 Ill. 53, 4 Am. Rep. 582; Forehand v. Niagara Ins. Co., 58 Ill. App. 161, revd. 169 Ill. 626, 48 N. E. 830; Germania Fire Ins. Co. v. Stewart, 13 Ind. App. 627, 42 N. E. 286; Taylor v. Merchants' &c. Ins. Co., 83 Iowa 402, 49 N. W. 994; Smith v. Monmouth Mut. Fire Ins. Co., 50 Maine 96; Rice v. Tower, 67 Mass. 426; Judge v. Connecticut Fire Ins. Co., 132 Mass. 521; Loy v. Home Ins. Co., 24 Minn. 315, 31 Am. Rep. 346; Barry v. Hamburg &c. Ins. Co., 110 N. Y. 1, 17 N. E. 405; Conover v. Mutual Ins. Co. of Albany, 1 N. Y. 290, 4 How. Pr. (N. Y.) 365; Byers v. Farmers' Ins. Co., 35 Ohio St. 606, 35 Am. Rep. 623; Sun Fire Office v. Clark, 53 Ohio St. 414, 42 N. E. 248, 38 L. R. A. 562; Peck v. Girard F. & M. Ins. Co., 16 Utah 121, 51 Pac. 255, 67 Am. St. 600; Hartford Steam Boiler Inspection & Ins. Co. v. Lasher Stocking Co., 66 Vt. 439, 29 Atl. 629, 44 Am. St. 859. See also, Nussbaum v. Northern Ins. Co., 37 Fed. 524, 1 L. R. A. 704.

[19] Morotock Ins. Co. v. Rodefer, 92 Va. 747, 24 S. E. 393, 53 Am. St. 846.

[20] Aurora F. Ins. Co. v. Eddy, 55 Ill. 213; McKibban v. Des Moines &c. Ins. Co., 114 Iowa 41, 86 N. W. 38; Koshland v. Home Mut. Ins. Co., 31 Ore. 321, 49 Pac. 864, 50 Pac. 567.

[21] East Texas Fire Ins. Co. v. Clarke, 79 Tex. 23, 15 S. W. 166, 11 L. R. A. 293.

[22] Sossaman v. Pamlico Banking & Ins. Co., 78 N. Car. 145. See also, Watson v. North Carolina Home Ins. Co. (N. Car.), 75 S. E. 1105.

[23] Olney v. German Ins. Co., 88 Mich. 94, 50 N. W. 100, 13 L. R. A. 684, 26 Am. St. 281.

the legal title will not avoid a policy under a prohibition against changes in the title without the consent of the company indorsed upon the policy, if such mortgage is merely the obligation of the mortgagor and not of the insured.[24] The giving of a mortgage has been held a material alteration of the ownership of the property insured, however, under a policy which provides that "all alienations and alterations in the ownership, situation or state of the property" shall invalidate the policy.[25] Where the policy contains a condition against a change of title and the creation of encumbrances, a mere paper transfer, without a bill of sale and without consideration, and without a delivery of the possession of the property, is not a breach of the condition.[26] Where the policy contains a condition that it shall be void if there is any change in the title, or the creation of an encumbrance, and to which is attached a mortgage slip protecting the rights of a mortgagee against a breach of condition by the mortgagor, the rights of such mortgagee are not affected by a transfer of the title or the creation of an encumbrance by the mortgagor.[27] But, according to the weight of authority, if there is no such stipulation protecting the mortgagee, a mere clause making the loss, if any, payable to him does not protect him against the avoidance of the policy because of breach by the mortgagor.[28]

§ 4264. **Defeasible conveyances.**—It has been held that a deed absolute in form, but intended as a mortgage, is not a breach of the condition that the policy will be void if there is any change in the title or possession.[29] Such conveyances are treated as sim-

[24] Hoose v. Prescott Ins. Co. of Boston, 84 Mich. 309, 47 N. W. 587, 11 L. R. A. 340.

[25] Edmands v. Mutual Safety Fire Ins. Co., 1 Allen (Mass.) 311, 79 Am. Dec. 746.

[26] Forward v. Continental Ins. Co., 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637.

[27] Phenix Ins. Co. v. Omaha Loan & Trust Co., 41 Nebr. 834, 60 N. W. 133, 25 L. R. A. 679; Boyd v. Thuringia Ins. Co., 25 Wash. 447, 65 Pac. 785, 55 L. R. A. 165.

[28] Brecht v. Law Union & Crown Ins. Co., 160 Fed. 399, 87 C. C. A. 351, 18 L. R. A. (N. S.) 197n, citing numerous cases.

[29] German Ins. Co. v. Gibe, 162 Ill. 251, 44 N. E. 490; Barry v. Hamburg &c. Ins. Co., 110 N. Y. 1, 17 N. E. 405. Contra, Adams v. Rockingham &c. Ins. Co., 29 Maine 292; Tomlinson v. Monmouth &c. Ins. Co., 47 Maine 232; Western Massachusetts Ins. Co. v. Riker, 10 Mich. 279. But in Bemis v. Harborcreek &c. Ins. Co., 200 Pa. 340, 49 Atl. 769, it was held that a deed absolute in form, and containing no intimation that it is not an absolute conveyance, is a breach of the condition.

ply encumbrances, and hence come within the rule stated in the preceding section. The fact that a deed absolute in form is recorded, and the defeasance is not, does not change the rule, although the statute provides that persons having no notice of defeasance shall not be affected thereby.[30] A conveyance of real estate by a debtor to a creditor under the provisions of the Georgia Code is not an alienation of the property within the prohibition against a change of title.[31]

§ 4265. Invalid conveyances or encumbrances.—A deed to the property covered by the policy, executed by the insured while insane, is not a violation of the condition.[32] So, the rights of the insured are not affected by a sale of the property made by her husband without her consent.[33] And an invalid mortgage will not avoid the policy even where it is stipulated that it shall be void if the property shall become mortgaged or encumbered.[34] But it has been held that a voluntary conveyance, without consideration, is a breach of the condition against alienation.[35]

§ 4266. Sale with purchase-money mortgage.—A condition prohibiting a change of title, interest or possession is broken by the execution and delivery of a deed and the taking back of a mortgage to secure the payment of the purchase-money.[36] The contrary has been held in Ohio on the theory that only a transfer

[30] Bryan v. Traders' Ins. Co., 145 Mass. 389, 14 N. E. 454. See Foote v. Hartford Fire Ins. Co., 119 Mass. 259; Dailey v. Westchester Fire Ins. Co., 131 Mass. 173.

[31] Phœnix Ins. Co. v. Ashberry, 95 Ga. 792, 22 S. E. 717.

[32] Gerling v. Agricultural Ins. Co., 39 W. Va. 689, 20 S. E. 691.

[33] Commercial Ins. Co. v. Spankneble, 52 Ill. 53, 4 Am. Rep. 582; German Ins. Co. v. York, 48 Kans. 488, 29 Pac. 586, 30 Am. St. 313.

[34] Weigen v. Council Bluffs Ins. Co., 104 Iowa 410, 73 N. W. 862; Rowland v. Home Ins. Co., 82 Kans. 220, 108 Pac. 118, 136 Am. St. 104; Smith v. Niagara Fire Ins. Co., 60 Vt. 682, 15 Atl. 353, 1 L. R. A. 216, 6 Am. St. 144.

[35] Brown v. Cotton &c. Ins. Co., 156 Mass. 587, 31 N. E. 691; Home Fire Ins. Co. of Omaha v. Collins, 61 Nebr. 198, 85 N. W. 54.

[36] Savage v. Howard Ins. Co., 52 N. Y. 502, 11 Am. Rep. 741; Kitts v. Massasoit Ins. Co., 56 Barb. (N. Y.) 177; Tittemore v. Vermont &c. Ins. Co., 20 Vt. 546. In Sanders v. Hillsborough Ins. Co., 44 N. H. 238, notice of the transaction was given to the company and consent to the continuance of the insurance was indorsed on the policy. See also, California State Bank v. Hamburg-Bremen Ins. Co., 71 Cal. 11, 11 Pac. 798; Farmers' Ins. Co. v. Archer, 36 Ohio St. 608.

of the entire interest of the insured violates this condition,[37] but this does not seem to follow.

§ 4267. **Conveyance to the wife of insured.**—A transfer of the insured property to a third party, and by such party to the wife of the insured, is a breach of this condition and renders the policy void.[38] It has also been held that a marriage contract conveying land to the wife, but providing for a reversion should she prove unfaithful or fail to survive the grantor, vests such a title in the wife as to come within the prohibition against change of title, and the fact that after the loss the husband secured a divorce cannot authorize a recovery by the husband on the policy.[39] Under the Illinois Statute, which provides that no conveyance of a homestead estate shall be valid unless signed and acknowledged by the wife, it is held that a conveyance by the insured to his wife does not constitute such a change of title as would avoid the policy, where the wife does not join in the execution and acknowledgment of the deed.[40]

§ 4268. **Transfers by and between partners.**—According to the weight of authority and what seems to be the better reason, a condition making the policy void if there is any change in the title or interest of the insured without the consent of the company is not violated by the sale by one partner to another of his interest in the property, as this provision has no reference to a transfer of interest between partners.[41] But in Iowa and a few

[37] Blackwell v. Miami &c. Ins. Co., 48 Ohio St. 533, 29 N. E. 278, 14 L. R. A. 431, 29 Am. St. 574.

[38] Langdon v. Minnesota Farmers' Mut. F. Assn., 22 Minn. 193; Baldwin v. Phœnix Ins. Co., 60 N. H. 164; Walton v. Agricultural Ins. Co., 116 N. Y. 317, 22 N. E. 443, 5 L. R. A. 677. See also, Oakes v. Manufacturers' Fire & Marine Ins. Co., 131 Mass. 164; Glaze v. Three Rivers Farmers' Mut. Fire Ins. Co., 87 Mich. 349, 49 N. W. 595.

[39] Cummins v. National Fire Ins. Co., 81 Mo. App. 291.

[40] Kitterlin v. Milwaukee Mechanics' Mut. Ins. Co., 134 Ill. 647, 25 N. E. 772, 10 L. R. A. 220.

[41] Burnett v. Eufaula &c. Ins. Co., 46 Ala. 11, 7 Am. Rep. 581; Sun Fire Office v. Wich, 6 Colo. App. 103, 39 Pac. 587; Drennen v. London Assur-Corp., 20 Fed. 657, revd. 113 U. S. 51, 28 L. ed. 919, 5 Sup. Ct. 341; Powers v. Guardian Fire & Life Ins. Co., 136 Mass. 108, 49 Am. Rep. 20; New Orleans Ins. Assn. v. Holberg, 64 Miss. 51, 8 So. 175; Phenix Ins. Co. v. Holcombe, 57 Nebr. 622, 78 N. W. 300, 73 Am. St. 532; German Mut. Fire Ins. Co. v. Fox, 4 Nebr. (unof.) 833, 96 N. W. 652, 63 L. R. A. 334; Wilson v. Genesee Mut. Ins. Co., 16 Barb. (N. Y.) 511, revd. 14 N. Y. 418; Hoffman v. Ætna Fire Ins. Co., 19 Abb. Prac. (N. Y.) 325, 24 N. Y. Super. Ct. 501, affd. 32 N. Y. 405, 88 Am. Dec. 337; Tallman v. At-

other states a different view has been taken.[42] So, it was held that the retiring of one partner from participation in the business management or control of the partnership business, reserving to himself simply the right to see that the stock of goods is kept up to its value at the time of retiring as security for the payment of the amount allowed by the other partner for his interest, is such a change of possession, if not of title, as to avoid the policy on the goods, under a policy which provides that it shall be void if the title or possession of the property is changed.[43] It is generally held that a change in the firm by which a third party becomes a member of the firm is a violation of the condition and renders the policy void.[44] And the same has been held where the insured turns over property to a partnership of which he is a member.[45] In a recent New York case, where the policy contained a provision that it should be void "if the property be sold or transferred, or any change takes place in title or possession," the court

lantic &c. Ins. Co., 29 How. Pr. (N. Y.) 71, revd. 42 N. Y. 87, 4 Abb. Dec. (N. Y.) 345, 33 How. Pr. (N. Y.) 400; Wood v. American Fire Ins. Co., 149 N. Y. 382, 44 N. E. 80, 52 Am. St. 733; West v. Citizens' Ins. Co., 27 Ohio St. 1, 22 Am. Rep. 294; Texas Banking & Insurance Co. v. Cohen, 47 Tex. 406, 26 Am. Rep. 298; Virginia Fire & Marine Ins. Co. v. Vaughan, 88 Va. 832, 14 S. E. 754. Agreement of one partner to sell his interest to another: Georgia Home Ins. Co. v. Hall, 94 Ga. 630, 21 S. E. 828; Allemania Ins. Co. v. Peck, 133 Ill. 220, 24 N. E. 538, 23 Am. St. 610. See also, Virginia Fire & Marine Ins. Co. v. Thomas, 90 Va. 658, 19 S. E. 454.

[42] Oldham v. Anchor Mut. Fire Ins. Co., 90 Iowa 225, 57 N. W. 861; Jones v. Phœnix Ins. Co., 97 Iowa 275, 66 N. W. 169. As supporting the rule that a transfer from one partner to another is within this provision, see Buckley v. Garrett, 47 Pa. St. 204; Finley v. Lycoming County Mut. Ins. Co., 30 Pa. St. 311, 72 Am. Dec. 705; Keeler v. Niagara Fire Ins. Co., 16 Wis. 523, 84 Am. Dec. 714. See Hartford Fire Ins. Co. v. Ross, 23 Ind. 179, 85 Am. Dec. 452; Tillou v. Kingston &c. Ins. Co., 5 N. Y. 405. See also, Keith v. Royal Ins. Co., 117 Wis. 531, 94 N. W. 295.

[43] Jones v. Phœnix Ins. Co., 97 Iowa 275, 66 N. W. 169.

[44] Drennen v. London Assur. Corp., 20 Fed. 657, revd. 113 U. S. 51, 28 L. ed. 919, 5 Sup. Ct. 341; Firemen's Ins. Co. v. Floss, 67 Md. 403, 10 Atl. 139, 1 Am. St. 398; American Laundry Co. v. Hamburg-Bremen Fire Ins. Co., 121 Tenn. 13, 113 S. W. 394, 21 L. R. A. (N. S.) 442n. See also, Malley v. Atlantic Fire & Marine Ins. Co., 51 Conn. 222; Card v. Phœnix Ins. Co., 4 Mo. App. 424; Virginia Fire & Marine Ins. Co. v. Thomas, 90 Va. 658, 19 S. E. 454. But compare Hanover Fire Ins. Co. v. Lewis, 28 Fla. 209, 10 So. 297.

[45] Germania Fire Ins. Co. v. Home Ins. Co., 144 N. Y. 195, 39 N. E. 77, 26 L. R. A. 591, 43 Am. St. 749; Biggs v. North Carolina Home Ins. Co., 88 N. Car. 141; Royal Ins. Co. v. Martin, 192 U. S. 149, 48 L. ed. 385, 24 Sup. Ct. 247. But compare Cowan v. Iowa State Ins. Co., 40 Iowa 551, 20 Am. Rep. 583; Blackwell v. Miami Valley Ins. Co., 48 Ohio St. 533, 29 N. E. 278, 29 Am. St. 574, 14 L. R. A. 431.

said:[46] "The contract of insurance is peculiarly personal in its nature, and the success of the business of underwriting depends largely upon what is known as the moral hazard. * * * It is of the utmost importance to the company to ascertain who is to be vested with the title and possession of the property sought to be insured. It would be a harsh and indefensible rule that required the underwriter, who had insured an individual on a stock of goods in a store, to continue the insurance after the insured had taken in two partners and formed a firm wherein each partner was vested with an undivided third interest in the property covered by the policy, without having been afforded the opportunity to examine into the moral and business characters of two strangers to the original contract. This right of the insurance company was in no wise invaded when this court held that a sale by one partner to another of his interest, where both were insured, did not avoid the policy. It is only when a stranger is to be brought into contractual relations with the insurance company that the consent of the latter is essential."

§ 4269. **Transfers between joint owners.**—It seems that the provision prohibiting the sale of insured property does not prevent sales and transfers of interests as between joint owners.[47] Thus, a transfer from one joint tenant to another such tenant is not an alienation of the property.[48] But it has been held that

[46] Germania Fire Ins. Co. v. Home Ins. Co., 144 N. Y. 195, 39 N. E. 77. 26 L. R. A. 591, 43 Am. St. 749. See cases cited in Beebe v. Ohio &c. Ins. Co., 93 Mich. 514, 53 N. W. 818, 18 L. R. A. 481, 32 Am. St. 519. See also, as sustaining this doctrine, Drennen v. London Assur. Corp., 20 Fed. 657, revd. 113 U. S. 51, 28 L. ed. 919, 5 Sup. Ct. 341, and Malley v. Atlantic Fire & Marine Ins. Co., 51 Conn. 222; Card v. Phœnix Ins. Co., 4 Mo. App. 424. The mere dissolution of a firm does not destroy the joint interest of the copartners in the partnership property or make them tenants in common. The property continues as partnership property until it is disposed of. Until this is done there is no violation of the condition against a change in the title. But a dissolution of the partnership and a division of the partnership property prior to the fire is a violation of the condition. Roby v. American Cent. Ins. Co., 120 N. Y. 510, 24 N. E. 808. See Dreher v. Ætna Ins. Co., 18 Mo. 128.

[47] Hoffman v. Ætna Fire Ins. Co., 19 Abb. Prac. (N. Y.) 325, 24 N. Y. Super. Ct. 501, affd. 32 N. Y. 405, 88 Am. Dec. 337. See also, Combs v. Shrewsbury Mut. Fire Ins. Co., 34 N. J. Eq. 403. And compare Tate v. Citizens' Mut. Fire Ins. Co., 13 Gray (Mass.) 79.

[48] Lockwood v. Middlesex Mut. Assur. Co., 47 Conn. 553; Tillou v. Kingston &c. Ins. Co., 7 Barb. (N. Y.) 570.

a transfer from one tenant in common to another is within the provision against "alienation by sale or otherwise."[49]

§ 4270. Legal process or judgment.—The provision in regard to alienation or change of interest by legal process or judgment is valid; and its violation, as by confessing judgment, will render the insurance void.[50] It is not, however, broken by the seizure of the goods on execution,[51] as the mere levy of an execution is not an alienation of the property so long as the right of redemption remains.[52] A change of title or interest is not effected by a delivery of an execution to an officer and a levy thereunder.[53] Where the policy provided that it should be rendered void by the "levy of an execution," it was held that the mere issuance of an execution and the advertisement of the property for sale by the sheriff, was not a

[49] Buckley v. Garrett, 47 Pa. St. 204.

[50] Dover Glass Works Co. v. American Fire Ins. Co., 1 Marv. (Del.) 32, 29 Atl. 1039, 65 Am. St. 264; Olney v. German Ins. Co., 88 Mich. 94, 50 N. W. 100, 13 L. R. A. 684, 26 Am. St. 281. A judgment entered on a warrant of an attorney is an encumbrance. Pennsylvania Mut. Fire Ins. Co. v. Schmidt, 119 Pa. St. 449, 13 Atl. 317.

[51] Rice v. Tower, 1 Gray (Mass.) 426.

[52] Greenlee v. North British &c. Ins. Co., 102 Iowa 427, 71 N. W. 534, 63 Am. St. 455; Clark v. New England Mut. Fire Ins. Co., 6 Cush. (Mass.) 342, 53 Am. Dec. 44. See also, Wood v. American Fire Ins. Co., 149 N. Y. 382, 44 N. E. 80, 52 Am. St. 733, and note. See note 57.

[53] Walradt v. Phœnix Ins. Co., 136 N. Y. 375, 32 N. E. 1063, 32 Am. St. 752, where the court says: "While each event in the progress of the proceedings for collection may bring the debtor and creditor into closer relations, and press nearer upon the property of the debtor, yet his title or interest in the property is not divested or transferred until a sale is made which operates in law to transfer his interest to another. By the delivery of the execution and levy thereunder the officer has simply obtained authority, at some future time and in the mode prescribed by law, to expose the property of the debtor for sale, and that is the final act which changes the title and interest of the debtor. The officer has, no doubt, in law and from the necessity of the case, a sufficient interest in the property levied upon to enable him to protect it by insurance or against the acts of wrongdoers, otherwise the proceedings for collection of the debt might be defeated, but still the owner retains the title in the same sense that he did after he made default in the payment of the debt, which as we have seen is the basis of every step in the process of enforcement. His interest is, no doubt, affected by the issuing of the execution and the levy, but that is also true, though perhaps in a more remote sense, by contracting the debt. The words 'change of interest,' as used in the policy, are substantially synonymous with the words 'change of title,' and neither event occurs until the sale upon the execution." See as to effect of confirmation of administrator's sale, Molley v. Niagara Fire Ins. Co., 54 Wash. 439, 103 Pac. 449, 24 L. R. A. (N. S.) 807n, 132 Am. St. 1115.

violation of the provision.[54] This provision is also held to be limited to acts of omission or commission by the insured, or to a change of possession by process under his order or control.[55] Where the policy contained a provision that it should be void "if any change takes place in the title or possession of the property (except in case of succession by reason of the death of the insured) whether by sale, transfer, conveyance, legal process, or judicial decree," it was held that a writ of attachment was, under the Wisconsin Statute, process, and that therefore the policy was rendered invalid by the levy of the attachment on the insured property. "There can be no question," said the court, "but that Evans, the deputy sheriff, took exclusive possession of the property under the writ, and that a change of possession of the property took place 'by legal process,' in the language of the condition."[56] But an illegal levy, assessment, seizure and sale of the insured property does not violate this condition,[57] and the general rule is that the mere levy of an attachment, like the levy of an execution, does not avoid the policy under the clause of the standard policy here under consideration.[58]

§ 4271. **By judgment.**—A change of title by "judgment" means change of title through judicial sale; and where the sale under judicial decree must be confirmed and the loss occurs before such confirmation, recovery upon the policy is not defeated.[59]

[54] Caraher v. Royal Ins. Co., 63 Hun (N. Y.) 82, 44 N. Y. St. 141, 17 N. Y. S. 858, affd. 136 N. Y. 645, 32 N. E. 1015.

[55] Carey v. German American Ins. Co., 84 Wis. 80, 54 N. W. 18, 20 L. R. A. 267, 36 Am. St. 907.

[56] Carey v. German American Ins. Co., 84 Wis. 80, 54 N. W. 18, 20 L. R. A. 267, 36 Am. St. 907.

[57] Runkle v. Citizens' Ins. Co., 6 Fed. 143.

[58] O'Toole v. Ohio German Fire Ins. Co., 159 Mich. 187, 123 N. W. 795, 24 L. R. A. (N. S.) 802n. See also, Springfield Fire & Marine Ins. Co. v. Phillips, 16 Ky. L. (abstract) 352, 16 Ky. L. 390; McClelland v. Greenwich Ins. Co., 107 La. Ann. 124, 31 So. 691; Tefft v. Providence &c. Ins. Co., 19 R. I. 185, 32 Atl. 914, 61 Am. St. 761; Herman v. Katz Bros., 101 Tenn. 118, 47 S. W. 86, 41 L. R. A. 700.

[59] Manhattan Ins. Co. v. Stein, 5 Bush (Ky.) 652; Slobodisky v. Phenix Ins. Co., 53 Nebr. 816, 74 N. W. 270; Haight v. Continental Ins. Co., 92 N. Y. 51; Collins v. London Assur. Corp., 165 Pa. St. 298, 30 Atl. 924. And a void judicial sale will not breach the provisions. Pearman v. Gould, 42 N. J. Eq. 4, 5 Atl. 811. But confirmation has been held to defeat a recovery under this provision and the Washington Statute. Moller v. Niagara Fire Ins. Co., 54 Wash. 439, 103 Pac. 449, 24 L. R. A. (N. S.) 807n, 132 Am. St. 1115.

So where the provision merely referred to a change of title, ownership or possession of the property, it was held not broken by a sale under execution where, before the time for redemption had expired, the husband of the insured paid the money to redeem the property under an agreement that the purchaser would convey to him, and the property was destroyed before the conveyance was actually made.[60] There is no such change of title until the period of redemption expires.[61] So, it has been held that a sale by the sheriff does not pass title until his deed is acknowledged and delivered.[62] But these matters may depend somewhat on statute.

§ 4272. **By partition.**—The condition prohibiting a change in the interest, title or possession of the property is broken by the setting aside of the insured property to the widow of the insured in partition proceedings after his death. The partition of the property, whether it is inter se or by judgment or decree, effects a change "in the interest, title or possession" of the property.[63]

§ 4273. **Assignment and bankruptcy proceedings.**—A general assignment of the property of the insured for the benefit of his creditors violates the clause which provides that the policy shall be void, "If the realty * * * or any part thereof shall be sold or transferred,"[64] and it seems clear, where the assignee takes possession before the loss occurs there can be no recovery on the

[60] Lodge v. Capital Ins. Co., 91 Iowa 103, 58 N. W. 1089. See also, Greenlee v. North British &c. Ins. Co., 102 Iowa 427, 71 N. W. 534, 63 Am. St. 455.

[61] Wood v. American Fire Ins. Co., 149 N. Y. 382, 44 N. E. 80, 52 Am. St. 733. This is the general rule, and recovery is not defeated where there is left in the owner an equity of redemption and the loss occurs before the expiration of the period of redemption. Williams v. North German Ins. Co., 24 Fed. 625; Stephens v. Illinois Mut. Fire Ins. Co., 43 Ill. 327; Loy v. Home Ins. Co., 24 Minn. 315, 31 Am. Rep. 346; Bronson v. New York Fire Ins. Co., 64 W. Va. 494, 63 S. E. 283, 19 L. R. A. (N. S.) 643n.

[62] Collins v. London Assur. Corp., 165 Pa. St. 298, 30 Atl. 924. But see Cropper v. Brown, 76 N. J. Eq. 406, 74 Atl. 987, 139 Am. St. 770.

[63] Trabue v. Dwelling House Ins. Co., 121 Mo. 75, 25 S. W. 848, 23 L. R. A. 719, 42 Am. St. 523. See also, Barnes v. Union &c. Ins. Co., 51 Maine 110, 81 Am. Dec. 562n; Burbank v. Rockingham &c. Ins. Co., 24 N. H. 550, 57 Am. Dec. 300; Sherwood v. Agricultural Ins. Co., 73 N. Y. 447, 29 Am. Rep. 180; Finley v. Lycoming County Mut. Ins. Co., 30 Pa. St. 311, 72 Am. Dec. 705; Hartford Fire Ins. Co. v. Ransom (Tex. Civ. App.), 61 S. W. 144.

[64] Orr v. Hanover Fire Ins. Co., 158 Ill. 149, 41 N. E. 854, 49 Am. St. 146; Ohio Farmers' Ins. Co. v.

policy.[65] This is true under a policy which provides that "when any property insured by this company shall be taken possession of by a mortgagee, or in any way be alienated, the policy shall be void."[66] So, a condition against alienation has been held to be broken by a transfer of the property by the wife of the insured, who held the title as security for a debt to the husband's assignee in insolvency.[67] But it has been held in Kentucky that a transfer of goods to an assignee in trust to pay the creditors of the insured, the insured remaining in actual possession, did not violate the clause prohibiting a "transfer of the interest of the insured by sale or otherwise," without the consent of the company.[68] So, an assignment for the benefit of creditors by one member of a firm has been held not to affect the sole and undivided ownership by the firm of the partnership property.[69] A similar provision to that in the standard policy is violated by a transfer by a registrar under and in pursuance of the bankruptcy act.[70] And it is fairly well settled that where the loss occurs after the trustee is appointed and qualified there can be no recovery on the policy by the insured; but it seems that the provision in question is not violated so as to defeat a recovery where the loss occurs before the appointment of a trustee or the like.[71]

§ 4274. **Transfer by death.**—By the weight of authority, even in the absence of the exception as to change of title by death, a general provision forbidding a transfer of the property will be

Waters, 65 Ohio St. 157, 61 N. E. 711. See also, Small v. Westchester Fire Ins. Co., 51 Fed. 789; Campbell v. German Ins. Co. (Tex. Civ. App.), 31 S. W. 310.

[65] Orr v. Hanover Fire Ins. Co., 158 Ill. 149, 41 N. E. 854, 49 Am. St. 146; Milwaukee Trust Co. v. Lancashire Ins. Co., 95 Wis. 192, 70 N. W. 81. But see for case in which the company was held estopped, Highlands v. Lurgan Mut. Fire Ins. Co., 177 Pa. St. 566, 35 Atl. 728, 55 Am. St. 739.

[66] Young v. Eagle Fire Ins. Co., 14 Gray (Mass.) 150, 74 Am. Dec. 673. See also, Roper v. National F. Ins. Co. (N. Car.), 76 S. E. 869.

[67] Brown v. Cotton &c. Ins. Co., 156 Mass. 587, 31 N. E. 691.

[68] Phœnix Ins. Co. v. Lawrence, 4 Metc. (Ky.) 9, 81 Am. Dec. 521.

[69] Wood v. American Fire Ins. Co., 149 N. Y. 382, 44 N. E. 80, 52 Am. St. 733.

[70] Adams v. Rockingham &c. Ins. Co., 29 Maine 292; Perry v. Lorillard Fire Ins. Co., 61 N. Y. 214, 19 Am. Rep. 272.

[71] Gordon v. Mechanics &c. Ins. Co., 120 La. 441, 45 So. 384, 15 L. R. A. (N. S.) 827, 124 Am. St. 434; Fuller v. New York Fire Ins. Co., 184 Mass. 12, 67 N. E. 879. See also, In re M. J. Hibbler Mach. Supply Co., 192 Fed. 741; Marcello v. Concordia F. Ins. Co., 234 Pa. 31, 82 Atl. 1090; Fuller v. Jameson, 98 App. Div. (N. Y.) 53, 90 N. Y. S. 456, affd. 184 N. Y. 605, 77 N. E. 1187.

construed as referring to a voluntary transfer, and not to a transfer as the result of the death of the insured.[72] Such cases distinguish between alienation and devolution, one being the act of the party and the other the act of the law. But some decisions hold that under the language of the policy there under consideration the passing of the title by devolution upon the death of the insured terminates the policy.[73] This was the effect where the prohibition was against "a change of title."[74] Where, after the death of the insured, his wife rents the premises to tenants without the consent of the company, the provision forbidding a change of occupancy and possession is violated.[75]

§ 4275. **Change of possession.**—As already shown, the prohibition against a change of possession is usually held not to apply where the property is insured for the joint benefit of partners, and is transferred from one partner to another.[76] There is no change of possession within the meaning of this provision where the insured enters into an oral contract to lease the property and the intended lessee enters into actual possession under a parol license from the insured for the mere purpose of making repairs.[77] Leaving the property in charge of a person as agent of the owner is not a change of the possession of the property.[78] It has also been held that there is no change of possession under a policy which is payable to a chattel mortgagee, where he takes possession on default by the mortgagor.[79] Where a policy was issued upon cotton owned by the insured "or held by them in trust or on commission," the insured giving its receipts to the owners, and thereafter the receipts were transferred to certain railroad companies, which received bills of lading therefor from

[72] Planters' Mut. Ins. Assn. v. Dewberry, 69 Ark. 295, 62 S. W. 1047, 86 Am. St. 195; Forest City Ins. Co. v. Hardesty, 182 Ill. 39, 55 N. E. 139, 74 Am. St. 161; Pfister v. Gerwig, 122 Ind. 567, 23 N. E. 1041; Richardson's Admr. v. German Ins. Co., 89 Ky. 571, 12 Ky. L. 37, 13 S. W. 1, 8 L. R. A. 800; Burbank v. Rockingham &c. Ins. Co., 24 N. H. 550, 57 Am. Dec. 300; Georgia Home Ins. Co. v. Kinnier's Admx., 28 Grat. (Va.) 88.

[73] Sherwood v. Agricultural Ins. Co., 73 N. Y. 447, 29 Am. Rep. 180.

[74] Miller v. German Ins. Co., 54 Ill. App. 53.

[75] Planters' Mut. Ins. Assn. v. Dewberry, 69 Ark. 295, 62 S. W. 1047.

[76] Allemania F. Ins. Co. v. Peck, 133 Ill. 220, 24 N. E. 538, 23 Am. St. 610.

[77] Alkan v. New Hampshire Ins. Co., 53 Wis. 136, 10 N. W. 91.

[78] Shearman v. Niagara Fire Ins. Co., 46 N. Y. 526, 7 Am. Rep. 380.

[79] Getman v. Guardian Fire Ins. Co., 46 Ill. App. 489.

the insured, it was held that this did not effect a change of possession.[80]

§ 4276. **Lease of the property.**—It has been held that the leasing of the insured property does not violate a condition that the policy shall be void if the property be sold or transferred, or any change take place in the title or possession, "whether by legal process, judicial decree, voluntary transfer, or conveyance."[81] And a lease with the privilege of purchase at any time during the term does not violate the provision where the privilege is not exercised.[82] But it has been held, on the other hand, that the execution of a lease where the lessee goes into possession thereunder is a violation of the condition against a change of possession.[83]

§ 4277. **Assignment of policy.**—The provision that "this entire policy * * * shall be void * * * if this policy be assigned before a loss,"[84] is reasonable and valid,[85] and is not an unlawful restraint upon the right to transfer property.[86] Fire insurance contracts are personal in their nature, and are therefor

[80] California Ins. Co. v. Union Compress Co., 133 U. S. 387, 33 L. ed. 730, 10 Sup. Ct. 365.

[81] Rumsey v. Phœnix Ins. Co., 1 Fed. 396, 17 Blatchf. (U. S.) 527. See also, Rowland v. Home Ins. Co., 82 Kans. 220, 108 Pac. 118, 136 Am. St. 104.

[82] Planters' Mut. Ins. Co. v. Rowland, 66 Md. 236, 7 Atl. 257.

[83] Wenzel v. Commercial Ins. Co. of California, 67 Cal. 438, 7 Pac. 817; Smith v. Phenix Ins. Co. (Cal.), 23 Pac. 383, revd. 31 Cal. 323, 27 Pac. 738, 13 L. R. A. 475, 25 Am. St. 191. See Queen of Arkansas Ins. Co. v. Pendola, 94 Ark. 594, 128 S. W. 559; Fire Assn. v. Flournoy, 84 Tex. 632, 19 S. W. 793, 31 Am. St. 89.

[84] This provision is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Wisconsin, Louisiana, North Dakota, South Dakota, Michigan, North Carolina, Iowa, Massachusetts, Minnesota and Maine. The New Hampshire policy provides that the policy shall be "void and inoperative during the existence or continuance of the acts or conditions of things stipulated against, as follows: * * * or if, without such assent, the said property shall be sold, or this policy assigned."

[85] Spare v. Home Mut. Ins. Co., 19 Fed. 14, 9 Sawy. (U. S.) 148; Waterhouse v. Gloucester Fire Ins. Co., 69 Maine 409; Carroll v. Boston Marine Ins. Co., 8 Mass. 515; Biggs v. North Carolina Home Ins. Co., 88 N. Car. 141; Stolle v. Ætna Fire & Marine Ins. Co., 10 W. Va. 546, 27 Am. Rep. 593. See also, Davis v. Bremer County &c. Ins. Co. (Iowa), 134 N. W. 860; Bartling v. German &c. Ins. Co. (Iowa), 134 N. W. 864. An assignment of a fire insurance policy must be in writing. St. Paul Fire & Marine Ins. Co. v. Brunswick Grocery Co., 113 Ga. 786, 39 S. E. 483. See also, Kamm &c. Brewing Co. v. St. Joseph &c. F. Ins. Co., 168 Mich. 606, 134 N. W. 999 (requiring consent to be indorsed on policy).

[86] Lazarus v. Commonwealth Ins. Co., 5 Pick. (Mass.) 76.

not assignable without the consent of the insurer.[87] A transfer of the insured property does not of itself effect an assignment of the policy.[88] It has been held that the clause does not apply to a deposit by way of pledge which gives the creditor a lien upon the proceeds.[89] And an equitable assignment of the insured's interest in the policy will not defeat the insurance under this general clause.[90] Where the policy is assigned with the consent of the company, and the property is transferred to the assignee, a new contract is created between such assignee and the insurance company, which is not affected by subsequent breaches of conditions of the policy by the assignor.[91] But it is otherwise where the policy is merely assigned as collateral security, as the insurance is still upon the interest of the assignor.[92] This is true where the policy is assigned with the consent of the company as collateral security to a mortgagee, and unless there is an agreement to the contrary,[93] the policy will be rendered invalid by subsequent breaches of condition by the assignor.[94] Where a mortgagee to whom such an assignment is made assumes the payment of future premiums the transaction will be construed so as to protect him from the results of future breaches of conditions by the assignor.[95] But the assignee takes subject to the conditions of the policy, and if the assignor has lost his right to recover thereon by reason of a breach of condition, he can transfer nothing to the

[87] Rayner v. Preston, L. R. 18 Ch. Div. 1; Simeral v. Dubuque Mut. Fire Ins. Co., 18 Iowa 319; Jecko v. St. Louis Fire & Marine Ins. Co., 7 Mo. App. 308; Lett v. Guardian Fire Ins. Co., 125 N. Y. 82, 25 N. E. 1088.

[88] Lett v. Guardian Fire Ins. Co., 125 N. Y. 82, 25 N. E. 1088. See also, Harper v. Michigan &c. Ins. Co. (Mich.), 139 N. W. 27.

[89] Ellis v. Kreutzinger, 27 Mo. 311, 72 Am. Dec. 270.

[90] Bergson v. Buildings' Ins. Co., 38 Cal. 541; Hall v. Dorchester Mut. Fire Ins. Co., 111 Mass. 53, 15 Am. Rep. 1.

[91] Donnell v. Donnell, 86 Maine 518, 30 Atl. 67; Fogg v. Middlesex Mut. Fire Ins. Co., 10 Cush. (Mass.) 337; Bonefant v. American Ins. Co., 76 Mich. 653, 43 N. W. 682; Cummings v. Cheshire County M. F. Ins. Co., 55 N. H. 457; Buckley v. Garrett, 47 Pa. St. 204. See also, Ellis v. Insurance Co. of North America, 32 Fed. 646; Commonwealth v. National Ins. Co., 113 Mass. 514.

[92] Birdsey v. City Fire Ins. Co., 26 Conn. 165; Reed v. Windsor County Mut. Fire Ins. Co., 54 Vt. 413; Pupke v. Resolute Fire Ins. Co., 17 Wis. 378, 84 Am. Dec. 754.

[93] Hartford Fire Ins. Co. v. Williams, 63 Fed. 925, 11 C. C. A. 503.

[94] Illinois Mut. Fire Ins. Co. v. Fix, 53 Ill. 151, 5 Am. Rep. 38; Tomlinson v. Monmouth &c. Ins. Co., 47 Maine 232; Grosvenor v. Atlantic Fire Ins. Co., 17 N. Y. 391.

[95] Brannin v. Mercer &c. Ins. Co., 28 N. J. L. 92; Francis v. Butler Mut. Fire Ins. Co., 7 R. I. 159.

assignee.[96] This clause does not affect the right of the insured to transfer his interest after a loss.[97] It is, then, a mere chose in action, and is assignable like any other claim, without the consent of the company, subject, of course, to such defenses as would have been available against the original insured.[98] The transfer and assignment of a claim after loss is not void as against public policy.[99] An executory contract for the sale of property has been held not to violate the provision against sale or assignment.[1] Nor is it violated by a transfer of an interest in the insured property from one partner to another.[2] Nor does this provision apply to the assignment of the interest of a mortgagee to whom the policy is made payable as his interest may appear.[3] The assent of the company to an assignment of the policy

[96] Home Mut. Ins. Co. v. Hauslein, 60 Ill. 521; Eastman v. Carrol County Mut. Fire Ins. Co., 45 Maine 307; Citizens' Fire Ins. &c. Co. v. Doll, 35 Md. 89, 6 Am. Rep. 360. See also, Polk v. State Mut. F. Ins. Co. (Tex. Civ. App.), 151 S. W. 1126. In Ellis v. Council Bluffs Ins. Co., 64 Iowa 507, 20 N. W. 782, it was held that by consenting to an assignment the company, as against the assignee, could not defend on the ground of the fraud of the assignor in obtaining the insurance.

[97] Hall v. Dorcester Mut. Fire Ins. Co., 111 Mass. 53, 15 Am. Rep. 1; Imperial Fire Ins. Co. v. Dunham, 117 Pa. St. 460, 12 Atl. 668.

[98] Imperial Fire Ins. Co. v. Dunham, 117 Pa. St. 460, 12 Atl. 668; Dogge v. Northwestern Nat. Ins. Co., 49 Wis. 501, 5 N. W. 889.

[99] Goit v. National Protection Ins. Co., 25 Barb. (N. Y.) 189; West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289, 80 Am. Dec. 573; Alkan v. New Hampshire Ins. Co., 53 Wis. 136, 10 N. W. 91.

[1] Washington Fire Ins. Co. v. Kelly, 32 Md. 421, 3 Am. Rep. 149.

[2] Hoffman v. Ætna Fire Ins. Co., 19 Abb. Pr. (N. Y.) 325, 24 N. Y. Super. Ct. 501, affd. 32 N. Y. 405, 88 Am. Dec. 337; West v. Citizens' Ins. Co., 27 Ohio St. 1, 22 Am. Rep. 294.

[3] Whiting v. Burkhardt, 178 Mass. 535, 60 N. E. 1, 52 L. R. A. 788, 86 Am. St. 503, where the court said: "The object of that provision (coupled with the provision declaring the policy void if the property insured is sold) is to prevent the company becoming the insurer of the property of a person who is not acceptable to it. * * * The transfer prohibited by this provision is a transfer of the contract of insurance, —that is to say, a transfer by * * * the persons insured; not a transfer by J., who was the person designated as the person entitled to receive the proceeds of the insurance, if any, due under the contract between the company on the one hand and the insured on the other. * * * What J. did by assigning his 'right and interest in this policy' was not to transfer the policy, but to assign to another his right to receive the proceeds, if any, under it, the policy remaining, after this assignment, as before, the policy of G." In this case the policy was made payable to a mortgagee, and provided that no act or default of any person but the mortgagee, his agents or those claiming under him, should affect his right to recover in case of loss; and it was held that the assignee of such mortgagee might recover on the policy, although a part owner of the property had sold his interest therein before loss, and that the provision against assignment did not apply to an assignment by such mortgagee.

may be given after an unauthorized assignment as well as before.[4] Where a policy which had been assigned was presented to the agent of the company for the purpose of having its consent indorsed thereon, and the agent, instead of making this indorsement, signed and attached to the policy a slip which provided that loss, if any, thereunder, should be payable to the assignee, as his interest might appear, it was held that there was a substantial consent to the assignment.[5] Where, at the instance of the insured, an entry was made in the policy register of the company, "transferred to G.," it was held sufficient to show acceptance by the company of G. instead of the original insured.[6] It has been held, however, that an indorsement, "in case of loss, pay to A," is not an assignment of the policy.[7] Generally the insertion of a clause in the policy making the loss payable to a third party does not operate as an assignment of the policy.[8] Thus, where the policy is payable to a mortgagee as his interest may appear, there is no assignment of the policy by a mere designation of one to whom the fund, or a portion thereof, is to be paid with the company's consent. The right of action is still in the original insured.[9] A mortgagee to whom a policy is made payable as his interest may appear need not obtain the further consent of the company as upon a formal assignment of the policy.[10] An unsuccessful attempt to assign the policy where the interest in the insured property is not transferred will not render the policy void under this provision.[11] The consent to an assignment may

[4] Shearman v. Niagara Fire Ins. Co., 46 N. Y. 526, 7 Am. Rep. 380; Gould v. Dwelling-House Ins. Co., 134 Pa. St. 570, 19 Atl. 793, 19 Am. St. 717.

[5] Queen Ins. Co. v. Block, 22 Ky. L. 626, 58 S. W. 471. See also, Buchanan v. Exchange F. Ins. Co., 61 N. Y. 26; Southern Fertilizer Co. v. Reames, 105 N. Car. 283, 11 S. E. 467. But compare Atlas Reduction Co. v. New Zealand Ins. Co., 138 Fed. 497, 71 C. C. A. 21, 9 L. R. A. (N. S.) 433.

[6] Griswold v. American Cent. Ins. Co., 70 Mo. 654. See Minturn v. Manufacturers' Ins. Co., 10 Gray (Mass.) 501. As to the meaning of "indorsement" when required to be on the policy, see Pennsylvania Ins. Co. v. Bowman, 44 Pa. St. 89, and Reynolds v. Atlas Acc. Ins. Co., 69 Minn. 93, 71 N. W. 831.

[7] Russ v. Waldo Mut. Ins. Co., 52 Maine 187.

[8] Froehly v. North St. Louis. Mut. Fire Ins. Co., 32 Mo. App. 302; Martin v. Franklin Fire Ins. Co., 9 Vroom (N. J.) 140, 20 Am. Rep. 372.

[9] Williamson v. Michigan Fire & Marine Ins. Co., 86 Wis. 393, 57 N. W. 46, 39 Am. St. 906.

[10] National Fire Ins. Co. v. Crane, 16 Md. 260, 77 Am. Dec. 289.

[11] Smith v. Monmouth Mut. Fire Ins. Co., 50 Maine 96. In Bursinger v. Watertown Bank, 67 Wis. 75, 30 N. W. 290, 58 Am. Rep. 848, it ap-

be given by any duly authorized agent of the company.[12]

§ 4278. Use of property—Prohibited articles.—The customary clause[13] in regard to certain prohibited articles contains a proper restriction upon the use of the property, and must be observed by the insured.[14] The language, "any usage or custom of trade or manufacture to the contrary" was apparently inserted in the standard form for the purpose of avoiding the rule of construction which permits the use of the articles named in the printed slip, where they constitute an ordinary part of the stock of goods described in the policy or are necessary and commonly used as incident to the business. But the rule still seems to prevail, and it is said that the only effect of the clause is "to impose upon the insured the burden of showing with perhaps greater clearness that the written description fairly covers the prohibited

peared that the insured attempted to assign the policy while intoxicated.

[12] Breckenridge v. American &c. Ins. Co., 87 Mo. 62; Imperial Fire Ins. Co. v. Dunham, 117 Pa. St. 460, 12 Atl. 668. As to manner on which assent may be made, see Durar v. Hudson County Mut. Ins. Co., 24 N. J. L. 171; Boynton v. Farmers' Mut. Fire Ins. Co., 43 Vt. 256, 5 Am. Rep. 276. See also, Grant v. Eliot &c. Fire Ins. Co., 75 Maine 196; Leinkauf v. Calman, 110 N. Y. 50, 17 N. E. 389.

[13] "This entire policy * * * shall be void * * * if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light)." This clause is found in the standard policies in New York, New Jersey, Connecticut, Rhode Island, Louisiana, North Dakota, South Dakota, Michigan, North Carolina and Iowa. Wisconsin substitutes the words "Wisconsin standard" for "United States standard" in referring to kerosene oil. Massachusetts, Maine and Minnesota have the following clause in their standard policies: "Or if gunpowder or other articles subject to legal restriction shall be kept in quantities or manner different from those allowed or prescribed by law,—or if camphine, benzine, naphtha, or their chemical oils or burning fluids shall be kept or used by the insured, on the premises insured, except that what is known as refined petroleum, kerosene or coal-oil, may be used for lighting, and in dwelling-houses kerosene oil stoves may be used for domestic purposes—to be filled when cold, by daylight and with oil of lawful fire test only." The New Hampshire clause makes no reference to the use of kerosene oil stoves for domestic purposes, otherwise it is the same as the preceding clause.

[14] United Life &c. Ins. Co. v. Foote, 22 Ohio St. 340, 10 Am. Rep. 735; Liverpool & London & Globe Ins. Co. v. Gunther, 116 U. S. 113, 29

articles in question,"[15] although it has been held that the insured cannot prove the existence of a custom among dealers in the vicinity of keeping for sale at retail small quantities of the prohibited articles.[16] Operating a laundry is not a trade or manufacture within this clause so as to preclude proof of a custom of using gasoline by the residents of a community at the time the policy was issued.[17] Where the written part of a policy describes and covers a kind or stock of goods or property used in a certain business it is generally presumed that the intention was to insure all that is commonly carried in such a stock, and to permit the property to be used in the ordinary and customary way, and a policy covering materials of a certain business, although containing a printed condition prohibiting the keeping or using of certain inflammable substances, has often been held valid where the business is of such a character that the substances constitute a component part of the stock of materials used in the business.[18] Where the policy covered property described as a stock such as is usually kept in a general retail store, and the keeping of gunpowder was prohibited by the printed portions of the policy, it was held that if the gunpowder was a part of the stock usually kept in a retail store it might be kept without violating the condition of the policy.[19] So, where a policy insuring a stock of hardware provided that the keeping or using or allowing of dynamite

L. ed. 575, 29 Sup. Ct. 306. In Yoch v. Home Mut. Ins. Co., 111 Cal. 503, 44 Pac. 189, 34 L. R. A. 857, it was held that an "agreement indorsed" permitting otherwise prohibited articles to be kept on the insured premises is made where the articles are included in the written description of the insured property.

[15] Richards Ins., § 149; Birmingham Fire Ins. Co. v. Kroegher, 83 Pa. St. 64, 24 Am. Rep. 147.

[16] Hartford Protection Ins. Co. v. Harmer, 2 Ohio St. 452.

[17] Northern Assur. Co. v. Crawford, 24 Tex. Civ. App. 574, 59 S. W. 916.

[18] In a case where the question received full consideration it was said: "A contrary doctrine would present the strange anomaly of an insurance company issuing to another a policy of insurance containing such conditions as that under no circumstances could payment of a loss be thereunder legally demanded. A rule which permitted the printed conditions to control the written statement of the subject upon which the insurance was issued would place the insurance company in the peculiar position of saying, in effect: 'I issue you this policy. I accept your money in satisfaction of my demands for premiums. I insure your property to be used in your business, but if you use it your policy is void.'" Maril v. Connecticut Fire Ins. Co., 95 Ga. 604, 23 S. E. 463, 30 L. R. A. 835, 51 Am. St. 102. See also, Renshaw v. Missouri State Mut. Fire & Marine Ins. Co., 103 Mo. 595, 15 S. W. 945, 23 Am. St. 904, and note; Williams v. Fireman's Fund Ins. Co., 54 N. Y. 569, 13 Am. Rep. 620, 3 Elliott Ev., § 2335.

[19] Peoria Marine & Fire Ins. Co. v. Hall, 12 Mich. 202; Pindar v. Kings

on the premises would render the policy void unless otherwise provided by agreement on the policy, and an attached slip provided that the insurance should cover merchandise usually kept for sale in a hardware store, it was held that the policy covered dynamite when it was shown that it was usual to keep dynamite in such stores.[20] And, where the policy covered a stock of goods such as is usually kept in country stores, and contained a printed condition that it should be void if certain articles, including gasoline, were kept, used or allowed on the premises, it was held valid, where gasoline was kept as a part of the usual stock of merchandise. After discussing the various rules, the court said: "Applying these rules to the contract in the present case, it must be held that it was the intention of the defendant to insure gasoline, if it was an article usually kept in country stores, and that, if such was its intention, it was no violation of the policy for the insured to keep gasoline upon the premises as a part of the stock of merchandise."[21] It has also been held that benzine kept in small quantities as part of a stock of drugs and chemicals does not avoid a policy on such stock, although there is a stipulation against the keeping of benzine in the store.[22] An insurance company must be presumed to be familiar with the materials necessary to carry on a trade or business and to know what is commonly included in a stock of goods such as that insured, and in issuing the policy it is usually deemed to have intended to include all such materials in the risk.[23] Hence, where the policy was issued upon the materials used in the business of photography, it was held to cover all such articles, such as kerosene, as were in common use, although some other things might have been substituted therefor.[24] A policy upon a stock of fancy

County Fire Ins. Co., 36 N. Y. 648, 93 Am. Dec. 544.

[20] Phenix Ins. Co. v. Walters, 24 Ind. App. 87, 56 N. E. 257, 79 Am. St. 257, citing many cases.

[21] Yoch v. Home Mut. Ins. Co., 111 Cal. 503, 44 Pac. 189, 34 L. R. A. 857.

[22] Phœnix Ins. Co. v. Flemming, 65 Ark. 54, 44 S. W. 464, 39 L. R. A. 789, 67 Am. St. 900, where it is said: "The courts will not presume that the parties intended to make such an absurd agreement, but in such a case will presume that the intention was that the printed portions of the policy forbidding the keeping of benzine should not apply to the keeping of it bottled in small quantities as customary with druggists, but only to storing or keeping it in large quantities."

[23] Lancaster F. Ins. Co. v. Lenheim, 89 Pa. St. 497, 33 Am. Rep. 778, annotated.

[24] Hall v. Insurance Co. of North America, 58 N. Y. 292, 17 Am. Rep. 255; American &c. Ins. Co. v. Green, 16 Tex. Civ. App. 531, 41 S. W. 74.

goods, toys and other articles used in the business of the defendant as a German jobber and importer, with the privilege of keeping fireworks, which contained a provision requiring hazardous articles, such as fireworks, if kept, to be specially written in the policy, has been held avoided by the storing of fireworks on the premises without such permission, and they were considered not to be within the phrase, "other articles in his line of business," in view of the express provisions of the policy.[25] The use of an inflammable substance, which is a necessary, usual and customary incident to the business in which the insured property is used, is held to have been within the contemplation of the parties at the time of issuing the policy.[26] So, where the printed conditions exempt the insurer from liability for loss occasioned by the use of camphine, and there was a written provision granting the privilege for a printing office, bindery, bookstore and steam boiler in the yard, it was held that the use of camphine as one of the necessary articles for use in a printing office did not invalidate the policy.[27] The provision will be given a liberal construction where the prohibited articles are used incidentally and for temporary purposes only, such as for cleaning machinery,[28] or the like.[29] It is not broken by the keeping in a store of a jug containing crude petroleum, which is used by the insured for medicinal purposes, if the risk is not thereby increased, and this is a question for the jury.[30] So, it has even been held that gasoline is not kept, used or allowed on the premises within the meaning of the policy by leaving a five-gallon can containing gasoline in a building for a number of days for use in burning off paint prepa-

[25] Steinbach v. Relief Fire Ins. Co., 13 Wall. (U. S.) 183, 20 L. ed. 615. In Steinbach v. Lafayette Fire Ins. Co., 54 N. Y. 90, upon the same facts, it was held that if, as a matter of fact, the keeping of fireworks was in the plaintiff's line of business, they were embraced in the description of the property covered by the policy.

[26] Maril v. Connecticut Fire Ins. Co., 95 Ga. 604, 23 S. E. 463, 30 L. R. A. 835, 51 Am. St. 102.

[27] Harper v. New York City Ins. Co., 22 N. Y. 441.

[28] Wheeler v. Traders' Ins. Co., 62 N. H. 450, 13 Am. St. 582, note. See also, Mears v. Humboldt Ins. Co., 92 Pa. St. 15, 37 Am. Rep. 647.

[29] Garrebant v. Continental Ins. Co. (N. J.), 67 Atl. 90, 12 L. R. A. (N. S.) 43; Beer v. Insurance Co., 39 Ohio St. 109; Birmingham &c. Ins. Co. v. Kroegher, 83 Pa. St. 64, 24 Am. Rep. 147, note; Carrigan v. Lycoming Fire Ins. Co., 53 Vt. 418, 38 Am. Rep. 687; Clute v. Clintonville Mut. Fire Ins. Co., 144 Wis. 638, 129 N. W. 661, 32 L. R. A. (N. S.) 240n.

[30] Williams v. People's Fire Ins. Co., 57 N. Y. 274.

ratory to painting the building. The prohibition refers to the habitual keeping, using or allowing any of these articles on the premises, and not to the casual introduction of the articles for some temporary purpose connected with their occupation.[31] So, there was held to be no breach of the condition where the policy prohibits the use of camphine, spirit gas, burning fluid, or chemical oils, but permits the use of refined coal oil, kerosene or other carbon oils for lights, if drawn and the lamps filled by daylight, and the insured used lard oil and candles for lights and filled the lamps at night.[32]

§ 4279. Prohibited articles.—A narrower rule of construction than that stated in the preceding section has been applied in some states. Thus, in New Hampshire, a violation of the provision against the keeping and use of benzine and other enumerated articles of similar character was held to render the policy void. The court said: "Cases in which disregard of the prohibition of keeping or using of extraordinarily hazardous articles has not been held to work a forfeiture of the policy are those where the use made was one incident to the business of the insured, adopted from necessity or custom, and recognized by the insurer, so that a waiver of the prohibitory clause followed." And in reference to the claim that the provision was not violated because the use was merely temporary, the court said: "Where there is a stipulation that the policy shall be avoided on the use of the article expressly named, and there is nothing in the policy from which a permission to use the article, in a partial, limited, or temporary way can be inferred, full effect is usually given to the prohibitive clause by a forfeiture of the policy for its violation."[33] So, in Pennsylvania, under a policy which provided that it should be void if the hazard be increased by any means within the control

[31] Smith v. German Ins. Co., 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368. Contra, see First Congregational Church v. Holyoke Mut. Fire Ins. Co., 158 Mass. 475, 33 N. E. 572, 19 L. R. A. 587, 35 Am. St. 508, where it was held that the policy was avoided by the use of a naphtha torch for burning off old paint on the building.

[32] Carlin v. Western Assur. Co., 57 Md. 515, 40 Am. Rep. 440. See also, Phœnix Ins. Co. v. Fleenor (Ark.), 148 S. W. 650. Compare Wheeler v. Traders' Ins. Co., 62 N. H. 450, 13 Am. St. 582.

[33] Wheeler v. Traders' Ins. Co., 62 N. H. 450, 13 Am. St. 582.

or knowledge of the insured, or if there be kept, used or allowed on the premises fireworks or other named explosives, it was held that the temporary storing of an assorted lot of fireworks upon the premises for celebration purposes, with the knowledge and consent of the insured, was a breach of the condition and prevented a recovery for loss arising from the accidental explosion of such fireworks.[34] But even in Pennsylvania it has been held that where the use of the prohibited article is a necessary one in connection with the business, it must be presumed that the intent of the parties was to insure the subject of the insurance as it would continue to be during the life of the policy, notwithstanding the printed provision.[35] A violation of the provision by the tenant of the insured, however, is generally given the same effect as a violation by the insured himself.[36] The policy is not avoided by the use of kerosene oil otherwise than in lamps for illuminating purposes where the policy provides that "kerosene oil of legal standard (which last may be used for lights only, provided the oil be drawn and the lamps be trimmed and filled solely by daylight)," as this restriction is merely a regulation of the use of kerosene when used for lighting purposes, and will not be construed to prohibit its use for any other purpose than for lights.[37]

[34] Heron v. Phœnix Mut. Fire Ins. Co., 180 Pa. St. 257, 36 Atl. 740, 36 L. R. A. 517, 57 Am. St. 638, reviewing Pennsylvania cases. In this case fireworks were placed in the parlor of a residence on the third of July for the purpose of using them in a celebration on the evening of the fourth, and the policy contained a clause that it should be void if fireworks or other such articles were "kept, used, or allowed" on the premises, "any usage or custom of trade or manufacture to the contrary notwithstanding."

[35] Fraim v. National Fire Ins. Co., 170 Pa. St. 151, 32 Atl. 613, 50 Am. St. 753.

[36] Edwards v. Farmers' Mut. Ins. Assn., 128 Ga. 353, 57 S. E. 707, 12 L. R. A. (N. S.) 484n, 119 Am. St. 385 (even though the insured did not know of it); Norwaysz v. Thuringia Ins. Co., 204 Ill. 334, 68 N. E. 551; Duncan v. Sun Fire Ins. Co., 6 Wend. (N. Y.) 488, 22 Am. Dec. 539; Farmers' Ins. Co. v. Wells, 42 Ohio St. 519; Liverpool & London & Globe Ins. Co. v. Gunther, 116 U. S. 113, 29 L. ed. 575, 6 Sup. Ct. 306; Westchester Fire Ins. Co. v. Ocean View Pleasure Pier Co., 106 Va. 633, 56 S. E. 584. But see where the assured has no knowledge and stipulation only applies to such matters within the knowledge or control of the assured, Merrill v. Insurance Co. of North America, 23 Fed. 245. See also, Atlantic Ins. Co. v. Manning, 3 Colo. 224; North British Mercantile Ins. Co. v. Union Stock Yards Co., 120 Ky. 465, 27 Ky. L. 852, 87 S. W. 285; Nebraska & I. Ins. Co. v. Christiensen, 29 Nebr. 572, 45 N. W. 924, 26 Am. St. 407. See Hencker v. British Am. Assn. Co., 14 U. C. C. P. 57.

[37] Snyder v. Dwelling House Ins. Co., 59 N. J. L. 544, 37 Atl. 1022, 59 Am. St. 625. The New York court declined, in view of the fact that the legislature has declared certain

§ 4280. **Vacancy—In general.**—The standard form provides that, "This entire policy * * * shall be void * * * if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days."[38] The question of the effect of a temporary vacancy is thus eliminated. A vacancy beyond the prescribed period is a breach of the condition,[39] and it is generally held that it is not necessary for the insured to show, in addition to the fact of vacancy, that the risk was thereby increased.[40] Under a general provision rendering a policy void if the insured buildings become vacant and unoccupied, it is held by the weight of authority that a mere temporary vacancy will not affect a recovery,[41] although there are authorities to the contrary. Thus, in Texas it is held that where the policy provides that if the buildings become vacant and unoccupied without the consent of the company indorsed upon the policy, it shall be null and void, it is invalidated

grades and qualities of kerosene proper and safe to use, to take judicial notice of the explosive qualities of kerosene, and held it incumbent on the defendant to show that the kerosene used was in fact inflammable. Wood v. North Western Ins. Co., 46 N. Y. 421. But see 1 Elliott Ev., §§ 37, 70. See also, Mears v. Humboldt Ins. Co., 92 Pa. St. 15, 37 Am. Rep. 647.

[38] This is found in the standard policies of New York, New Jersey, Connecticut, North Carolina, Rhode Island, Wisconsin, Louisiana, Michigan, North Dakota, and South Dakota. The Iowa clause reads: "If the building herein described, whether intended for occupancy by the owner or tenant be or become vacant or unoccupied and so remain for ten consecutive days." The standard policies of Massachusetts, Minnesota, Maine, and New Hampshire read, "or if the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty day without such assent."

[39] Burner's Admr. v. German-American Ins. Co., 20 Ky. L. 71, 45 S. W. 109; Thompson v. Caledonia Fire Ins. Co., 92 Wis. 664, 66 N. W. 801. As to statutory provision that vacancy will avoid the policy only when there is an increase of risk, see Germania Fire Ins. Co. v. Werner, 76 Ohio St. 543, 81 N. E. 980, 12 L. R. A. (N. S.) 456, 118 Am. St. 891. Moody v. Amazon Ins. Co., 52 Ohio St. 12, 38 N. E. 1011, 26 L. R. A. 313, 49 Am. St. 699.

[40] Knowlton v. Patrons' Androscoggin Fire Ins. Co., 100 Maine 481, 62 Atl. 689, 2 L. R. A. (N. S.) 517; Doten v. Ætna Ins. Co., 77 Minn. 474, 80 N. W. 630; Germania Fire Ins. Co. v. Werner, 76 Ohio St. 543, 81 N. E. 980, 12 L. R. A. (N. S.) 456, 118 Am. St. 891. See also, Dennison v. Phœnix Ins. Co., 52 Iowa 457, 3 N. W. 500. But see contra, Traders' Ins. Co. v. Race, 142 Ill. 338, 31 N. E. 392; Moore v. Phœnix Fire Ins. Co., 64 N. H. 140, 6 Atl. 27, 10 Am. St. 384.

[41] Johnson v. Norwalk Fire Ins. Co., 175 Mass. 529, 56 N. E. 569; Liverpool & London & Globe Ins. Co. v. Buckstaff, 38 Nebr. 146, 56 N. W. 695, 41 Am. St. 725. See also, McMurray v. Capital Ins. Co., 87 Iowa 453, 54 N. W. 354; Hill v. Ohio Ins. Co., 99 Mich. 466, 58 N. W. 359; Franklin Fire Ins. Co. v. Kepler, 95 Pa. St. 492. See 3 Elliott Ev., § 2328.

by a temporary vacancy of the property, although without the knowledge of the owner, and a subsequent reoccupancy does not revive the policy unless the forfeiture has been waived by the insurer.[42] It has been held that a reasonable time elapsing between a change of tenants does not render the policy void under this clause,[43] and that vacancy of the house alone does not avoid the policy where it prohibits vacancy of the premises and covers both a house and a barn.[44]

§ 4281. **Construction.**—This condition against a building becoming vacant or unoccupied must be construed in the light of the situation and character of the property and the ordinary incidents and contingencies affecting the use to which it and other property of similar character in the same use is subject.[45] The Supreme Court of Wisconsin has said:[46] "Under certain circumstances, premises may be vacant or unoccupied, when under other circumstances premises in like situation may not be so, within the meaning of that term in insurance policies. Thus, if one insures his dwelling-house described in the policy as occupied by

[42] East Texas Fire Ins. Co. v. Kempner, 87 Tex. 229, 27 S. W. 122, 47 Am. St. 99. See also, Knowlton v. Patrons' Androscoggin Fire Ins. Co., 100 Maine 481, 62 Atl. 689, 2 L. R. A. (N. S.) 517; and Schuerman v. Dwelling House Ins. Co., 161 Ill. 437, 43 N. E. 1093, 52 Am. St. 377. Contra, Ætna Ins. Co. v. Meyers, 63 Ind. 238; Ohio Farmers' Ins. Co. v. Vogel, 166 Ind. 239, 76 N. E. 977, 3 L. R. A. (N. S.) 966, 117 Am. St. 382.

[43] Ohio Farmers' Ins. Co. v. Vogel, 166 Ind. 239, 76 N. E. 977, 3 L. R. A. (N. S.) 966, 117 Am. St. 382; Worley v. State Ins. Co., 91 Iowa 150, 59 N. W. 16, 51 Am. St. 334. See also, cases cited in notes to next following section.

[44] Worley v. State Ins. Co., 91 Iowa 150, 59 N. W. 16, 51 Am. St. 334; commenting on Connecticut Fire Ins. Co. v. Tilley, 88 Va. 1024, 14 S. E. 851, 29 Am. St. 770. But compare Keith v. Quincy Mut. Fire Ins. Co., 10 Allen (Mass.) 228; Ashworth v. Builders &c. Ins. Co., 112 Mass. 422, 17 Am. Rep. 117.

[45] Continental Ins. Co. v. Kyle, 124 Ind. 132, 24 N. E. 727, 9 L. R. A. 81, 19 Am. St. 77, and note; Limburg v. German Fire Ins. Co., 90 Iowa 709, 57 N. W. 626, 23 L. R. A. 99, 48 Am. St. 468; Carr v. Roger Williams Ins. Co., 60 N. H. 513; Whitney v. Black River Ins. Co., 72 N. Y. 117, 28 Am. Rep. 116, and note.

[46] Hotchkiss v. Phœnix Ins. Co., 76 Wis. 269, 44 N. W. 1106, 20 Am. St. 69. To the same effect, see Lockwood v. Middlesex Mut. Assur. Co., 47 Conn. 553; Traders' Ins. Co. v. Race, 142 Ill. 338, 31 N. E. 392; Home Ins. Co. v. Wood, 47 Kans. 521, 28 Pac. 167; Doud v. Citizens' Ins. Co., 141 Pa. St. 47, 21 Atl. 505, 23 Am. St. 263; Roe v. Dwelling House Ins. Co., 149 Pa. St. 94, 23 Atl. 718, 34 Am. St. 595. See also, City Planing & Shingle Mill Co. v. Merchants' &c. Mut. Fire Ins. Co., 72 Mich. 654, 40 N. W. 777, 16 Am. St. 552; Cummins v. Agricultural Ins. Co., 67 N. Y. 260, 23 Am. Rep. 111.

himself as his residence, and moves out of it, leaving no person in the occupation thereof, it thereby becomes vacant or unoccupied. But if he insures it as a tenement house, or as occupied by a tenant, it may fairly be presumed, nothing appearing to the contrary, that the parties to the contract of insurance contemplated that the tenant was liable to leave the premises, and that more or less time might elapse before the owner could procure another tenant to occupy them, and hence that the parties did not understand that the house should be considered vacant, and the policy forfeited or suspended (according to its terms), immediately upon the tenant's leaving it." The condition against non-occupancy must therefore be construed and applied with reference to the subject-matter of the contract, and the ordinary incidents attending the use of such property.[47]

§ 4282. **"Vacant" and "unoccupied" not synonymous.**—The word "vacant" does not necessarily mean the same thing as "unoccupied." In the New York standard form of policy the words are connected by the conjunction "or," and it follows that a breach of either condition invalidates the policy. It would seem, however, that unoccupied in this sense must usually be intended to guard against the same condition as the word vacant. Thus, it has been held that a house from which the insured had removed was both vacant and unoccupied, although certain articles of furniture remained in the house.[48] Where, however, the condition was that the policy should be void if the house became vacant and unoccupied, it was held that there was no breach unless the building was both empty and unused as a place of abode, and the court said: "A dwelling-house is unoccupied when no one lives therein, but is not then necessarily vacant.

[47] Halpin v. Phenix Ins. Co., 118 N. Y. 165, 23 N. E. 482. To the same effect, see Albion Lead Works v. Williamsburg &c. Ins. Co., 2 Fed. 479; Ohio Farmers' Ins. Co. v. Vogel, 166 Ind. 239, 76 N. E. 977, 3 L. R. A. (N. S.) 966, 117 Am. St. 382; Keith v. Quincy Mut. Fire Ins. Co., 10 Allen (Mass.) 228; Ashworth v. Builders' &c. Ins. Co., 112 Mass. 422, 17 Am. Rep. 117.

[48] Brashears v. Perry County Farmers' &c. Ins. Co. (Ind. App.), 98 N. E. 889; Moore v. Phœnix Ins. Co., 62 N. H. 240, 13 Am. St. 556n. See also, Home Ins. Co. v. Boyd, 19 Ind. App. 173, 49 N. E. 285; Agricultural Ins. Co. v. Hamilton, 82 Md. 88, 33 Atl. 429, 30 L. R. A. 633, 51 Am. St. 457; Lester v. Mississippi Home Ins. Co. (Miss), 19 So. 99; Craig v. Springfield Fire &c. Ins. Co., 34 Mo. App. 481.

A house filled with furniture throughout cannot be said to be 'vacant,' the primary and ordinary meaning of which is 'empty.' To avoid the policy, the premises must not only be unoccupied but also vacant. Force should be given to both words."[49] The same court in a subsequent case recognized the fact that the words may have different meanings, and said:[50] "There are doubtless conditions of a dwelling-house, or other like structure, when either word applied to it, or both words applied to it, will express a like state of it. There are, however, states of it when that will not be the case. * * * Sometimes, indeed, the use of the word 'vacant,' as applied to a dwelling, carries the notion that there is no dweller therein; and we would not be sure always to get or convey the idea of an empty house, by the words 'vacant dwelling' applied to it. But when the phrase 'vacant or unoccupied' is applied to a dwelling-house, plainly there is a purpose—an attempt to give a different statement of the condition thereof; by the first word, as an empty house, by the second word, as one in which there is not habitually the presence of human beings."

§ 4283. Construction when applied to dwelling-house.—Where the evident intent of the insurer is that the house shall be used as a place of abode for human beings,[51] and when this is not the case, there is added a risk which is not assumed under the contract. A dwelling-house should therefore be deemed vacant and unoccupied when it is no longer used as a place of abode.[52] A policy was held invalidated where it appeared that the insured moved his family to another building, taking all the furniture except a few beds and trifling household articles, trunks

[49] Herrman v. Merchants' Ins. Co., 81 N. Y. 184, 37 Am. Rep. 488. See also, Western Assur. Co. v. Mason, 5 Ill. App. 141.

[50] Herrman v. Adriatic Fire Ins. Co., 85 N. Y. 162, 39 Am. Rep. 644.

[51] Bonefant v. American Fire Ins. Co., 76 Mich. 653, 43 N. W. 682; Weidert v. State Ins. Co., 19 Ore. 261, 24 Pac. 242, 20 Am. St. 809, and note. See note in Moore v. Phœnix Ins. Co., 10 Am. St. 392; also, Burner's Admr. v. German-American Ins. Co., 103 Ky. 370, 45 S. W. 109; Sonneborn v. Manufacturers' Ins. Co., 44 N. J. L. 220, 43 Am. Rep. 365; Eureka Fire &c. Ins. Co. v. Baldwin, 62 Ohio St. 368, 57 N. E. 57.

[52] North American Fire Ins. Co. v. Zaenger, 63 Ill. 464; American Ins. Co. v. Padfield, 78 Ill. 167; Hanscom v. Home Ins. Co., 90 Maine 333, 38 Atl. 324; Agricultural Ins. Co. v. Hamilton, 82 Md. 88, 33 Atl. 429, 30 L. R. A. 633, 51 Am. St. 457; Hartshorne v. Agricultural Ins. Co. of Watertown, 50 N. J. L. 427, 14 Atl. 615; Alston v. Old North State Ins. Co.,

containing clothing and some provisions in the pantry, and that the only occupation of the house was by laborers in the employment of the insured, sleeping therein part of the time, and his wife going there every day to get provisions.[53] The occupation of a dwelling-house as a mere storehouse is not a compliance with this condition.[54] Where a tenant removed a week before the fire, and the furniture was all stored in one of the rooms for the purpose of being removed, and no one had slept in the house for more than a month, the house was held to be "vacant, unoccupied or uninhabited," although a person went there occasionally to see if the goods were all right.[55] But to constitute occupancy of a dwelling-house it need not be used continuously, and a mere temporary absence of such a character that it may fairly be said to have been a contingency within the contemplation of the parties should not be held to avoid the policy.[56] So, a policy is not invalidated where it appears that the occupant and his wife absented themselves from the house for a considerable period, but for a temporary and special purpose, and retained it as a residence, intending to return to it, leaving his family clothing there, and his wife going once a week to the house for the purpose of caring for and cleansing it, and from time to time for other purposes.[57]

80 N. Car. 326; Fitzgerald v. Connecticut Fire Ins. Co., 64 Wis. 463, 25 N. W. 735; and see note 48 supra.

[53] Agricultural Ins. Co. v. Hamilton, 82 Md. 88, 33 Atl. 429, 30 L. R. A. 633, 51 Am. St. 457.

[54] Limburg v. German Fire Ins. Co., 90 Iowa 709, 57 N. W. 626, 23 L. R. A. 99, 48 Am. St. 468, reviewing many cases; Agricultural Ins. Co. v. Hamilton, 82 Md. 88, 33 Atl. 429, 30 L. R. A. 633, 51 Am. St. 457; Haplin v. Ætna Fire Ins. Co., 120 N. Y. 70, 23 N. E. 988, 8 L. R. A. 79. A house is unoccupied when no one is living in it. Cook v. Continental Ins. Co., 70 Mo. 610, 35 Am. Rep. 438; Herrman v. Adriatic Fire Ins. Co., 85 N. Y. 162, 39 Am. Rep. 644. See also, Stoltenberg v. Continental Ins. Co., 106 Iowa 565, 76 N. W. 835, 68 Am. St. 323.

[55] Home Ins. Co. v. Boyd, 19 Ind. App. 173, 49 N. E. 285. See also, Stoltenberg v. Continental Ins. Co., 106 Iowa 565, 76 N. W. 835, 68 Am. St. 323; Lester v. Mississippi Home Ins. Co. (Miss.), 19 So. 99.

[56] Home Fire Ins. Co. v. Peyson, 54 Nebr. 495, 74 N. W. 960; Springfield Fire & Marine Ins. Co. v. McLimans, 28 Nebr. 846, 45 N. W. 171; Franklin Fire Ins. Co. v. Kepler, 95 Pa. St. 492; Georgia Home Ins. Co. v. Brady (Tex.), 41 S. W. 513. See also, Burlington Ins. Co. v. Lowery, 61 Ark. 108, 32 S. W. 383, 54 Am. St. 196; McMurray v. Capital Ins. Co., 87 Iowa 453, 54 N. W. 354; Stupetzki v. Transatlantic Fire Ins. Co., 43 Mich. 373, 5 N. W. 401, 38 Am. Rep. 195; Laselle v. Hoboken Fire Ins. Co., 43 N. J. L. 468; Moody v. Amazon Ins. Co., 52 Ohio St. 12, 38 N. E. 1011, 26 L. R. A. 313, 49 Am. St. 699.

[57] Cummins v. Agricultural Ins. Co., 67 N. Y. 260, 23 Am. Rep. 111.

§ 4284. Building—Contents—Vacancy.—Insurance upon a building may be invalidated by a breach of this condition without affecting the insurance upon the personal property in the building. In the case of a manufacturing establishment it was said: "The same form of policy is prescribed for insurance upon all kinds of property, and general provisions would naturally be inserted which are applicable to some kinds of property and not to other kinds. The provision in regard to the removal of property insured is evidently intended for movable property; the provision in regard to the premises becoming vacant by the removal of the owner or occupant, and the provision in regard to dangerous materials being kept or used on the premises, evidently relate only to buildings insured. There is more reason in holding that those provisions apply to furniture, and that an insurance on furniture or any personal property in a house would be made void by the vacancy of the house, or by the keeping in it of the dangerous articles mentioned, than that an insurance on stock in a manufacturing establishment would be made void if the factory ceased operation. * * * The building, and the machinery, fixtures, and appliances, constitute the manufacturing establishment. It is going far enough to hold that, in one insurance of machinery, the premises insured are the manufacturing establishment of which the machinery constitutes a part."[58]

§ 4285. Illustrations of construction of this provision.—It has been held that a building is unoccupied where a tenant who occupies the same as a store abandons it before the end of the term and leaves therein only a small amount of merchandise of a nominal value, although he retains the key to the building at the request of the insured;[59] and that a dwelling or tenement house is vacant and unoccupied if the occupant has left it, although some trifling articles of furniture of little value are left in one of the rooms.[60] The fact that a tenant intending to remove goes away to meet his wife, leaving two of his children in the house, with instructions to remain there until he returned, and that a

[58] Stone v. Howard Ins. Co., 153 Mass. 475, 27 N. E. 6, 11 L. R. A. 771.

[59] Home Ins. Co. v. Scales, 71 Miss. 975, 15 So. 134, 42 Am. St. 512.

[60] Schuermann v. Dwelling-House Ins. Co., 161 Ill. 437, 43 N. E. 1093, 52 Am. St. 377. See also, notes 48 and 52 supra.

small portion of the furniture has been removed, does not, however, constitute a breach of this condition.[61] A building was held not occupied by a tenant as a dwelling-house where the tenant had moved out and the son of the owner slept in the house during the day and worked nights, having only a cot, chair and alarm clock in the house, and the family of the owner resided next door and obtained water from a cistern in the kitchen of this house, and the owner went through the house every day.[62] The fact that a tenant and his servants had for two days before the fire been cleaning the house preparatory to its occupation does not constitute occupation.[63] So, a house was not occupied although two workmen took their meals there and kept their trunks and clothing in the building and slept at night in one of the rooms, but were employed elsewhere during the day.[64] So, a dwelling-house is unoccupied where the house remains vacant for three months and is then let to a tenant, who, up to the time of the loss, has placed therein implements for cleaning it, but not otherwise occupied the premises.[65]

It has been held, however, that a church used by the congregation in the ordinary manner that such buildings are used, and which was occasionally visited by the sexton at times when the congregation was not in session, is occupied, although there was no church meeting in the building for a period of six weeks, during which time there was no minister of the church and the congregation was awaiting the arrival of a new minister;[66] and that a house was not vacant where a part of the tenant's goods were in the house the night of the fire, and the tenant had retained the key to enable him to remove the same the next day, although he had already removed a part of the goods and the house was not occupied that night.[67] An ice house is not, as a matter of law, vacant and unoccupied because there was nothing therein at the

[61] Burlington Ins. Co. v. Lowery, 61 Ark. 108, 32 S. W. 383, 54 Am. St. 196. See also, Seubert v. Fidelity &c. Ins. Co. (S. Dak.), 136 N. W. 103.

[62] Eureka Fire &c. Ins. Co. v. Baldwin, 62 Ohio St. 368, 57 N. E. 57.

[63] Thomas v. Hartford Fire Ins. Co., 21 Ky. L. 914, 53 S. W. 297.

[64] Poor v. Humboldt Ins. Co., 125 Mass. 274, 28 Am. Rep. 228.

[65] Litch v. North British & Mercantile Ins. Co., 136 Mass. 491.

[66] Hampton v. Hartford F. Ins. Co., 65 N. J. L. 265, 47 Atl. 433, 52 L. R. A. 344.

[67] Norman v. Missouri Town Mut. Fire &c. Ins. Co., 74 Mo. App. 456.

time it was burned, in October, except the tools used in putting up ice and a small quantity of unmerchantable ice.[68] The premises are not vacated by a tenant leaving the premises when threatened by a forest fire in order to remove his sick wife to a place of safety, leaving several people to defend the property against fire.[69] Occupation by one tenant is within the provision that it shall become void if the premises be occupied by tenants.[70] A house is not vacant where it appears that the occupant of the house commenced to move out at nine o'clock in the morning and intended to complete the removal of the goods in the afternoon, and the house was destroyed by fire at noon.[71] So, a building described as "a ten tenement frame block" is not unoccupied if two of the tenements are in actual use and occupancy as residences.[72] But where the former occupant of a house had moved with his family into another house, where they slept and took their meals, the house was vacant, although some furniture remained in the house and the keys had not been surrendered to the landlord.[73] And where a building was insured as a "normal school and dwelling," it was held that where, at the time of the loss, its use as a normal school was suspended for an indefinite time and it was not the abode of any one, the condition was broken and there was no liability under the policy although the building was used for the temporary storage of the library and a portion of the household effects of the teacher who had formerly lived in the building.[74]

§ 4286. **Building in process of construction.**—An important question sometimes arises, although it has not often been decided, as to the effect of the vacancy clause where the building insured is in the process of erection or construction and is burned during such time. A recent case in Massachusetts decides not only this question but also several other points germane to the

[68] Des Moines Ice Co. v. Niagara Fire Ins. Co., 99 Iowa 193, 68 N. W. 600.

[69] Raymond v. Farmers' Mut. Fire Ins. Co., 114 Mich. 386, 72 N. W. 254.

[70] Elliott v. Farmers' Ins. Co., 114 Iowa 153, 86 N. W. 224.

[71] Insurance Co. of New York v. Coombs, 19 Ind. App. 331, 49 N. E. 471.

[72] Harrington v. Fitchburg Mut. Fire Ins. Co., 124 Mass. 126.

[73] Corrigan v. Connecticut Fire Ins. Co., 122 Mass. 298.

[74] Connecticut Fire Ins. Co. v. Buchanan, 141 Fed. 877, 73 C. C. A. 111, 4 L. R. A. (N. S.) 758.

subject. It is there held that a provision rendering the policy void if the premises become vacant by removal of the owner or occupant does not apply where the policy is issued on a building in process of erection, which, because not fully fitted for occupancy, is never occupied before the fire; that parol evidence is admissible to show that the building was in course of construction, and known to be so, when the policy was issued; and that one who states in his application that the building is a "dwelling-house" but in process of erection, complies with his undertaking, if the building is used as a dwelling-house when completed or occupied.[75] Under somewhat similar provisions or circumstances a like result has been reached in other cases either upon similar grounds or upon the ground of waiver.[76] But failure to complete and occupy the building within a provision granting a definite time therefor has been held a violation of such provision.[77]

§ 4287. Authorized change of location.—The clause authorizing the removal of the property when endangered by fire and providing that the policy shall remain in force for five days after such removal, and fixing the amount of recovery whether the property is in the new location or not,[78] does not seem to have

[75] Harris v. North American Ins. Co., 190 Mass. 361, 77 N. E. 493, 4 L. R. A. (N. S.) 1137.

[76] German Ins. Co. v. Penrod, 35 Nebr. 273, 53 N. W. 74; Alkan v. New Hampshire Ins. Co., 53 Wis. 136, 10 N. W. 91. Compare however, Royal Ins. Co. v. Lubelsky, 86 Ala. 530, 5 So. 768. See generally as to whether there is a waiver where building is unoccupied at time policy is issued, the note in 4 L. R. A. (N. S.) 758 and authorities there cited on both sides.

[77] Burnham v. Royal Ins. Co., 75 Mo. App. 394.

[78] "If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value of any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not." This is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Wisconsin, Louisiana, Michigan, North Dakota, South Dakota, Iowa and North Carolina. The standard policies of Massachusetts, Minnesota, Maine and New Hampshire provide that: "If such removal shall be necessary for the preserva-

been often construed by the courts. There are, however, as elsewhere shown, numerous cases which determine the liability of the company for damage occasioned while the property is being removed from a building which is on fire or threatened with destruction.[79] And in a recent case where a rider was attached to the policy granting permission to remove the property to a certain place and providing that the policy should "cover the same in both locations during removal, in proportion as the value of each location shall bear to the value in both and after the removal shall attach and cover in the new location only," it was held that the property was not covered and no recovery could be had for its loss while temporarily stored in another building with a view to its subsequent removal to the building designated in the rider.[80]

§ 4288. **Renewal of contract—In general.**—Another clause found in the standard policy of many states is as follows: "This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void."[81] Whether a renewal creates a new contract depends upon its terms. It has been held that every renewal of a policy of insurance, being upon a new consideration and optional with both parties, creates a new contract, and is, unless otherwise expressed, subject to the terms and conditions which are contained in the original policy.[82] Where the contract is renewed from year to year the description of the insured property in the original policy must be applied to

tion of the property from fire, this policy shall be valid without such assent for five days thereafter."

[79] See §§ 4213-4215, 4222, also 3 Elliott Ev., § 2331.

[80] Palatine Ins. Co. v. Kehoe, 197 Mass. 354, 83 N. E. 866, 15 L. R. A. (N. S.) 1007, 125 Am. St. 375. See also, Goodhue v. Hartford Fire Ins. Co., 184 Mass. 41, 67 N. E. 645. But compare, Ohio Farmers' Ins. Co. v. Burget, 65 Ohio St. 119, 61 N. E. 712, 55 L. R. A. 825, 87 Am. St. 596, and note.

[81] This provision is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Wisconsin, South Dakota, Iowa, Michigan, North Dakota, Louisiana, and North Carolina. It is not in the standard policies of Massachusetts, Minnesota, Maine and New Hampshire.

[82] Hartford Fire Ins. Co. v. Walsh, 54 Ill. 164, 5 Am. Rep. 115; Brady v. Northwestern Ins. Co., 11 Mich. 425; Aurora F. & M. Ins. Co. v. Kranich, 36 Mich. 289. Contra, New England Fire & Marine Ins. Co. v. Wetmore, 32 Ill. 221. See and compare, National Life &c. Ins. Co. v. Lokey, 166 Ala. 174, 52 So. 45; Standard Accident &c. Co. v. Wood, 116 Md. 575, 82 Atl. 702.

the condition of the property at the date of the last renewal.[83] In Maryland it was held that where, under a policy of insurance, an option was given to renew the same at its expiration, and the insured elected to renew, and notified the company of its election, such notification did not bind the company unless accompanied by payment or tender of payment of the premium.[84] In Michigan where an application for renewal was made, and the company's agent filled out, signed and delivered the policy without asking for payment of the premium, it was held that there was a valid contract.[85] But where it was provided that the company should not be liable by virtue of the policy or any renewal thereof until the premium had been actually paid, and it had been the custom of the agent to make renewals, deliver them and collect the premium, and ten days before the original contract expired the insured asked the agent to attend to its renewal, and he promised to do so, but nothing was done and the property was burned six months thereafter, it was held that the agent had not waived prepayment of the premium and that the company was not liable on the policy.[86] Where there was a verbal agreement to renew the risk, and payment of the premium was to be made on the first day of the succeeding month, which fell on Sunday, an offer to pay on Monday was sufficient, although the building was burned on Sunday.[87] The authorized agent of the company may renew a policy by parol, although the policy provides that it can be done only in writing.[88] A renewal need not be under seal, although the policy is under seal.[89] And it has been held that an

[83] Garrison v. Farmers' Mut. Fire Ins. Co., 56 N. J. L. 235, 28 Atl. 8.

[84] American Casualty Co.'s Case, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97.

[85] Lum v. United States F. Ins. Co., 104 Mich. 397, 62 N. W. 562.

[86] Zigler v. Phœnix Ins. Co., 82 Iowa 569, 48 N. W. 987.

[87] Taylor v. Germania Ins. Co., 2 Dill. (U. S.) 282, Fed. Cas. No. 13793. An insurance company agreed that a policy for one year should be a permanent risk, and that its officer should call for the premiums as they became due, and leave the certificates of payment and renewal. The assured party relying on this arrangement, did not call and pay the renewal premium, or get a renewal certificate. Before any of the officers called for the renewal premium, the property was destroyed by fire. Held, that the company was liable for the loss. Trustees of First Baptist Church v. Brooklyn Fire Ins. Co., 18 Barb. (N. Y.) 69.

[88] Cohen v. Continental Fire Ins. Co., 67 Tex. 325, 3 S. W. 296, 60 Am. Rep. 24. See Royal Ins. Co. v. Beatty, 119 Pa. St. 6, 12 Atl. 607, 4 Am. St. 622.

[89] Lockwood v. Middlesex Mut. Assur. Co., 47 Conn. 553.

agent of the company has power to make a valid parol agreement to renew a contract of insurance, although the policy and certificates of renewal issued by the company provide that it shall not be valid unless countersigned by the agent.[90] An agreement to renew must, however, have all the elements of a contract.[91] And where the authority of the agent was limited by the policy so that he could only renew on the same policy, "provided the premium therefor is paid and indorsed on this policy, or a receipt given," it was held that the company was not liable when nothing more was shown than a conversation between the insured and the agent which took place four weeks before a renewal was necessary.[92] When a policy is renewed it is generally the duty of the insured to inform the company of any change in the nature or use of the property which increases the hazard. Where the insured made representations as to the nature of the occupancy of the premises, and stipulated that, if they should be used and occupied so as to increase the risk without the notice and consent of the insurer in writing, the policy should be void, and that the insurance might be continued for such time as might be agreed upon, it was held that the performance of such conditions, unless otherwise specified in writing, should be construed as continued under the original representations, and an omission to give notice of a change of occupancy, increasing the risk, rendered a subsequent renewal invalid.[93] So, where a fire policy provided that, "This insurance (the risk not being changed) may be continued for

[90] Post v. Ætna Ins. Co., 43 Barb. (N. Y.) 351. See also, Cohen v. Continental Fire Ins. Co., 67 Tex. 325, 3 S. W. 296, 60 Am. Rep. 24.

[91] Johnson v. Connecticut Fire Ins. Co., 84 Ky. 470, 8 Ky. L. 460, 2 S. W. 151; O'Reilly v. Corporation of London Assurance, 101 N. Y. 575, 5 N. E. 568. Mere silence of the agent when asked if the company would renew is not a renewal. Royal Ins. Co. v. Beatty, 119 Pa. St. 6, 12 Atl. 607, 4 Am. St. 622. See also, American Cent. Ins. Co. v. Hardin, 148 Ky. 246, 146 S. W. 418 (even though there appeared to be a custom among agents in a certain locality to renew without notice or request). As to the authority of the agent to renew, see Carroll v. Charter Oak Ins. Co., 40 Barb. (N. Y.) 292, affd. 1 Abb. Dec. (N. Y.) 316, 10 Abb. Pr. (N. S.) (N. Y.) 166; Baubie v. Ætna Ins. Co., 2 Dill. (U. S.) 156, Fed. Cas. No. 1111. A contract to "hold" certain expiring policies is a renewal. Baker v. Westchester F. Ins. Co., 162 Mass. 358, 38 N. E. 1124. But see Richmond v. Travelers' Ins. Co., 123 Tenn. 307, 130 S. W. 790, 30 L. R. A. (N. S.) 954. Compare London Guarantee &c. Co. v. Mississippi Cent. R. Co., 97 Miss. 165, 52 So. 787.

[92] O'Reilly v. Corporation of London Assurance, 101 N. Y. 575, 5 N. E. 568. See also, Underwood v. Penna. F. Ins. Co., 134 N. Y. S. 105.

[93] Wolff v. Oswego, & O. Ins. Co., 43 Hun (N. Y.) 633, 6 N. Y. S. 548.

such further time as shall be agreed on * * * under the original representation, * * * but in case there shall have been any change in the risk, either within itself or by neighboring buildings, not made known to the company by the assured, at the time of renewal, this policy and renewal shall be void," it was held that if, after the first insurance and before the renewal policy was delivered, there was any change in the risk increasing the hazard, whether known to the insured or not, and it was not made known to the company at the time of the renewal, the policy and the renewal were void.[94] It seems, however, that there is no increase of hazard under a policy which contains no provision against alienation, where the insured sells the property and takes back a mortgage as security for the purchase-money, and it is not necessary to give notice of this change in the nature of the interest at the time of the renewal.[95] Yet, although by the terms of a mortgage clause in the policy the rights of a mortgagee were not to be affected by any act of the mortgagor in increasing the hazard during the life of the policy, it is necessary upon a renewal of the policy to inform the company of any facts which increase the hazard.[96] Like other provisions, this requirement may be waived. Where the president of the company often stopped at a hotel which was the subject of the insurance, while additions were being made which were claimed to increase the risk, and gave his consent to the making of such changes, it was held that there was a waiver of a breach of the conditions, and upon renewal of the policy it was not necessary to make representations in writing as to the changes.[97]

§ 4289. **Illustrations.**—Where the policy does not state the procedure necessary to effect such renewal, the company cannot show secret limitations upon the authority of its agent to contract for renewal.[98] Where a policy upon a building was re-

[94] Brueck v. Phœnix Ins. Co., 21 Hun (N. Y.) 542.

[95] Phelps v. Gebhard Fire Ins. Co., 22 N. Y. Super. Ct. 404. And where the company has notice originally that the property was on leased ground it was held that such notice need not be again given to the company on renewal. Farley v. Spring Garden Ins. Co., 148 Wis. 622, 134 N. W. 1054.

[96] Cole v. Germania Fire Ins. Co., 99 N. Y. 36, 1 N. E. 38.

[97] Martin v. New Jersey City Ins. Co., 44 N. J. L. 273.

[98] McCullough v. Hartford Fire Ins. Co., 2 Pa. Super. Ct. 233.

newed it was held that an ordinance passed during the life of the original policy forbidding the rebuilding or repairing of wooden buildings within certain limits entered into the new contract created by renewal.[99] Where a policy covered the plaintiff's property generally, and an indorsement apportioned it among several items, and before the term expired plaintiff took the policy to defendant's agent and requested a renewal, nothing being said in reference to a different policy, or to any alteration of the terms of the existing one, it was held that it was the intention of the parties that the new policy should contain the same provisions as those indorsed on the old policy.[1] Where the policy covered a specified sum on a grist mill, and another sum on the machinery therein, and was renewed in general terms for an amount equal to the entire insurance, without any distribution of the risk, it was held that the insurance should thereafter be without distribution and apply generally to both building and machinery.[2] The owner of an insured building sold one-half of it to a partner, and at the expiration of the original policy a renewal certificate was issued reciting the receipt of the premium from the firm and the continuation of the policy, and that "the renewal is made upon condition that the original policy continues in force, and that there has been no change in the risk since first insured not noticed on the books of this company, otherwise this renewal is not binding." It was held that the insurers intended to continue the insurance on the property on the terms and conditions expressed in the policy, for the benefit of the parties who paid the premium.[3]

§ 4290. **Reformation of the policy.**—A renewal policy containing a coinsurance clause which was not the original policy will be reformed where it appears that the renewal was solicited by the company with the understanding that the two policies were to be the same, and that the insured, relying upon the agreement and good faith of the company, did not read the policy and

[99] Brady v. Northwestern Ins. Co., 11 Mich. 425.

[1] Cochran Cotton Seed Oil Co. v. Phenix Ins. Co., 7 Misc. (N. Y.) 695, 58 N. Y. St. 381, 28 N. Y. S. 45.

[2] Driggs v. Albany Ins. Co., 10 Barb. (N. Y.) 440.

[3] Lancey v. Phœnix F. Ins. Co., 56 Maine 562.

discover the material changes until after the loss had occurred.[4] In one case a mortgagee applied to the company for a renewal with an increase of the insurance, which was agreed to, and the new policy contained a clause not in the first, that in case of loss the mortgagee should assign to the company all his right to receive satisfaction from any other person, and that the loss should not be payable until after the enforcement of the original security, and that the company should only be liable for so much as could not be collected. The mortgagee did not discover the change until after loss, and it was held that he might maintain an action to reform the policy and recover thereon as reformed, but that it was discretionary with the court to refuse relief on the ground of his neglect to discover the change within a reasonable time.[5]

§ 4291. **Cancelation of policy—In general.**—There is a provision in the standard policy for its cancelation and return of the unearned or pro rata premium,[6] and in a number of states there are statutes which secure the right to cancel a contract of insurance upon proper notice. Unless there is such a statute or stipulation in the contract of insurance giving the right to the insurer, the policy cannot, ordinarily, be canceled without the

[4] Palmer v. Hartford Ins. Co., 54 Conn. 488, 9 Atl. 248.

[5] Hay v. Star Fire Ins. Co., 77 N. Y. 235, 33 Am. Rep. 607. See generally as to reformation of policies, note in 2 L. R. A. (N. S.) 548, 11 L. R. A. (N. S.) 357.

[6] "This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancelation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium." This provision is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Louisiana, South Dakota, Iowa, Michigan, North Dakota, and North Carolina. The Wisconsin provision is somewhat different. The standard policies of Massachusetts, Minnesota, Maine and New Hampshire have the following provision: "This policy may be canceled at any time at the request of the insured, who shall thereupon be entitled to a return of the portion of the above premium remaining, after deducting the customary monthly short rates for the time this policy shall have been in force. The company also reserves the right, after giving written notice to the insured, and to any mortgagee to whom this policy is made payable, and tendering to the insured a ratable proportion of the premium, to cancel this policy as to all risks subsequent to the expiration of ten days from such notice, and no mortgagee shall then have the right to recover as to such risks."

consent of the insured.[7] The right does not exist unless reserved, and the clause conferring the right is in the nature of a condition precedent which must be strictly complied with.[8] Where the policy provides that the "insurance may be terminated at any time at the request of the assured," a surrender of the policy, with the request that it be terminated, has been held to operate ipso facto as a cancelation.[9] Where the contract is to bind the insurer only so long as it chooses, it may cancel the policy at any time by notice to the other party;[10] but after the liability of the company has become fixed by fire, notice of a previous election to cancel the policy has no effect on the contract.[11] And the right to cancel the policy thus reserved to the company cannot be exercised under circumstances which would operate as a fraud on the insured; as where notice was given pending an approaching con-

[7] Alliance Mut. Ins. Co. v. Swift, 10 Cush. (Mass.) 433. See also, Green v. Star Ins. Co., 190 Mass. 586, 77 N. E. 649.

[8] Van Valkenburgh v. Lenox Fire Ins. Co., 51 N. Y. 465; Wicks v. Scottish Union & National Ins. Co., 107 Wis. 606, 83 N. W. 781; Northern Pine Co. v. Liverpool Ins. Co., 143 Wis. 433, 128 N. W. 70. Provisions for cancelation in an insurance policy must be strictly followed to effect that result. John R. Davis Lumber Co. v. Hartford Fire Ins. Co., 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131. In German Union F. Ins. Co. v. Fred G. Clarke Co., 116 Md. 622, 82 Atl. 974, the insurer mailed notice on July 15 saying policy would be canceled on July 20, but the notice was not received until July 17, and it was held that the provision for cancelation on five days' notice was not sufficiently complied with. Transactions with reference to the cancelation of an insurance policy must, however, be construed reasonably and fairly, and in accordance with the evident understanding of the parties at the time. Bingham v. Fire Ins. Co., 74 Wis. 498, 43 N. W. 494. The provision may be waived. Larsen v. Thuringen &c. Ins. Co., 208 Ill. 166, 70 N. E. 31; Bradshaw v. Fire Ins. Co. of County of Philadelphia, 89 Minn. 334, 94 N. W. 866; Baldwin v. Pa. Fire Ins. Co., 206 Pa. 248, 55 Atl. 970. The cancelation of a policy and the retention of the pro rata premium is a confirmation of the validity of the policy. Commercial Assur. Co. v. New Jersey Rubber Co., 61 N. J. Eq. 446, 49 Atl. 155, revd. 64 N. J. Eq. 338, 51 Atl. 451.

[9] Crown Point Iron Co. v. Ætna Ins. Co., 127 N. Y. 608, 28 N. E. 653, 14 L. R. A. 147; Lipman v. Niagara Fire Ins. Co., 121 N. Y. 454, 24 N. E. 699, 8 L. R. A. 719. See also, Farmers' Ins. Co. v. Hunter, 38 Ind. App. 11, 77 N. E. 951; Parsons v. Northwestern Nat. Ins. Co., 133 Iowa 532, 110 N. W. 907. Under North Carolina statute the policy is canceled where insured requests it, without action on the part of the insurer. Roberta Mfg. Co. v. Royal Exchange Assur. Co. (N. Car.), 76 S. E. 865. But see as to mere physical surrender of the policy by the assured without any intention to cancel, Waters v. Security Life & Annuity Co., 144 N. Car. 663, 57 S. E. 437, 13 L. R. A. (N. S.) 805, and note. See as to cancelation by brokers, note in 38 L. R. A. (N. S.) 623.

[10] Manchester Fire Assur. Co. v. Insurance Co. of Ill., 91 Ill. App. 609. See also, Sun Fire Office v. Hart, 14 App. Cas. 98, 58 L. J. P. C. 69.

[11] Massasoit Steam Mills Co. v. Western Assur. Co., 125 Mass. 110. See also, Ætna Ins. Co. v. Rosenberg, 62 Ark. 507, 36 S. W. 908; Partridge

flagration which threatened to destroy the insured property.[12] Where the policy provides for notice it means notice to the insured.[13] His rights cannot be affected by the conduct of others who have no authority to represent him. The consent of a mortgagee, to whom the policy is made payable in case of loss, to a cancelation without the knowledge of the insured, is of no effect and does not deprive him of his rights.[14] So, the notice should be personal and it has been held that notice by publication is not sufficient.[15] An attempt to transfer the risk from a company which has refused to carry it to another without the consent of the insured, after the agent has placed the risk in the former company under a general request for insurance, without specifying any company, has been held ineffectual when the five days' notice of the cancelation of the first policy stipulated for therein was not given.[16] The parties may of course, by mutual consent, rescind the contract without notice for the specified time,[17] even though no right to rescind is reserved in the contract.[18]

§ 4292. **Authority of agent to cancel.**—An agency to procure insurance is not, as a matter of law, presumed to continue for the purpose of canceling the policy.[19] It must appear that the

v. Milwaukee Mechanics' Ins. Co., 162 N. Y. 597, 57 N. E. 1119, affg. 13 App. Div. (N. Y.) 519, 43 N. Y. S. 632.

[12] Home Ins. Co. v. Heck, 65 Ill. 111.

[13] London &c. Ins. Co. v. Turnbull, 86 Ky. 230, 9 Ky. L. 544, 5 S. W. 542.

[14] Peterson v. Hartford Fire Ins. Co., 87 Ill. App. 567, revd. 187 Ill. 395, 58 N. E. 1095. See as to when notice to mortgagee is necessary to affect his rights, Lattan v. Royal Ins. Co., 45 N. J. L. 453.

[15] Frink v. Nat. Mut. F. Ins. Co., 90 S. Car. 544, 74 S. E. 33.

[16] Clark v. Ins. Co., 89 Me. 26, 35 Atl. 1008, 35 L. R. A. 276. But see where the insured obtained other insurance and mailed former policy for cancelation, Wygal v. Georgia Home Ins. Co., 148 Ky. 674, 147 S. W. 394. See generally as to effect and relative rights where one company has absorbed another or transferred the insurance to it, Federal L. Ins. Co. v. Kerr, 173 Ind. 613, 89 N. E. 398, 91 N. E. 230; Timberlake v. Supreme Commandery United Order of the Golden Cross of the World, 208 Mass. 411, 94 N. E. 685, 36 L. R. A. (N. S.) 597, and note.

[17] Sea Ins. Co. v. Johnston, 105 Fed. 286, 44 C. C. A. 477; Cox v. Farmers' Mut. Fire Ins. Co., 133 Ga. 175, 65 S. E. 409.

[18] Boland v. Whitman, 33 Ind. 64. See also, Lee v. New Hampshire Ins. Co., 154 N. Car. 446, 70 S. E. 819. See generally as to what does or does not entitle insured to rescind, Blakely v. Fidelity Mut. L. Ins. Co., 143 Fed. 619, affd. 154 Fed. 43, 83 C. C. A. 155. Compare also, Finley v. New Brunswick F. Ins. Co., 193 Fed. 195.

[19] Broadwater v. Lion F. Ins. Co., 34 Minn. 465, 26 N. W. 455; Hermann v. Niagara Fire Ins. Co., 100 N. Y. 411, 3 N. E. 341, 53 Am. Rep. 197; Grace v. American Cent. Ins.

person to whom notice was given was at the time the authorized agent of the insured for the purpose of canceling the policy, or that the act was subsequently ratified by the insured.[20] So, where a broker had been employed by the plaintiff to procure a fire policy on certain property, notice afterward given by the company to such broker of an intention to cancel the policy was held not sufficient to effect a cancelation.[21] Mere notice to a broker or the agent of the insured that the company desires to cancel the policy is not enough where the policy contains a provision that it may be terminated by notice to the person who procured it.[22] The agent of the company cannot give notice to himself as the person who procured the insurance.[23] A delivery of the policy to an agent of the insurer for cancelation by a clerk in the office of the agent of the insured, who was authorized to deliver up the policy for cancelation, is the act of the insured, and not of the insurer, and will support a cancelation of the policy.[24] And where the insured left the policy in the hands of her agent, and thus placed it in his power to mislead the insurer by surrendering the policy, and the insurer acted in good faith in canceling it, it was held that the insured was bound by this surrender, although it was without authority.[25] An agent may, sometimes, represent both parties. And a general insurance agency representing both parties, with authority to act upon applications and issue policies, as well as to cancel the same in proper cases, may also act as the agent of the insured in waiving

Co., 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. 207; White v. Connecticut Fire Ins. Co., 120 Mass. 330, cited in 12 Ins. L. J. 787. See also, Phœnix Ins. Co. v. Radford, 4 Nebr. (Unof.) 232, 93 N. W. 1000.

[20] Quong Tue Sing v. Anglo-Nevada Assur. Corp., 86 Cal. 566, 25 Pac. 58, 10 L. R. A. 144. See also, Wilson v. Hartford Fire Ins. Co., 17 App. D. C. 14, revd. 187 U. S. 467, 47 L. ed. 261, 23 Sup. Ct. 189; Standard Leather Co. v. Northern Assur. Co. of London, England, 156 Fed. 689; Kinney v. Rochester German Ins. Co., 141 Ill. App. 543.

[21] Healy v. Insurance Co. of the State of Pennsylvania, 50 App. Div. (N. Y.) 327, 63 N. Y. S. 1055. See also, Insurance Co. of North America v. Wisconsin Cent. R. Co., 134 Fed. 794, 67 C. C. A. 300; Martin v. Palatine Ins. Co., 106 Tenn. 523, 61 S. W. 1024.

[22] Hermann v. Niagara F. Ins. Co., 100 N. Y. 411, 3 N. E. 341, 53 Am. Rep. 197. See also, note in 38 L. R. A. (N. S.) 623-625.

[23] Niagara Fire Ins. Co. v. Raden, 87 Ala. 311, 5 So. 876, 13 L. R. A. 36.

[24] Faulkner v. Manchester Fire Assur. Co., 171 Mass. 349, 50 N. E. 529. See also, Edwards v. Home Ins. Co., 100 Mo. App. 695, 73 S. W. 881.

[25] Kooistra v. Rockford Ins. Co., 122 Mich. 626, 81 N. W. 568. See also, Royal Ins. Co. v. Wight, 55 Fed. 455, 5 C. C. A. 200.

notice of cancelation and in accepting delivery of the new policy when substituted for the one canceled. In Minnesota it was said:[26] "Such a business arrangement is in many cases adopted by business firms and corporations in cities, and is beneficial both to the underwriters and parties insured; adding to the business of the one and relieving the other from anxiety regarding the expiration and replacement of risks. The long course of business usage and custom pursued in a uniform manner between the agency, representing the defendant and other companies, and plaintiff, in which the latter had permitted the former to act for it, would justify a conclusion that the agency was authorized to act for the plaintiff in waiving the notice of cancelation and in accepting the new policy of insurance, by which a delivery of such policy was accomplished as fully as if the plaintiff's manager had been present and received such policy into his own hands." But ordinarily, notice to the agent of the insurer is not notice to the insured.[27]

§ 4293. **Return of premium.**—According to the weight of authority, mere notice that the unearned premium will be returned by the agent of the company is not sufficient;[28] there must be an actual return or tender of the money;[29] and a mere request that the policy be returned and a promise to return the premiums

[26] Hamm Realty Co. v. New Hampshire Fire Ins. Co., 80 Minn. 139, 83 N. W. 41. See also, Dibble v. Northern Assur. Co., 70 Mich. 1, 37 N. W. 704, 14 Am. St. 470; Buick v. Mechanics' Ins. Co., 103 Mich. 75, 61 N. W. 337; Hamm Realty Co. v. New Hampshire Fire Ins. Co., 84 Minn. 336, 87 N. W. 933; Stone v. Franklin Fire Ins. Co., 105 N. Y. 543, 12 N. E. 45; Arnfeld v. Guardian Assur. Co., 172 Pa. St. 605, 34 Atl. 580.

[27] British Am. Assur. Co. v. Cooper, 26 Colo. 452, 58 Pac. 592; Snedicor v. Citizens' Ins. Co., 106 Mich. 83, 64 N. W. 35; Grace v. American Cent. Ins. Co., 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. 207; Body v. Hartford F. Ins. Co., 63 Wis. 157, 23 N. W. 132.

[28] Tisdell v. New Hampshire Fire Ins. Co., 155 N. Y. 163, 49 N. E. 664, 40 L. R. A. 765. See also to the same effect, German Union F. Ins. Co. v. Fred G. Clarke Co., 116 Md. 622, 82 Atl. 974; Nitsch v. American Cent. Ins. Co., 83 Hun (N. Y.) 614, 31 N. Y. S. 1131, affd. 152 N. Y. 635, 46 N. E. 1149.

[29] Hollingsworth & Moraque v. Germania Fire Ins. Co., 45 Ga. 294, 12 Am. Rep. 579; Peterson v. Hartford Fire Ins. Co., 87 Ill. App. 567, revd. 187 Ill. 395, 58 N. E. 1095; Peoria Marine & Fire Ins. Co. v. Botto, 47 Ill. 516; Ætna Ins. Co. v. Maguire, 51 Ill. 342; Hathorn v. Germania Ins. Co., 55 Barb. (N. Y.) 28; Goit v. National Protection Ins. Co., 25 Barb. (N. Y.) 189; Franklin Fire Ins. Co. v. Massey, 33 Pa. St. 221. See also, Southern Ins. Co. v. Williams, 62 Ark. 382, 35 S. W. 1101; Phœnix Assur. Co. v. Munger Improved Cotton &c. Mfg. Co., 92 Tex. 297, 49 S. W. 222.

are not effective.[30] But some courts hold that the provisions as to cancelation and return of premium are independent and that the company is not obliged to return or even tender the unearned premium in order to cancel the policy.[31] A tender of a part of the unearned premium, together with a policy of insurance in another company representing the remainder of such premium, will not terminate a policy which provides for its own termination upon the refunding or tendering back to the insured of a ratable proportion of the premium for the unexpired term of the policy.[32] An attempt to rescind the contract is not a cancelation of the policy. So, a tender of the unearned premiums upon a policy and a demand for its surrender for the purpose of rescission of the contract from the beginning, and a refusal upon that ground, are not a sufficient tender to effect a cancelation under the terms of the policy.[33] But the insured is estopped to assert the nonreturn of the premium after having induced the company's agent to believe that the cancelation was recognized by him without such payment.[34] So, the provision requiring the return of the unearned premium may be waived or disregarded by the parties, and if their minds meet upon an agreement that the policy is canceled it is sufficient.[35]

§ 4294. **What amounts to a cancelation.**—The notice under this provision must be unequivocal, as a mere notice of a desire to cancel or to deliver the policy for cancelation is not sufficient.[36] The notice must be communicated to the insured,

[30] Griffey v. New York Cent. Ins. Co., 100 N. Y. 417, 3 N. E. 309, 53 Am. Rep. 202; Tisdell v. New Hampshire Fire Ins. Co., 155 N. Y. 163, 49 N. E. 664, 40 L. R. A. 765. See also, Buckley v. Citizens' Ins. Co., 112 App. Div. (N. Y.) 451, 98 N. Y. S. 622, revd. 188 N. Y. 399, 81 N. E. 165, 13 L. R. A. (N. S.) 889.

[31] Schwarzchild & Sulzberger Co. v. Phœnix Ins. Co. of Hartford, 115 Fed. 653, affd. 124 Fed. 52, 59 C. C. A. 572; Davidson v. German Ins. Co., 74 N. J. L. 487, 65 Atl. 996, 13 L. R. A. (N. S.) 885n. See also, Parsons v. Northwestern Nat. Ins. Co., 133 Iowa 532, 110 N. W. 907.

[32] Quong Tue Sing v. Anglo-Nevada Assur. Corp., 86 Cal. 566, 25 Pac. 58, 10 L. R. A. 144.

[33] John R. Davis Lumber Co. v. Hartford Fire Ins. Co., 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131.

[34] Hopkins v. Phœnix Ins. Co., 78 Iowa 344, 43 N. W. 197. See also, as to ratification, Larsen v. Thuringia &c. Ins. Co., 208 Ill. 166, 70 N. E. 31. And compare, Ragley Lumber Co. v. Insurance Co. of North America, 42 Tex. Civ. App. 511, 94 S. W. 185.

[35] Bingham v. Fire Ins. Co., 74 Wis. 498, 43 N. W. 494.

[36] Lyman v. State Mut. F. Ins. Co., 14 Allen (Mass.) 329; Griffey v. New York Cent. Ins. Co., 100 N. Y. 417, 3 N. E. 309, 53 Am. Rep. 202. But see American Glove Co. v. Penn-

and it is held in New York and California that merely mailing notice does not effect a cancelation when it was not in fact received by the insured.[37] This provision in the standard policy is not complied with, it seems, by sending the insured a letter notifying him of an intention to cancel the policy without further notice, and stating that a pro rata part of the unearned premium will be returned.[38] Cancelation of the policy has been held not effected by the fact that the insured was induced to authorize its cancelation through mistake or misrepresentations of his agent concerning directions from the insurance company.[39] The mailing of the policy with the obvious purpose of its cancelation to, and its receipt by the company, may effect a cancelation.[40] Where four days before the loss the company wrote a letter to the insured stating that the policy had been canceled according to notice given in a former letter, it was held that the company was liable, as it did not appear that the former notice had been given, and there was nothing to show an intention to surrender for immediate cancelation.[41] Where a written agreement provided that the policy should remain in force from the date of expiration, until discontinuance, and the insured paid pro rata for the time used, it was held that the sending of a check for an additional month's insurance was not notice of a discontinuance at the end of that month.[42] When the report of an oral contract of reinsurance was received at the office of the company, the secretary called the agents by telephone and directed them to cancel such reinsurance. The agents delivered the message by telephone to an assistant in the office of the company procuring the reinsurance, who usually received orders over the telephone both for writing and canceling insurance, and it was held sufficient to show that the reinsurance, if ever written, had been

sylvania Fire Ins. Co., 15 Call. App. 77, 113 Pac. 688.

[37] Farnum v. Phœnix Ins. Co., 83 Cal. 246, 23 Pac. 869, 17 Am. St. 233; Crown Point Iron Co. v. Ætna Ins. Co., 127 N. Y. 608, 28 N. E. 653, 14 L. R. A. 147.

[38] Tisdell v. New Hampshire Fire Ins. Co., 155 N. Y. 163, 49 N. E. 664, 40 L. R. A. 765.

[39] Parker & Young Mfg. Co. v. Exchange Fire Ins. Co., 166 Mass. 484, 44 N. E. 614.

[40] Ikeller v. Hartford Fire Ins. Co., 24 Misc. (N. Y.) 136, 53 N. Y. S. 323.

[41] Healy v. Insurance Co. of the State of Pennsylvania, 50 App. Div. (N. Y.) 327, 63 N. Y. S. 1055.

[42] Greenwich Ins. Co. v. Providence &c. Co., 119 U. S. 481, 30 L. ed. 473, 7 Sup. Ct. 292.

canceled.[43] In another case it appeared that the company had issued a policy to the plaintiff which provided that it could be canceled by the company upon giving five days' notice. There was a provision that only a pro rata premium should be retained by the company on its cancelation of the policy. The special agent and adjuster of the company wrote the local agent, directing him to cancel the policy. The local agent wrote the insured requesting a return of the policy, and inclosing two policies in other companies in lieu of the one issued by the defendant. The letter was received by the insured on Saturday afternoon, and on Saturday night the property was destroyed by fire. The letter was not opened until Monday morning, and it was held that the letter and acts did not constitute a cancelation of the defendant's policy.[44] A company demanded payment of premiums earned upon an open policy, and received a letter from the insured stating that they could not "go on" unless the rate was reduced. The company refused to make a reduction and again sent the bill asking that if the insured decided not to continue using the policy that it be returned to it. The insured returned the policy and check for the amount of the bill, saying, "We inclose check and policy, which we suppose will conclude the whole matter. * * * If we are mistaken please return check." The check was cashed, and it was held that the policy was rescinded by mutual consent.[45] But where a policy contained a provision for cancelation by the insurance company upon giving five days' notice of a surrender by the holder, the company was held liable for a loss occurring within the five days.[46]

§ 4295. **Waiver—Limitations upon power to waive.**—The standard policy contains an apparently strong provision against waiver,[47] but the prevailing rule seems to be that, notwithstand-

[43] Manchester Fire Assur. Co. v. Insurance Co., 91 Ill. App. 609.

[44] Partridge v. Milwaukee Mechanics' Ins. Co., 162 N. Y. 597, 57 N. E. 1119, affg. 13 App. Div. (N. Y.) 519, 43 N. Y. S. 632. See also, for other cases in which it was held that there was no effective cancelation, Bradshaw v. Phila. County Fire Ins. Co., 89 Minn. 334, 94 N. W. 866; Baldwin v. Pa. F. Ins. Co., 206 Pa. 248, 55 Atl. 970; Northern Pine Co. v. Liverpool Ins. Co., 143 Wis. 433, 128 N. W. 70. Compare also, Waterloo Lumber Co. v. Des Moines Ins. Co. (Iowa), 138 N. W. 504.

[45] Sea Ins. Co. v. Johnston, 105 Fed. 286, 44 C. C. A. 477.

[46] Wicks v. Scottish Union &c. Ins. Co., 107 Wis. 606, 83 N. W. 781.

[47] "No officer, agent, or other representative of this company shall

ing this provision, a general agent of the company may waive this as well as other provisions of the policy.[48] Thus, it has been held that the provision requiring the insured to keep books showing purchases and sales in an iron safe, in a policy which contains a provision that no officer or agent of the company shall have power to waive any condition or provision, unless in writing, may be waived by parol by an agent having general authority to make contracts of insurance.[49] And it is pretty well settled that an agent of a fire insurance company may, by issuing a policy with knowledge of facts, waive a condition that the policy shall be void if the property insured be encumbered and the fact of encumbrance be not indorsed on the policy, notwithstanding the provision in the policy that no agent of the company shall have power to waive any such condition except by written indorsement.[50] Under this provision, however, a pol-

have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officers, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached. * * * This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for." This is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, South Dakota, Louisiana, North Dakota, Michigan, and North Carolina. Wisconsin adds the words: "Up to the time of the delivery of this policy to assured, in all transactions relating to this policy or to the property herein insured, between the assured and any agent of the company, knowledge of the agent shall be knowledge of the company; and in all transactions relating to the subject of insurance, between the insured and any agent of the company after loss, knowledge of the agent shall be knowledge of the company." The provision is not found in the standard policies of Massachusetts, Minnesota, Maine and New Hampshire.

[48] Langan v. Ætna Ins. Co., 96 Fed. 705. But see Northern Assur. Co. v. Grand View Bldg. Assn., 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. 133, revg. 101 Fed. 77, 41 C. C. A. 207.

[49] Hanover Fire Ins. Co. v. Dole, 20 Ind. App. 333, 50 N. E. 772.

[50] London L. & F. Ins. Co. v. Fischer, 92 Fed. 500, 34 C. C. A. 503; Skinner v. Norman, 165 N. Y. 565, 59 N. E. 309, 80 Am. St. 776. In German Ins. Co. v. Amsbaugh, 8 Kans. App. 197, 55 Pac. 481, the rule announced in American Central Ins. Co. v. McLanathan, 11 Kans. 533, and Phœnix Ins. Co. v. Munger, 49 Kans. 178, 30 Pac. 120, 33 Am. St. 360, as to the authority of insurance agents to waive conditions of the policy, was applied, and it was held that the agent of the company which issued the policy sued on had authority to waive the provision of the policy limiting the time within which suit should be brought to recover for the loss. See also, Hatcher

icy was held void on the ground that the property had been removed without the consent of the company, although it appeared that the insured had informed the agent of the company that he was about to remove it to another place of residence, and requested the agent to procure the consent of the company in due form. It also appeared that the agent thereafter returned the policy to the insured and informed him that all the formalities had been complied with and that the policy would cover the property in the new location.[51] There is much conflict among the authorities and some of them make a distinction in regard to waiver or estoppel and between conditions existing at the inception of the policy and those subsequent thereto, but the whole subject has already been sufficiently treated in this work.[52]

v. Sovereign &c. Assur. Co. (Wash.), 127 Pac. 588. In Ordway v. Continental Ins. Co., 35 Mo. App. 426, it was said that the settled policy of the state was that an agent might waive a stipulation in the policy against concurrent insurance.

[51] Hill v. London Assur. Corp. 16 Daly (N. Y.) 120, 30 N. Y. St. 539, 9 N. Y. S. 500, 34 N. Y. St. 65, 26 Abb. N. Cas. 203, 12 N. Y. S. 86.

[52] Note to Haapa v. Metropolitan L. Ins. Co., 16 L. R. A. (N. S.) 1165n, 121 Am. St. 625; People's F. Ins. Assn. v. Goyne, 16 L. R. A. (N. S.) 1180. See also, Forwod v. Prudential Ins. Co., 117 Md. 254, 83 Atl. 169. The provision to the effect that the company shall not be held to have waived any forfeiture by any requirement, act or proceeding relating to appraisal is valid. Hence, where the policy provided that proofs of loss should be made within sixty days on penalty of forfeiture it was held that this provision was not waived by submitting the question of the amount of loss to appraisers within sixty days after loss. Fournier v. German American Ins. Co., 23 R. I. 36, 49 Atl. 98. See also, American &c. Ins. Co. v. Bass, 90 Tex. 380, 38 S. W. 1119. But compare, Springfield Fire and Marine Ins. Co. v. Reynolds, 107 Md. 107, 68 Atl. 281, 126 Am. St. 379, and note. See also, for case holding demand by insured for appraisal not a condition precedent, Rochester German Ins. Co. v. Rodenhouse (Okla.), 128 Pac. 508.

CHAPTER CXXVII.

PROVISIONS OF THE STANDARD POLICY RELATING TO MATTERS SUBSEQUENT TO LOSS.

§ 4300. Notice and proof of loss—Generally.
4301. "Immediate" notice.
4302. Separation of goods "forthwith."
4303. Who may make proof—Excuses for failure to furnish proofs.
4304. When a condition precedent.
4305. What is compliance with this provision.
4306. Certificate of magistrate.
4307. Plans and specifications.
4308. Waiver.
4309. To whom notice must be given.
4310. Exhibition of property and records — Examination of party.
4311. False swearing.
4312. Failure to produce books.
4313. The iron safe clause.
4314. Arbitration of the amount of loss—Disagreement.
§ 4315. Validity of provision.
4316. Where there is a total loss.
4317. Demand for arbitration.
4318. Condition precedent.
4319. Failure of arbitration through fault of party.
4320. Revocation.
4321. Invalidity of the award.
4322. Waiver.
4323. Second arbitration — Resubmission.
4324. Demand for arbitration as admission of liability.
4325. Right of mortgagee.
4326. Right to repair, rebuild or replace.
4327. Time within which loss is payable.
4328. Time of bringing suit—Generally.
4329. Time when limitation begins to run.

§ 4300. Notice and proof of loss—Generally.—The provision in the standard policy for notice and proof of loss attempts to state in considerable detail when and how the notice shall be given and what it shall contain or of what the proof shall consist,[1] but this clause, and others relating to what shall be done

[1] "If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances

after loss, are rather more liberally construed than most of those which define and limit the terms of the contract, and the doctrine of waiver or estoppel seems to be more readily applied as against the company. The proofs do not form part of the contract of insurance; and the insured is not estopped from showing that statements in his proofs of loss were erroneous in so far as they state facts tending to annul the policy.[2] Nor is the insured concluded as to the amount of loss by a statement in the proofs when the company refuses to pay on the basis of that amount.[3] A misstatement made by the owner in his proofs of loss, through mistake and without intent to defraud, with an understanding with the adjuster that it may be subsequently corrected, will not prevent a recovery.[4] It is enough if this requirement of the policy

thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify." This is found in the standard policies of New York, New Jersey, Rhode Island, Connecticut, Michigan, Louisiana, Iowa, Wisconsin, South Dakota, North Dakota and North Carolina. Massachusetts, Maine and New Hampshire have the following provision: "In case of any loss or damage under this policy, a statement in writing, signed and sworn to by the insured, shall be forthwith rendered to the company, setting forth the value of the property insured, the interest of the insured therein, all other insurance thereon, in detail, the purposes for which and the persons by whom the building insured, or containing the property insured, was used, and the time at which and manner in which the fire originated, so far as known to the insured." The Minnesota provision is similar to that of Massachusetts except that "in case of total loss on buildings the value of said buildings need not be stated."

[2] Fowle v. Springfield Fire & Marine Ins. Co., 122 Mass. 191, 23 Am. Rep. 308; McMaster v. Insurance Co. of North America, 55 N. Y. 222, 14 Am. Rep. 239. See also, Connecticut Mut. Life Ins. Co. v. Schwenk, 94 U. S. 593, 24 L. ed. 294; Newton v. Theresa Village Mut. Fire Ins. Co., 125 Wis. 289, 104 N. W. 107; note in 32 L. R. A. (N. S.) 453.

[3] Corkery v. Security Fire Ins. Co., 99 Iowa 382, 68 N. W. 792. Nor are they evidence as to value against the insurer when objected to. 3 Elliott Ev., § 2345.

[4] Garner v. Mutual Fire Ins. Co. (Iowa), 86 N. W. 289. And see further as to proof not being conclusive against the insured where mistake or the like is shown, Hanover Fire Ins. Co. v. Lewis, 28 Fla. 209, 10 So. 297; Supreme Tent Knights of Macabees v. Stensland, 206 Ill. 124, 68 N. E. 1098, 99 Am. St. 137; Backmeyer v. Mutual Re-

is substantially complied with.[5] An affidavit describing the premises, stating the loss and the date thereof, the amount of damage and the insurance, and that the cause of the fire is unknown, is held sufficient.[6] Under the Minnesota form, proofs of loss need not contain a specific demand or claim of a particular amount, and in a recent case,[7] the court said: "A substantial compliance with the terms of the policy with respect to the proof of loss is uniformly held sufficient. * * * If the matters and information required to be stated and given therein are set out in substance and effect, the proof is sufficient. We have found no case requiring the insured to go beyond this, or to state and set forth any matters not specially provided for. So the full answer to the defendant's contention is found in the fact that the policy does not require proof of loss to contain a statement of the amount claimed by the insured. * * * The fact that the presentation of a specific claim by the insured would enable the company to refuse payment if deemed excessive, and thus bring into operation the arbitration provisions of the policy, is no reason why the court should read into the contract a requirement not made a part thereof by the parties. The right to have the amount of the loss determined by arbitration is in no measure obstructed or prevented by the failure on the part of the insured to demand a specific sum. The company may, upon notice of

serve Fund Life Assn., 82 Wis. 255, 52 N. W. 101. See also, 3 Elliott Ev., § 2346.

[5] Robinson v. Palatine Ins. Co., 11 N. Mex. 162, 66 Pac. 535; Georgia Home Ins. Co. v. Goode, 95 Va. 751, 30 S. E. 366. In Jarvis v. Northwestern Mut. Relief Assn., 102 Wis. 546, 78 N. W. 1089, 72 Am. St. 896, it is said that "due proof" of loss does not require any particular form arbitrarily demanded by the insurer, but such a statement of facts, reasonably verified, as, if established in court, would prima facie require payment of the claim. See also, Charter Oak Life Ins. Co. v. Rodel, 95 U. S. 232, 24 L. ed. 433. In Bumstead v. Dividend &c. Ins. Co., 12 N. Y. 81, Woodruff Ins. Cas. 185, it is held that the provisions requiring proofs of loss and notice within any designated time, are reasonable and binding, but that they should be given a fair and reasonable construction. A particular account of the loss or damage, etc., requires the party only to furnish a statement as particular and full as he can, under the circumstances, make. Hence, where his books and papers were destroyed by the same fire that destroyed the insured property, and he is thus deprived of the only means by which he can comply literally with the conditions of the policy, a less particular statement is sufficient. See also, People's Fire Ins. Co. v. Pulver, 127 Ill. 246, 20 N. E. 18; Greenough v. Phœnix Ins. Co., 206 Mass. 247, 92 N. E. 447, 138 Am. St. 383n.

[6] Rochester Loan & Banking Co. v. Liberty Ins. Co., 44 Nebr. 537, 62 N. W. 877, 48 Am. St. 745.

[7] DeRaiche v. Liverpool &c. Ins. Co., 83 Minn. 398, 86 N. W. 425.

loss, investigate the fire, the extent of the damage and loss, and make such offer of settlement as it may deem fair and just; and, if the insured declines to accept the same, an arbitration may then be had." Whether notice is given or proof served within the time is ordinarily a question to be determined by the jury, but on undisputed evidence the question as to whether the notice or proof of loss was sufficient may well be a question for the court.[8]

§ 4301. "Immediate" notice.—The word "immediate" in this connection means such reasonable or convenient time as is necessary under the circumstances to do the thing required.[9] It is not to be given a literal construction.[10] Notice must be given within a reasonable time—with due diligence.[11] A notice given two days after the loss is given immediately within the meaning of this provision.[12] Whether proofs of loss are furnished within a reasonable time is usually for the jury to determine.[13] And where the plaintiff omitted to give immediate notice of loss as required, and it appeared that the policy was transferred before

[8] Travelers Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18; Baker v. German &c. Ins. Co., 124 Ind. 490, 24 N. E. 1041. Compare Walker v. John Hancock Mut. Life Ins. Co., 167 Mass. 188, 45 N. E. 89. See also, Insurance Co. of North America v. Brim, 111 Ind. 281, 12 N. E. 315; Kimball v. Howard Fire Ins. Co., 8 Gray (Mass.) 33; Foster v. Fidelity & Casualty Co., 99 Wis. 447, 75 N. W. 69. See 3 Elliott Ev., §§ 2340, 2343.

[9] Kentzler v. American Mut. Acc. Assn., 88 Wis. 589, 60 N. W. 1002, 43 Am. St. 934. See also, 3 Elliott Ev., §§ 2325, 2326, and cases there cited; Ætna Life Ins. Co. v. Fitzgerald, 165 Ind. 317, 75 N. E. 262, 1 L. R. A. (N. S.) 422, 112 Am. St. 232; Greenough v. Phœnix Ins. Co., 206 Mass. 247, 92 N. E. 447, 138 Am. St. 383, and note.

[10] Pennypacker v. Capital Ins. Co., 80 Iowa 56, 45 N. W. 408, 8 L. R. A. 236, 20 Am. St. 395; Matthews v. American Cent. Ins. Co., 154 N. Y. 449, 48 N. E. 751, 39 L. R. A. 433, 61 Am. St. 627. See also, National Surety Co. v. Western Pac. R. Co., 200 Fed. 675.

[11] Travelers' Ins. Co. v. Nax, 142 Fed. 653, 73 C. C. A. 649 (notice held too late); Solomon v. Continental Fire Ins. Co., 160 N. Y. 595, 55 N. E. 279, 46 L. R. A. 682, 73 Am. St. 707. As to what constitutes compliance with a provision requiring "immediate notice," see cases collected in note to Phœnix Ins. Co. v. Pickel, 119 Ind. 155, 21 N. E. 546, 12 Am. St. 393. See also, Kimball v. Howard Fire Ins. Co., 8 Gray (Mass,) 33; Kingsley v. New England Fire Ins. Co., 8 Cush. (Mass.) 393; Bennett v. Lycoming &c. Ins. Co., 67 N. Y. 274; People's Accident Assn. v. Smith, 126 Pa. St. 317, 17 Atl. 605, 12 Am. St. 870, and Rokes v. Amazon Ins. Co. of Cincinati, 51 Md. 512, 34 Am. Rep. 323.

[12] Taber v. Royal Ins. Co., 124 Ala. 681, 26 So. 252. See also, Greenough v. Phœnix Ins. Co., 206 Mass. 247, 92 N. E. 447, 138 Am. St. 383n; Beatty v. Lycoming County Mut. Ins. Co., 66 Pa. St. 9.

[13] Fletcher v. German-American Ins. Co., 79 Minn. 337, 82 N. W. 647. See also, Ætna Ins. Co. v. Fitzgerald, 165 Ind. 317, 75 N. E. 262, 1 L. R. A. (N. S.) 422, 112 Am. St. 232.

the fire to the plaintiff, and that he had no knowledge of its contents, and that he used due diligence to discover the policy, which had accidentally fallen behind a case of pigeonholes in his office, to ascertain what it required, and that, notwithstanding such diligence, he obtained neither the policy nor any information as to the notice until fifty days after the fire, and that notice, dated three days after obtaining possession of the policy, was prepared and served with due diligence, the company receiving it three days after its date, it was decided that it could not be held, as a matter of law, that the service of the notice was not within a reasonable time.[14] An unexcused delay of eleven days,[15] and, in another case, of forty-eight days, however, has been held fatal.[16] So, a failure for nearly sixty days after a fire to give notice of loss has been held, as a matter of law, a breach of the condition.[17] But in one case a delay of thirty-five days in making proof of loss was excused under the circumstances.[18] The company was held to have received timely notice of loss, under a policy requiring immediate written notice, where its local agent knew of the fire and had several conversations with the insured, who made a verbal claim of loss, and thereafter the agent wrote the company, which, ten days after the fire, sent out an adjuster, and final proofs of loss were sent to the defendant, who retained them without comment.[19] So, where a general agent of the company, on the day of the loss, notified the company of the loss, and within a few days thereafter the company sent an adjuster with power to investigate, adjust and settle the loss, it was held that

[14] Solomon v. Continental Fire Ins. Co., 160 N. Y. 595, 55 N. E. 279, 46 L. R. A. 682, 73 Am. St. 707. See also, Capitol Ins. Co. v. Wallace, 50 Kans. 453, 31 Pac. 1070; Ben Franklin Fire Ins. Co. v. Flynn, 98 Pa. St. 627.

[15] Trask v. State &c. Ins. Co., 29 Pa. St. 198, 72 Am. Dec. 622.

[16] Brown v. London Assur. Corp., 40 Hun (N. Y.) 101. See also, Quinlan v. Providence Washington Ins. Co., 133 N. Y. 356, 31 N. E. 31, 28 Am. St. 645.

[17] Ermentrout v. Girard Fire & Marine Ins. Co., 63 Minn. 305, 65 N. E. 635, 30 L. R. A. 346, 56 Am. St. 481. And where the loss occurred on October 3 and the proof was not sent to the company until December 8, it was held not "forthwith rendered." Parker v. Farmers' Fire Ins. Co., 179 Mass. 528, 61 N. E. 215. See also, Pickel v. Phœnix Ins. Co., 119 Ind. 291, 21 N. E. 898.

[18] Knickerbocker Ins. Co. v. McGinnis, 87 Ill. 70.

[19] Partridge v. Milwaukee Mechanics' Ins. Co., 13 App. Div. (N. Y.) 519, 43 N. Y. S. 632, affd. 162 N. Y. 597, 57 N. E. 1119. See also, Gleason v. Prudential F. Ins. Co. (Tenn.), 151 S. W. 1030.

the requirement of immediate notice had been complied with.[20] It has been held that notice by parol to an agent of the insurance company is of no effect where the charter contains a condition that notice must be given in writing to the secretary or one of the directors.[21] The policy sometimes requires that notice shall be given "forthwith." This word is given the same construction as "immediate," and merely requires that the notice be given with due diligence—within a reasonable time and without unnecessary delay.[22] Hence, whether a statement is rendered "forthwith" depends upon all the circumstances, and is usually for the jury to determine.[23] A failure to render such statement until about two months after the fire is not necessarily a failure to render it "forthwith," if the delay is accounted for by the ill health of the assured, the confusion attending the fire, and other such obstructions.[24] So a requirement of proof of loss "as soon as possible" means within a reasonable time under the circumstances.[25]

§ 4302. **Separation of goods "forthwith."**—After giving immediate notice of the loss to the company the insured must, under some forms of the policy, proceed "forthwith" to separate the damaged from the undamaged personal property. "Forthwith," like immediate, means with due diligence under all the circumstances.[26]

[20] Kahn v. Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. 47.

[21] Patrick v. Farmers' Ins. Co., 43 N. H. 621, 80 Am. Dec. 197. In Ermentrout v. Girard Fire & Marine Ins. Co., 63 Minn. 305, 65 N. E. 635, 30 L. R. A. 346, 56 Am. St. 481, it was held that notice to the local agent was not notice to the company.

[22] Central City Ins. Co. v. Gates, 86 Ala. 558, 6 So. 83, 11 Am. St. 67; Greenough v. Phœnix Ins. Co., 206 Mass. 247, 92 N. E. 447, 138 Am. St. 383n. See also, Pennypacker v. Capital Ins. Co., 80 Iowa 56, 45 N. W. 408, 8 L. R. A. 236, 20 Am. St. 395; Mason v. St. Paul Fire & Marine Ins. Co., 82 Minn. 336, 85 N. W. 13, 83 Am. St. 433; St. Louis Ins. Co. v. Kyle, 11 Mo. 278, 49 Am. Dec. 74; Griffey v. New York Cent. Ins. Co., 100 N. Y. 417, 3 N. E. 309, 53 Am. Rep. 202; Whitehurst v. North Carolina Mut. Ins. Co., 52 N. Car. 433, 78 Am. Dec. 246.

[23] Harnden v. Milwaukee Mechanic's Ins. Co., 164 Mass. 382, 41 N. E. 658, 49 Am. St. 467.

[24] Harnden v. Milwaukee Mechanics' Ins. Co., 164 Mass. 382, 41 N. E. 658, 49 Am. St. 467. See also, Ætna Life Ins. Co. v. Fitzgerald, 165 Ind. 317, 75 N. E. 262, 1 L. R. A. (N. S.) 422, 112 Am. St. 232.

[25] Great American &c. Fire Assn. v. Jenkins (Ga. App.), 76 S. E. 159.

[26] Fletcher v. German-American Ins. Co., 79 Minn. 337, 82 N. W. 647. See cases cited in previous section.

§ 4303. Who may make proof—Excuses for failure to furnish proofs.—As a general rule the provision that proof of loss shall be made by the insured under oath requires it to be sworn to personally by the insured,[27] but there may be circumstances which will excuse a failure to verify it personally or to make proofs of loss within the exact time and in all respects as required by the policy. Thus, the insanity of the insured is a sufficient excuse for not making proofs of loss within the specified time,[28] and so may be the illness of the insured where his clerk gives notice and verifies the proofs in time, and after his recovery the insured ratifies it.[29] As said in a recent case in New York:[30] "It is well settled that when liability has become fixed by the capital fact of loss within the range of the responsibility assumed in the contract, the courts are reluctant to deprive the insured of the benefit of that liability by any narrow or technical construction of the conditions and stipulations which prescribe the formal requisites by means of which this accrued right is to be made available for his indemnification. * * * While it is true that the policy in suit contained the usual clause as to proofs of loss being filed within sixty days, and that no officer, agent or other representative of the company should have power to waive any condition thereof, except by a written agreement indorsed thereon, yet, a party to a contract containing such a provision may, by conduct, estop himself from enforcing it against one who has acted in reliance upon such conduct. He may also be estopped by the act of an agent who possesses, or whom he has held out to possess, this power in respect to the provision." It has been held that failure to comply with this provision does not defeat the claim of a beneficiary when he does not know of the

[27] St. Paul Fire &c. Ins. Co. v. Mittendorf, 24 Okla. 651, 104 Pac. 354, 28 L. R. A. (N. S.) 651, and note.

[28] Wheeler v. Connecticut Mut. Life Ins. Co., 82 N. Y. 543, 37 Am. Rep. 594; Germania Fire Ins. Co. v. Boykin, 12 Wall. (U. S.) 433, 20 L. ed. 442.

[29] Burnes v. Michigan &c. Mut. Fire Ins. Co., 130 Mich. 561, 90 N. W. 411. See also, Hilmer v. Western Travelers' Assn., 86 Nebr. 285, 125 N. W. 535, 27 L. R. A. (N. S.) 319, and note. But compare Kowicz v. Teutonia Ins. Co., 30 Pittsb. Leg. J. (N. S.) 140.

[30] Sergent v. Liverpool &c. Ins. Co., 155 N. Y. 349, 49 N. E. 935; McNally v. Phœnix Ins. Co., 137 N. Y. 389, 33 N. E. 475; Bishop v. Agricultural Ins. Co., 130 N. Y. 488, 29 N. E. 844.

existence of the policy, or of the death of the insured, until more than a year thereafter, and then notifies the company at once after acquiring such knowledge.[31] The policy requires that the proof shall be made and signed by the insured, but when he is not in a position personally to comply with this requirement it may be done by his agent.[32] Thus, where the insured is a nonresident and not in the state, the proofs may be signed and sworn to by his agent.[33] So, where the insured dies, the right to idemnity is not lost by a failure to comply with the provision literally, owing to such death and the absence of persons qualified to give such notice and make such proofs. But, upon the death of the insured it is the duty of those interested to use reasonable effort to comply with the provision, and where no executor has been appointed because of the contest of a will, the heirs or next of kin should, within a reasonable time, give notice of the loss and make the proof provided for in the policy, or procure the appointment of a special or temporary administrator to do so. Where this was not done, and where no notice of loss was given until more than two years after the death of the insured, the company was held to have been relieved from liability.[34] And where the insured returned the proofs of loss, signed and sworn to by his attorney in fact, and gave as a reason therefor the fact that such attorney negotiated the policy and lived in the property, and that the insured was sick and not able to execute the power of attorney before a justice, it was held that the insured had not shown a sufficient excuse for not signing and swearing to the proofs himself, and that therefore he could not maintain an action on the policy.[35] The fact that the insured

[31] McElroy v. John Hancock Mut. Life Ins. Co. of Boston, 88 Md. 137, 41 Atl. 112, 71 Am. St. 400. See also, United States Casualty Co. v. Hanson, 20 Colo. App. 393, 79 Pac. 176; Phillips v. United States Ben. Soc., 120 Mich. 142, 79 N. W. 1, affd. 125 Mich. 186, 84 N. W. 57; Munz v. Standard Life & Accident Co., 26 Utah 69, 72 Pac. 182, 62 L. R. A. 485, 99 Am. St. 830.

[32] Lumbermen's Mut. Ins. Co. v. Bell, 166 Ill. 400, 45 N. E. 130, 57 Am. St. 140.

[33] Brunswick-Balke-Collender &c. Co. v. Northern Assur. Co., 142 Mich. 29, 105 N. W. 76 (or even though a resident, it seems, if out of the state at the time); Walsh's Admx. v. Vermont Mut. Fire Ins. Co., 54 Vt. 351.

[34] Matthews v. American Cent. Ins. Co., 154 N. Y. 449, 48 N. E. 751, 39 L. R. A. 433, 61 Am. St. 627.

[35] Kowicz v. Teutonia Ins. Co., 30 Pittsb. Leg. J. (N. S.) 140. But see ante note 29, § 4303.

was occupied with other business and forgot to give notice is not a sufficient excuse.[36]

§ 4304. **When a condition precedent.**—Where the policy does not provide that a failure to furnish proofs of loss within the stipulated time shall operate as a forfeiture, or make it a condition precedent to liability, it is generally held that the policy is not invalidated by such failure.[37] In such case a failure to furnish proof of loss within the required time does not forfeit the policy if the proofs are furnished before the expiration of the time for bringing an action.[38] The Supreme Court of Minnesota, in a recent case, said:[39] "Where no forfeiture is provided by the terms of the contract, and the service of proofs of loss within the specified time is not made a condition precedent to the liability of the company, the effect of such failure is simply to postpone the day of payment. No liability attaches to the company, however, until such proofs are furnished; but, unless otherwise provided, expressly or by fair implication, it is not important that the proofs be not in fact served within the time stated in the policy.[40] * * * It has been held by this court * * * that a failure of strict compliance with similar provisions in the

[36] Smith & Dove Mfg. Co. v. Travelers' Ins. Co., 171 Mass. 357, 50 N. E. 516. See also, Harnden v. Milwaukee Mechanics' Ins. Co., 164 Mass. 382, 41 N. E. 658, 49 Am. St. 467.

[37] Orient Ins. Co. v. Clark, 22 Ky. L. 1066, 59 S. W. 863; Northern Assur. Co. v. Hanna, 60 Nebr. 29, 82 N. W. 97; Flatley v. Phœnix Ins. Co., 95 Wis. 618, 70 N. W. 828. See also, Hartford Fire Ins. Co. v. Redding, 47 Fla. 228, 37 So. 62, 67 L. R. A. 518, 110 Am. St. 118.

[38] American Cent. Ins. Co. v. Heaverin, 18 Ky. L. 190, 35 S. W. 922. But the burden of proving notice and proof of loss within the time required, or showing a good excuse, is upon the insured. 3 Elliott Ev., § 2338, and cases cited. As to what is competent and sufficient evidence thereof, see 3 Elliott Ev., § 2339. See also, Slocum v. Saratoga &c. F. Ins. Co., 149 App. Div. (N. Y.) 867, 134 N. Y. S. 72, holding the notice a condition precedent.

[39] Mason v. St. Paul Fire & Marine Ins. Co., 82 Minn. 336, 85 N. W. 13, 83 Am. St. 433.

[40] 2 May Ins. (4th ed.) 1097, note a; Kahnweiler v. Phœnix Ins. Co., 57 Fed. 562, revd. 67 Fed. 483, 14 C. C. A. 485; Southern Fire Ins. Co. v. Knight, 111 Ga. 622, 36 S. E. 821, 52 L. R. A. 70, 78 Am. St. 216; Kenton Ins. Co. v. Downs, 90 Ky. 236, 12 Ky. L. 115, 13 S. W. 882; Rynalski v. Insurance Co. of Pennsylvania, 96 Mich. 395, 55 N. W. 981; Steele v. German Ins. Co., 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85; Northern Assur. Co. v. Hanna, 60 Nebr. 29, 82 N. W. 97; Carpenter v. German-American &c. Ins. Co., 52 Hun (N. Y.) 249, 23 N. Y. St. 51, 4 N. Y. S. 925, revd. 135 N. Y. 298, 31 N. E. 1015; Coventry Mutual Live Stock Insurance Association v. Evans, 102 Pa. 281; Sun Mutual Ins. Co. v. Mattingly, 77 Tex. 162, 13 S. W. 1016; Vangindertaelen v. Phenix Ins. Co., 82 Wis. 112, 51 N. W. 1122, 33 Am. St. 29.

policies there under consideration was a condition precedent to the company's liability, but such policies contain express provisions to that effect, and the decisions there made are based upon that fact."[41] Where the policy provides that the loss shall not be payable until sixty days after proofs of loss have been furnished, and that no suit on the policy can be commenced within twelve months after the fire, the insured must submit his proofs of loss in time for sixty days to elapse between the time when they were furnished and the expiration of the twelve months' limitation.[42] Where the policy contained this provision and a further statement that no suit or action on the policy for the recovery of any claim should be sustainable in any court of law or equity until full compliance by the assured with this requirement, the court said:[43] "Under the stipulations in the policy there can be no question that, as a condition precedent to the payment of the loss, the proofs of loss should be submitted to the company within the time prescribed." And even though a failure to make proofs of loss within the stipulated time may not cause a forfeiture of the policy, it is necessary that proofs be submitted before an action can be maintained.[44]

§ 4305. **What is compliance with this provision.**—Notice to an agent of the company a day or so after the loss occurs, with a request that he notify his principal, is immediate notice.[45] The requirement that a statement should be rendered to the

[41] See Bowlin v. Hekla Fire Ins. Co., 36 Minn. 433, 31 N. W. 859; Shapiro v. Western &c. Ins. Co., 51 Minn. 239, 53 N. W. 463; Shapiro v. St. Paul &c. Ins. Co., 61 Minn. 135, 62 N. W. 614; Ermentrout v. Girard Fire & Marine Ins. Co., 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. 481.

[42] Southern Fire Ins. Co. v. Knight, 111 Ga. 622, 36 S. E. 821, 52 L. R. A. 70, 78 Am. St. 216.

[43] Cannon v. Phœnix Ins. Co., 110 Ga. 563, 35 S. E. 775, 78 Am. St. 124. See also, Slocum v. Saratoga &c. F. Ins. Co., 149 App. Div. (N. Y.) 867, 134 N. Y. S. 72.

[44] Western Home Ins. Co. v. Thorp, 48 Kans. 239, 28 Pac. 991; German Ins. Co. v. Fairbank, 32 Nebr. 750, 49 N. W. 711, 29 Am. St. 459. See also, Bennett v. Ætna Ins. Co., 201 Mass. 554, 88 N. E. 335, 131 Am. St. 414 (holding that the trustee in bankruptcy could not recover where the insured had lost his right by failing, without excuse, to make proof in time); Hatch v. United States Casualty Co., 197 Mass. 101, 83 N. E. 398, 14 L. R. A. (N. S.) 503n, 125 Am. St. 332, and note. And compare Hartford Fire Ins. Co. v. Redding, 47 Fla. 228, 37 So. 62, 67 L. R. A. 518, 110 Am. St. 118. See also, 3 Elliott Ev., § 2338.

[45] Burlington Ins. Co. v. Lowery, 61 Ark. 108, 32 S. W. 383, 54 Am. St. 196; Hoffecker v. New Castle County Mut. Ins. Co., 5 Houst. (Del.) 101.

company within a specified time is complied with by mailing a statement to the company within the time.[46] Where there was proof of mailing the notice and proofs of loss, properly stamped and addressed, which was opposed by declarations of the company's officers and clerks to the effect that the documents were never received, it was held that there was a question for the jury to determine.[47] But in New York it is held that the proofs of loss must be mailed so that they may be received by the insurer within the time fixed by the policy.[48] Merely sending the estimates of carpenters as to what the building destroyed would cost is not furnishing proofs of loss.[49] A statement which describes in general terms the merchandise destroyed, and alleges that it was owned by the insured, and was of a specified value, and further states that the origin of the fire is unknown, but is supposed to have been caused by a flue, sufficiently complies with a statute which requires the insured to state the facts as to how the loss occurred so far as within his knowledge, and the extent of the loss, although such proof does not meet the requirements of the policy.[50] So, a written notice, accompanied by an affidavit stating that the origin of the fire is unknown to the insured, and that the loss is total, entire and complete, satisfies the provision in the policy which requires "satisfactory" proofs of loss, as well as such statute.[51]

§ 4306. Certificate of magistrate.—The requirement that the insured shall furnish, if required, a certificate of a magistrate

[46] Manufacturers' & Merchants' Ins. Co. v. Zeitinger, 168 Ill. 286, 48 N. E. 179, 61 Am. St. 105; Susquehanna Mutual Fire Ins. Co. v. Tunkhannock Toy Co., 97 Pa. St. 424, 39 Am. Rep. 816; Whitmore v. Dwelling-House Ins. Co., 148 Pa. St. 405, 23 Atl. 1131, 33 Am. St. 838, note; Badger v. Glens Falls Ins. Co., 49 Wis. 389, 5 N. W. 845. Under Iowa Code, par. 23, § 48, providing that in computing time, if the last day falls on Sunday, prescribed time shall be extended so as to include the whole of the following Monday, a proof of loss mailed on Saturday, the last day for making the same being Sunday, and received by the insurance company on Monday, was in time. McKibban v. Des Moines Ins. Co., 114 Iowa 41, 86 N. W. 38.

[47] Pennypacker v. Capital Ins. Co., 80 Iowa 56, 45 N. W. 408, 8 L. R. A. 236, 20 Am. St. 395.

[48] Peabody v. Satterlee, 166 N. Y. 174, 59 N. E. 818, 52 L. R. A. 956.

[49] Heusinkveld v. St. Paul Fire & Marine Ins. Co., 96 Iowa 224, 64 N. W. 769.

[50] Warshawky v. Anchor Mut. Fire Ins. Co., 98 Iowa 221, 67 N. W. 237; Leadbetter v. Etna Ins. Co., 13 Maine 265, 29 Am. Dec. 505; Columbian Ins. Co. of Alexandria v. Lawrence, 2 Pet. (U. S.) 25, 7 L. ed. 335.

[51] Parks v. Anchor Mut. Fire Ins. Co., 106 Iowa 402, 76 N. W. 743.

or notary public living nearest the place of the fire stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount certified has often been upheld.[52] But the insured is under no obligation to furnish the certificate unless requested to do so, and it has been held that a mere notice to him to comply with the conditions of the policy is not notice to furnish this certificate, and the request must be made before suit is brought to recover the amount of the loss.[53] Courts will not attach much importance to slight differences in distance between different notaries.[54] Where the certificate furnished was that of a notary residing within four hundred feet of the fire, and it appeared that there was another notary who lived nearer, and the defect was not pointed out by the defendant until after the commencement of the suit, it was held that it was too late to make the objection.[55] It was held in Illinois that the certificate of a magistrate as to the amount of the loss is not conclusive on the insured, and that a party may, notwithstanding such certificate, show the true amount of the loss.[56] In some states the insertion of this provision in the policy is forbidden by statute, and in others it is held void and unenforcible.[57]

§ 4307. **Plans and specifications.**—The requirement that the insured shall, if required, furnish verified plans and specifications of any buildings or fixtures destroyed or damaged is reasonable and must be complied with. But where the company requests the insured to make out plans and specifications and hold and deliver the same to a common adjuster of itself

[52] Lane v. St. Paul Fire & Marine Ins. Co., 50 Minn. 227, 52 N. W. 649, 17 L. R. A. 197. The Minnesota statute now forbids the insertion of this clause in a policy. See also, Worsley v. Wood, 6 T. R. 710;; London Guarantee &c. Co. v. Fearnley, L. R. 5 App. Cas. 911.

[53] Leadbetter v. Etna Ins. Co., 13 Maine 265, 29 Am. Dec. 505; Johnson v. Phœnix Ins. Co., 112 Mass. 49, 17 Am. Rep. 65; Mover v. Sun Ins. Office, 176 Pa. St. 579, 53 Am. St. 690.

[54] Williams v. Niagara Fire Ins. Co., 50 Iowa 561. See also, German-American Ins. Co. v. Norris, 100 Ky. 29, 18 Ky. L. 537, 37 S. W. 267, 66 Am. St. 324; Paltrovitch v. Phœnix Ins. Co., 143 N. Y. 73, 37 N. E. 639, 25 L. R. A. 198; Schmurr v. State Ins. Co., 30 Ore. 29, 46 Pac. 363.

[55] Barnum v. Merchants' Fire Ins. Co., 97 N. Y. 188.

[56] Birmingham Fire Ins. Co. v. Pulver, 126 Ill. 329, 18 N. E. 804, 9 Am. St. 598; Kelly v. Sun Fire Office, 141 Pa. St. 10. 21 Atl. 447, 23 Am. St. 254.

[57] German-American Ins. Co. v. Norris, 100 Ky. 29, 18 Ky. L. 537, 37 S. W. 267, 66 Am. St. 324.

and other companies, it thereby waives the presentation of the plans and specifications to itself.[58]

§ 4308. Waiver.—If the company objects to the proofs of loss on technical grounds it must specify the particular defect, if it is one which may be remedied, or it will be held to have waived the defect. Where a party in good faith attempts to make proofs of loss, the failure of the company to make any objection to the proofs is usually sufficient to constitute a waiver.[59] "The law is settled that where the assured, in attempting in good faith to comply with the provisions of the policy, furnishes to the insuring company, within the time stipulated, what purports and is intended to be proof of loss, the company must point out particularly any defects therein if it intends to rely upon them. If it fails to do so, objection cannot thereafter be made to its sufficiency."[60] And the mere silence of an agent or manager of the company after receiving proofs of loss may constitute a waiver of the right to require further proofs.[61] But it is held otherwise as to failure to give notice in time where the silence of the insurer caused no injury and the default could not have been cured in any event.[62]

The company waives compliance with this provision of the policy by waiting until but two or three days are left within the

[58] Brownfield v. Mercantile &c. Ins. Co., 84 Mo. App. 134.

[59] Great American &c. Fire Assn. v. Jenkins (Ga. App.), 76 S. E. 159; Moyer v. Sun Ins. Office, 176 Pa. St. 579, 53 Am. St. 690. Withholding payment on special grounds having no relation to the notice or proof is usually a waiver of objections thereto. Ætna Ins. Co. v. Shryer, 85 Ind. 362; Ætna Ins. Co. v. Simmons, 49 Nebr. 811, 69 N. W. 125. See also, District Grand Lodge v. Hill (Ala.), 57 So. 147. And in general waiver of proof within the time specified may be inferred from acts and conduct inconsistent with an intention to exact it. Germania Fire Ins. Co. v. Pitcher, 160 Ind. 392, 64 N. E. 921, 66 N. E. 1003; Providence Washington Ins. Co. v. Wolf, 168 Ind. 690, 72 N. E. 606, 80 N. E. 26, 120 Am. St. 395; Hartford Fire Ins. Co. v. Keating, 86 Md. 130, 38 Atl. 29, 63 Am. St. 499. See also, 3 Elliott Ev., § 2353, § 2358.

[60] Schmurr v. State Ins. Co., 30 Ore. 29, 46 Pac. 363. See also, Bumstead v. Dividend &c. Ins. Co., 12 N. Y. 81; Vergeront v. German Ins. Co., 86 Wis. 425, 56 N. W. 1096.

[61] McBryde v. South Carolina Mut. Ins. Co., 55 S. Car. 589, 33 S. E. 729, 74 Am. St. 769; Morotock Ins. Co. v. Cheek, 93 Va. 8, 57 Am. St. 782, 24 S. E. 464.

[62] Travelers' Ins. Co. v. Nax, 142 Fed. 653, 73 C. C. A. 649. See also, Cook v. North British & Mercantile Ins. Co., 181 Mass. 101, 62 N. E. 1049; Travelers' Ins. Co. v. Myers, 62 Ohio St. 529, 57 N. E. 548, 49 L. R. A. 760; Mueller v. South Side Fire Ins. Co., 87 Pa. St. 399; Beatty v. Lycoming &c. Ins. Co., 66 Pa. St. 9, 5 Am. Rep. 318.

limit, and then demanding of the insured, indiscriminately, proofs which he was unconditionally required to furnish, and those which he was not required to furnish unless demanded, and failing to state that he had less time to furnish the former than the latter, and that a failure to furnish the former within the time limited would result in forfeiture.[63] Where the company denies all liability it is not necessary to furnish proofs of loss,[64] and it has been held to be so where the denial is made to a third person during the period prescribed for making the proofs, if the fact of such denial comes to the knowledge of the insured.[65] But the fact that the insurer, when denying its liability on the policy and insisting that it was void, at the same time objected to the proofs of loss, does not amount to a waiver of the forfeiture.[66] An adjuster, by agreeing to accept the estimate of a third person as to the amount of the loss, waives the proofs of loss required under the policy.[67] Where the company holds the proofs without objection until forty-three days after receiving them, and until the time allowed by the policy for furnishing proofs has expired, it cannot thereafter object to their sufficiency.[68] And in general the insurance company must object within a reasonable time and point out defects so that they may be remedied.[69] Thus, where it does not object within a reasonable time that the proof is defective in that the notary did not designate his title nor attach his seal it waives such defect.[70] The refusal of an adjuster for the company to pay the amount of the loss on the ground that the insured had made false representations in the application for insurance, and that he was guilty of burning the house, has been held not a waiver of a condition requiring proofs of loss.[71] It is

[63] McCarvel v. Phenix Ins. Co., 64 Minn. 193, 66 N. W. 367.

[64] American Central Ins. Co. v. Henninger, 87 Ill. App. 440; Soorholtz v. Marshall County &c. Ins. Co., 109 Iowa 522, 80 N. W. 542; J. B. Clark & Sons v. Franklin F. Ins. Co., 130 La. 384, 58 So. 345; Knickerbocker Life Ins. Co. v. Pendleton, 112 U. S. 696, 28 L. ed. 866, 5 Sup. Ct. 314.

[65] Merchants' Ins. Co. v. Nowlin (Tex.), 56 S. W. 198.

[66] Betcher v. Capital Fire Ins. Co., 78 Minn. 240, 80 N. W. 971.

[67] Wholley v. Western Assur. Co., 174 Mass. 263, 54 N. E. 548, 75 Am. St. 314.

[68] Fort Wayne Ins. Co. v. Irwin, 23 Ind. App. 53, 54 N. E. 817.

[69] Hanover Fire Ins. Co. v. Lewis, 28 Fla. 209, 10 So. 297; Arkansas Ins. Co. v. Cox, 21 Okla. 873, 98 Pac. 552, 129 Am. St. 808.

[70] Arkansas Ins. Co. v. Cox, 21 Okla. 873, 98 Pac. 552, 129 Am. St. 808.

[71] Phœnix Ins. Co. v. Minner, 64 Ark. 590, 44 S. W. 75. But see Ohio Farmers' Ins. Co. v. Vogel, 166 Ind.

said in New York that an insurance agent cannot waive the terms of the New York standard policy, and that where a party agrees to insure another and to issue a New York standard policy, but fails to do so, and after loss denies that any contract existed, it is not a waiver of proofs of loss.[72] The company was held to have waived proofs of loss where the local agent told the insured, at the time the general agent appraised the property after loss, that he need not make any proofs of loss, and that if he was not satisfied with the appraisement the company would make a new one.[73] So, where the insurer agreed to furnish blanks on which to make proof of loss, but failed to do so, it was held to be in no position to complain that proof was not made on time.[74] The fact that the policy prohibits a waiver of the proofs of loss, either by the adjuster or the president of the company, does not prevent their acts after the loss from amounting to a waiver.[75] An agent with full power to adjust and pay claims against the company has authority to waive the provisions in the policy requiring the service of notice and proofs of loss, and the appointment of appraisers.[76] The company waives proofs of loss where the adjuster, after having a personal interview with the insured, who answers questions respecting the origin of the fire, refuses to pay the amount of the loss to an assignee of the policy because the property was mortgaged.[77] Where there is a waiver of proofs of

239, 76 N. E. 977, 3 L. R. A. (N. S.) 966, 117 Am. St. 382.

[72] Hicks v. British America Assur. Co., 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424.

[73] McCoubray v. St. Paul Fire & Marine Ins. Co., 50 App. Div. (N. Y.) 416, 64 N. Y. S. 112, affd. 169 N. Y. 590, 62 N. E. 1097.

[74] Correll v. Nat. Acc. Soc., 139 Iowa 36, 116 N. W. 1046, 130 Am. St. 294; Gleason v. Prudential F. Ins. Co. (Tenn.), 151 S. W. 1030. See also, Sidebotham v. Merchants' Fire Assn., 41 Wash. 436, 83 Pac. 1028.

[75] Lake v. Farmers' Ins. Co., 111 Iowa 473, 81 N. W. 710.

[76] Smaldone v. President &c. Ins. Co., 162 N. Y. 580, 57 N. E. 168. See also, Western Underwriters Assn. v. Hankins, 221 Ill. 304, 77 N. E. 447; Farley v. Western Assur. Co. (Ore.), 124 Pac. 199. But see Rockwell v. Hamburg &c. F. Ins. Co. (Mass.), 98 N. E. 1086.

[77] Western Assurance Co. v. McCarty, 18 Ind. App. 449, 48 N. E. 265. See also, Czerweny v. National F. Ins. Co., 139 N. Y. S. 345. And, on the other hand, a distinct recognition of liability by the company, as by offering to pay all or part of the loss amounts to a waiver of formal notice and proof. Providence Washington Ins. Co. v. Wolf, 72 N. E. 606, 169 Ind. 690, 80 N. E. 26, 120 Am. St. 395. See also, Prussian Nat. Ins. Co. v. Peterson, 30 Ind. App. 289, 64 N. E. 102; Caledonian Fire Ins. Co. v. Traub, 86 Md. 86, 37 Atl. 782; Murphy v. North British & Mercantile Ins. Co., 70 Mo. App. 78; Hitchcock v. State Ins. Co., 10 S. Dak, 271, 72 N. W. 898.

loss by the company it inures to the benefit of the mortgagee where the policy is payable to him as his interest may appear.[78]

§ 4309. To whom notice must be given.—The policy provides that notice and statement of loss shall be given to the company. This provision is complied with by giving notice and furnishing a statement to a duly authorized agent of the company.[79] It is held in Minnesota that it is not sufficient to give notice of loss to a local agent;[80] but where the notice is given to a local agent, who transmits it to his principal, it is a substantial compliance. In Iowa, evidence that notice and proofs of loss were sent to the firm through which the policy was procured, although not agents of the company, and that they forwarded the papers by mail to the company, has been held admissible for the purpose of showing that the company actually received the same.[81] Where the risks of the insuring company are reinsured under a contract whereby the reinsuring company assumes the management and control of the business of the original insurer, and agrees to assume, adjust and promptly pay its losses, proofs of loss under a policy issued by the original insurer may be made to the reinsuring company.[82] Apparent authority on the part of the local agent to receive proofs of loss has been implied from a custom among insurance corporations to prepare proofs of loss and to send them to officers.[83] In the same case it was held that a

[78] State Ins. Co. v. Ketcham, 9 Kans. App. 552, 58 Pac. 229. Compare Ft. Scott Ben. & Life Assn. v. Palatine Ins. Co., 74 Kans. 272, 86 Pac. 142. See also, Hartford Fire Ins. Co. v. Smith, 3 Colo. 422; Killips v. Putnam Fire Ins. Co., 28 Wis. 480, 9 Am. Rep. 506.

[79] Burlington Ins. Co. v. Lowery, 61 Ark. 108, 32 S. W. 383, 54 Am. St. 196.

[80] Ermentrout v. Girard Fire & Marine Ins. Co., 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. 481. See also, Hicks v. British America Assur. Co., 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424.

[81] Pennypacker v. Capital Ins. Co., 80 Iowa 56, 45 N. W. 408, 8 L. R. A. 236, 20 Am. St. 395.

[82] Whitney v. American Ins. Co., 127 Cal. 464, 59 Pac. 897.

[83] Harnden v. Milwaukee Mechanics' Ins. Co., 164 Mass. 382, 41 N. E. 658, 49 Am. St. 467. "Neither does the policy," said Mr. Justice Morton, "contain any promise as to the manner in which proofs of loss should be delivered to the company. If, therefore, the local agents had apparent authority, by custom or otherwise, to receive the proofs of loss, we think that the delivery to them would constitute a delivery to the company even if they had not authority, from the nature of their agency, to receive them, or if, also, in the absence of custom, a delivery to them under the circumstances would not have been a reasonable mode of sending proofs of loss to the company,—neither of which do we pass upon."

delivery of the proofs to a local agent is delivery to the company where the commission of the agent gives him "full power to receive proposals for insurance against loss or damage by fire, * * * to receive moneys and countersign, issue, renew, and consent to the transfer of policies * * * subject to the rules and regulations of said company, and to such instructions as may from time to time be given by its officers." In Illinois a delivery of proofs of loss to a local agent of the insurer, in the absence of any provision in the policy to the contrary, has been held a delivery to the company for all purposes of the policy.[84]

§ 4310. Exhibition of property and records—Examination of party.—After a loss it is made the duty of the insured, as often as required, to exhibit to any person designated by the company all that remains of the insured property and to submit to examination under oath, by any person named by the company.[85] A general provision requiring the insured to submit to examination is valid,[86] although certain requirements in connection therewith, such as that the examination shall be held apart from all persons except the magistrate, have been questioned.[87] In one case the question whether the insured was, under the circumstances, required to submit to an examination was said to be a

[84] Insurance Co. of North America v. Hope, 58 Ill. 75, 11 Am. Rep. 48. See as to authority of adjusters and the like, Dibbrell v. Georgia Home Ins. Co., 110 N. Car. 193, 14 S. E. 783, 28 Am. St. 678. See also, Smaldom v. Ins. Co. of North America, 162 N. Y. S. 580, 57 N. E. 168; Bishop v. Agricultural Ins. Co., 130 N. Y. 488, 29 N. E. 844; Hahn v. Guardian Assur. Co., 23 Ore. 576, 32 Pac. 683, 37 Am. St. 709; Kidder v. Knights Templars & Masons Life Indemnity Co., 94 Wis. 538,, 69 N. W. 364; Kahn v. Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. 47.

[85] This provision is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Michigan, Louisiana, Iowa, South Dakota, North Dakota, Wisconsin and North Carolina. And the clause then continues as follows: "And, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made." The following provision is found in the standard policies of Massachusetts, Minnesota and Maine: "The company may also examine the books of account and vouchers of the insured, and make extracts from the same." New Hampshire adds the words "and shall have access to the premises and property damaged."

[86] Gross v. St. Paul F. & M. Ins. Co., 22 Fed. 74; Ætna Ins. Co. v. Simmons, 49 Nebr. 811, 69 N. W. 125.

[87] McGraw v. Germania Fire Ins. Co., 54 Mich. 145, 19 N. W. 927.

mixed question of law and fact, which would not be reviewed by a Court of Appeals.[88]

This provision is generally treated as a condition precedent to a recovery. In some cases a refusal is said to result in a forfeiture;[89] while others hold that it merely prevents a recovery upon the policy until there is a substantial compliance.[90]

The demand for an examination of the insured must be of such a character as to show that the company intends to require compliance with the provision, and it has been held that a mere expression of a "desire" that the insured be examined is not sufficiently explicit.[91] In a case where compliance with the condition was held to be a condition precedent to the right of recovery, the court said:[92] "Having used due diligence to notify the assured that they required the performance of this stipulation, they clearly ought not to be held to have waived its performance. If the assured has intentionally absented himself so that he cannot be notified that performance of the stipulation is required, he should be held to have had notice. And if for any cause, whether by his fault or otherwise, he cannot be notified, that may be his misfortune or the misfortune of those claiming under or through him, but is no reason for treating as inoperative an important stipulation which the defendants saw fit to require, and the assured to give, as a condition which was to be complied with before there could be any obligation to pay for the loss."

The insured need not submit to an examination by an adjuster who has not to his knowledge been authorized to represent the company.[93] The examination should be held at the place where the loss occurred, and neither party can require that it shall be

[88] Porter v. Traders' Ins. Co., 164 N. Y. 504, 58 N. E. 641, 52 L. R. A. 424n.

[89] Fire Ins. Co. v. Felrath, 77 Ala. 194, 54 Am. Rep. 58; Gross v. St. Paul F. & M. Ins. Co., 22 Fed. 74; Fleisch v. Insurance Co. of North America, 58 Mo. App. 596.

[90] Weide v. Germania Ins. Co., 1 Dill. (U. S.) 441, Fed. Cas. No. 17358; Commercial Bank v. Fire Ins. Co., 84 Wis. 12, 54 N. W. 109.

[91] McGraw v. Germania Fire Ins. Co., 54 Mich. 145, 19 N. W. 927; State Ins. Co. v. Maackens, 38 N. J. L. 564. See also, Ætna Ins. Co. v. Simmons, 49 Nebr. 811, 69 N. W. 125.

[92] Harris v. Phœnix Ins. Co., 35 Conn. 310; Niagara Fire Ins. Co. v. Forehand, 169 Ill. 626, 48 N. E. 830, and cases therein cited.

[93] Scottish Union &c. Ins. Co. v. Keene, 85 Md. 263, 37 Atl. 33. For further illustrations, see Harris v. Phœnix Ins. Co., 35 Conn. 310; Aurora Fire Ins. Co. v. Johnson, 46 Ind. 315; Dougherty v. German-American Ins. Co., 67 Mo. App. 526.

held elsewhere.[94] The insured need submit to but one complete examination,[95] and can be required to answer only material questions.[96] He is also entitled to have an attorney present at the examination.[97]

§ 4311. **False swearing.**—Where the policy provided that the insured should submit to an examination under oath by the agent of the company, and that fraud or false swearing would forfeit the policy, it was held that the policy was void, where, although the insured swore truthfully as to the actual loss, he swore falsely as to the persons from whom he had purchased the property, or as to the value of goods purchased from a certain firm, even though the false swearing was with no intent to deceive the defendant, but was for the purpose of deceiving other persons.[98] So, as elsewhere shown, intentional false swearing in the proofs of loss concerning a material matter will work a forfeiture or prevent a recovery,[99] although it is generally held that it will not do so if merely the result of an honest mistake.[1]

§ 4312. **Failure to produce books.**—In a recent case it appeared that the insured agreed to keep a set of books showing a complete record of the business transactions, including all purchases and sales both for cash and credit, together with the last inventory of said business, and in case of loss agreed and cove-

[94] American Cent. Ins. Co. v. Simpson, 43 Ill. App. 98; Fleisch v. Insurance Co. of North America, 58 Mo. App. 596. Even where the stipulation is that the examination shall be at "such reasonable place as shall be designated" by the company, the examination must be at the place of the loss when that is as convenient for the company as elsewhere. Murphy v. Northern British & Mercantile Co., 61 Mo. App. 323.

[95] Moore v. Protection Ins. Co., 29 Maine 97, 48 Am. Dec. 514.

[96] Titus v. Glens Falls Ins. Co., 81 N. Y. 410, 8 Abb. N. Cas. (N. Y.) 315; Porter v. Traders' Ins. Co., 164 N. Y. 504, 58 N. E. 641, 52 L. R. A. 424; Republic Fire Ins. Co. v. Weide, 14 Wall. (U. S.) 375, 20 L. ed. 894.

[97] American Cent. Ins. Co. v. Simpson, 43 Ill. App. 98; Thomas v. Burlington Ins. Co., 47 Mo. App. 169; Grigsby v. German Ins. Co., 40 Mo. App. 276.

[98] Claflin v. Franklin Ins. Co., 110 U. S. 81, 3 Sup. Ct. 507.

[99] Hiller Co. v. Ins. Co. of N. A., 125 La. 938, 52 So. 104, 32 L. R. A. (N. S.) 453, and note; Linscott v. Orient Ins. Co., 88 Maine 497, 34 Atl. 405, 51 Am. St. 435; Fowler v. Phœnix Ins. Co., 35 Ore. 559, 57 Pac. 421; Claflin v. Commonwealth Ins. Co., 110 U. S. 81, 28 L. ed. 76, 3 Sup. Ct. 507; Wunderlich v. Palatine Fire Ins. Co., 104 Wis. 382, 80 N. W. 467.

[1] American Cent. Ins. Co. v. Ware, 65 Ark. 336, 46 S. W. 129; Oshkosh Packing & Provision Co. v. Mercantile Ins. Co., 31 Fed. 200; Huston v. State Ins. Co., 100 Iowa 402, 69 N.

nanted to produce said books and inventory,—"and in the event of failure to produce the same, this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss." It was held, under this provision, that a failure to produce the books and inventory means a failure to produce them if they are in existence when called for, or if they have been lost or destroyed by the fault, negligence or design of the insured.[2]

§ 4313. **The iron safe clause.**—Many policies, however, contain a provision requiring the insured to keep his books of account in a fireproof safe, and a failure to comply with it generally precludes a recovery.[3] It must, however, be given a reasonable construction. The Supreme Court of the United States[4] recently considered a policy which contained the following provision: "The assured, under this policy, hereby covenants and agrees to keep a set of books, showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business; and further covenants and agrees to keep such books securely locked in a fireproof safe at night, and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where such business is carried on." While the building was threatened by fire one of the insured parties entered the

W. 674; Knop v. National Fire Ins. Co., 107 Mich. 323, 65 N. W. 228; Virginia Fire & Marine Ins. Co. v. Hogue, 105 Va. 355, 54 S. E. 8; Kahn v. Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. 47. See as to fraud by agent, note in 9 L. R. A. (N. S.) 485.

[2] Sneed v. British-America Ins. Co., 73 Miss. 279, 18 So. 928; Liverpool & London & Globe Ins. Co. v. Kearney, 180 U. S. 132, 45 L. ed. 460, 21 Sup. Ct. 326, 94 Fed. 314, 36 C. C. A. 265.

[3] Western Assurance Co. v. Redding, 68 Fed. 708, 15 C. C. A. 619; Niagara Fire Ins. Co. v. Forehand, 169 Ill. 626, 48 N. E. 830; Gibson v. Missouri Town Mut. Ins. Co., 82 Mo. App. 515; Scottish Union &c. Ins. Co. v. Virginia Shirt Co. (Va.), 74 S. E. 228. In Mechanics' & Traders' Ins. Co. v. Floyd, 20 Ky. L. 1538, 49 S. W. 543, it is held that a failure to comply with a provision in a policy in regard to the safe-keeping of a set of books and an inventory will not work a forfeiture of the policy since such a provision is without consideration, does not decrease the risk, and, at the most, only tends to the better preservation of the evidence to show the amount of loss sustained in case of fire.

[4] Liverpool & London & Globe Ins. Co. v. Kearney, 180 U. S. 132, 45 L. ed. 460, 21 Sup. Ct. 326.

building for the purpose of removing the books of the firm to a safe place. He opened the iron safe in the store in which they had been deposited for the night and took them to his residence, some distance away. In the hurry and confusion incident to removing the books the inventory was either left in the safe and destroyed, or was otherwise lost, and could not be produced after the fire. The other books were saved and exhibited to the insurer as required. It was not claimed that the loss of the inventory was due to fraud or bad faith, and the court charged the jury that the books which had been kept and which were produced on the trial were a substantial compliance with the terms of the policy. The company claimed a literal compliance with the words of the policy, and the court said: "It will be observed that the insured had the right to keep the books and inventory either in a fireproof safe or in some secure place not exposed to a fire that would destroy the house in which their business was conducted. But was it intended by the parties that the policy should become void unless the fireproof safe was one that was absolutely sufficient against every fire that might occur? We think not. If the safe was such as was commonly used, and such as, in the judgment of prudent men in the locality of the property insured, was sufficient, that was enough within the fair meaning of the words of the policy. * * * Nor do the words 'or in some secure place not exposed to a fire which would destroy the house where such business is carried on' necessarily mean that the place must be absolutely secure against every fire that would destroy such house. If, in selecting a place in which to keep their books and last inventory, the insured acted in good faith and with such care as prudent men ought to exercise under like circumstances, it could not be reasonably said that the terms of the policy relating to that matter were violated." The same view was taken and the same principle applied where the inventory was stolen.[5] So, as said in another case: "A 'fireproof' safe, * * * in view of the situation of a small country merchant, and his needs for and employment of an iron safe, can only mean the usual fireproof safe used by the country generally—a

[5] German Alliance Ins. Co. v. Newbern, 25 Okla. 489, 106 Pac. 836, 28 L. R. A. (N. S.) 337, and note on the general subject.

safe composed of incombustible materials and fitted to protect, to the usual extent and in the ordinary way, books and papers deposited therein, and not that rare and costly structure if, indeed, such there be which is capable of withstanding successfully the action of fire altogether, and of preserving its contents from harm absolutely."[6] And where the insured kept a complete set of books and inventories at his dwelling-house, located about seventy yards from the insured storehouse, all of which were produced for inspection, except a small cashbook which was accidentally left in the storehouse on the night of the fire, it was held that there was not a forfeiture of the policy, although it provided that he should keep his books, including his cashbook, in a place not exposed to a fire which would destroy the building.[7]

A policy contained a provision that the insured "shall take an inventory of the stock hereby covered at least once a year during the life of this policy, and shall keep books of account, correctly detailing purchases and sales of said stock, and shall keep said inventory and books securely locked in an iron safe during the hours that said store is closed for business. Failure to observe these conditions shall work a forfeiture of all claims under this policy." Reference was also made to the application, which was made a part of the policy. It was held that these provisions, which should be construed together, required the insured to take an inventory some time within a year after the policy was issued and thereafter to keep books as provided. The agreement to keep books was a promissory warranty, and failure to observe it rendered the policy voidable; and if the company knew that the condition was not being complied with, and took no steps to forfeit the policy, it could not, after the loss, be heard to say that by reason of the failure to observe the condition the policy was void.[8]

[6] Sneed v. British-America Assur. Co., 73 Miss. 279, 18 So. 928.

[7] Niagara Fire Ins. Co. v. Heflin, 22 Ky. L. 1212, 60 S. W. 393.

[8] Hanover Fire Ins. Co. v. Dole, 20 Ind. App. 333, 50 N. E. 772. See generally as to sufficiency of inventory and the like: Kline Bros. v. Royal Ins. Co., 192 Fed. 378; Chamberlain v. Shawnee F. Ins. Co. (Ala.), 58 So. 267; Day v. Home Ins. Co. (Ala.), 58 So. 549; Planters' F. Ins. Co. v. Nichols (Ark.), 147 S. W. 68; Phenix Ins. Co. v. Dorsey (Miss.), 58 So. 778; Home Ins. Co. v. Ballard (Okla.), 124 Pac. 316; Teutonia &c.

Where the insured agreed to keep the books connected with his saloon business in a fireproof safe or other secure place "at night," and at all times when the place was not actually open for business, it was held that he could not recover on the policy where the books were kept under the counter instead of in the safe, although the place was open all night.[9]

The provision requiring the books to be kept in a fireproof safe was held waived by the statement of an adjuster that the insured would have to get duplicates for certain invoices in order to make the required proofs of loss, whereby the insured was induced, at considerable expense and trouble, to secure such duplicates.[10]

§ 4314. Arbitration of the amount of loss—Disagreement. —A provision for arbitration in case of disagreement as to the amount of the loss is also found in the standard policy.[11] It

Ins. Co. v. Tobias (Tex. Civ. App.), 145 S. W. 251.

[9] Southern Ins. Co. v. Parker, 61 Ark. 207, 32 S. W. 507.

[10] Corson v. Anchor Mut. Fire. Ins. Co., 113 Iowa 641, 85 N. W. 806. In Northwestern Nat. Ins. Co. v. Mize (Tex.), 34 S. W. 670, it was held that the knowledge of an agent who states to the insured that it will not be necessary for him to have an iron safe, or to keep a set of books, although the policy contained such a provision, is not binding on the company where the policy also provides that no agent shall have power to waive any of the provisions of the policy except in writing attached to the policy. In German Ins. Co. v. Amsbaugh, 9 Kans. App. 197, 55 Pac. 481, it was held that an inventory of goods taken six and one-half years before the fire, shown to be a correct inventory as to quantities and values, is competent evidence in connection with books of account duly kept and proven to show purchases and sales of goods made from the day of the inventory to the fire. It further appeared that other evidence tending to show the value of the stock had been destroyed by the fire.

[11] "In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire." See also, post, § 4327. This provision is found in the standard policies of New York, New Jersey, Rhode Island, Connecticut, Louisiana, South Dakota, North Dakota and North Carolina. In Michigan it is provided that the award of the appraisers shall be "prima facie evidence of the amount of such loss." The Wisconsin clause is in part the same as the New York form but contains a limitation as to time and some other different provisions. The Massachusetts and Maine policies provide that: "In case of loss under this policy, and a failure of the parties to agree

must appear that there is a real disagreement between the insurer and the insured.[12] Hence, it has been held that a mere general objection to a statement of the loss without pointing out the items excepted to will not constitute a failure to agree, and will not make a case for arbitration.[13] A provision making an award a condition precedent to the commencement of an action upon the policy presupposes a failure to agree and consequent arbitration.[14] Where the company, after receiving proofs of loss, disputes the amount and demands an arbitration, there is a disagreement within the meaning of the provision.[15] But a disagreement merely as to the basis of estimating the loss,[16] or an arbitrary refusal to pay the amount named, without any reason being given

as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons, to be named by the other, and the third being selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference, unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss; but no person shall be chosen or act as referee, against the objection of either party, who has acted in a like capacity within four months." The provision in the Minnesota standard policy is similar to the above, but does not permit an appraisement in cases of total loss on buildings. The New Hampshire policy provides that: "In case difference of opinion shall arise to the amount of any loss under this policy other than on buildings totally destroyed, unless the company and the insured shall, within fifteen days after notice of loss, mutually agree upon referees to adjust the same, either party may, upon giving notice to the other, apply to a justice of the Supreme Court, who shall appoint three referees, one of whom shall be thoroughly acquainted with the kind of property to be considered, and their award in writing, after proper notice and hearing, shall be final and binding on the parties. The referees' fees shall be equally divided between the company and the insured."

[12] American Fire Ins. Co. v. Stuart (Tex.). 38 S. W. 395.

[13] Hickerson v. German-American Ins. Co., 96 Tenn. 193, 33 S. W. 1041, 32 L. R. A. 172.

[14] Farnum v. Phœnix Ins. Co., 83 Cal. 246, 23 Pac. 869, 17 Am. St. 233; Boyle v. Hamburg-Bremen Fire Ins. Co., 169 Pa. St. 349; Vangindertaelen v. Phœnix Ins. Co., 82 Wis. 112, 51 N. W. 1122, 33 Am. St. 29; Chapman v. Rockford Ins. Co., 89 Wis. 572, 62 N. W. 422, 28 L. R. A. 405. See also, Continental Ins. Co. v. Vallandingham, 116 Ky. 287, 25 Ky. L. 468, 76 S. W. 22, 105 Am. St. 218; Citizens' Ins. Co. v. Bland, 19 Ky. L. 110, 39 S. W. 825; Hayes v. Milford Mut. Fire Ins. Co., 170 Mass. 492, 49 N. E. 754; Kelly v. Liverpool & London & Globe Ins. Co., 94 Minn. 141, 102 N. W. 380, 110 Am. St. 351; Randall v. Lancashire Ins. Co., 10 Mont. 367, 25 Pac. 691; Kahn v. Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. 47.

[15] Phœnix Ins. Co. v. Carnahan, 63 Ohio St. 258, 58 N. E. 805. See Ætna Fire Ins. Co. v. Davis, 21 Ky. L. 1456, 55 S. W. 705.

[16] Virginia Fire & Marine Ins. Co. v. Cannon, 18 Tex. Civ. App. 588, 45 S. W. 945.

or any attempt being made to come to an agreement, has been held not to bring the arbitration provision into effect.[17]

§ 4315. Validity of provision.—The provision in question, as restricted in the standard policy, is almost universally held valid and binding upon the parties.[18] Nebraska seems to be the only state in which a provision for arbitration of this character is not sustained.[19] The effect of an arbitration under this provision is not such as to determine the liability of the company.[20] It is equally well settled that the parties cannot, by contract, oust the jurisdiction of the courts; and a provision which requires the submission of any and all differences between the parties wholly to arbitration is invalid and unenforcible.[21] Provisions for arbitration should not be subjected to a narrow or technical construction, but should be construed liberally in favor of the insured.[22] The rules governing arbitration apply to mutual as well as other insurance companies.[23] A by-law of a mutual insurance association which requires the presentation of claims to certain officers of the company, and, if their decision is adverse to the claimant,

[17] Moyer v. Sun Ins. Office, 176 Pa. St. 579, 35 Atl. 221, 53 Am. St. 690; Hickerson v. German-American Ins. Co., 96 Tenn. 193, 33 S. W. 1041, 32 L. R. A. 172.

[18] Scott v. Avery, 5 H. L. Cas. 811, 25 L. J. Exch. (N. S.) 308; Fisher v. Merchants' Ins. Co., 95 Maine 486, 50 Atl. 282, 85 Am. St. 428; Reed v. Washington Fire & Marine Ins. Co., 138 Mass. 572; Phœnix Ins. Co. v. Carnahan, 63 Ohio St. 258, 58 N. E. 805; Hamilton v. Home Ins. Co., 137 U. S. 370, 34 L. ed. 708, 11 Sup. Ct. 133; Straker v. Phœnix Ins. Co., 101 Wis. 413, 77 N. W. 752; Hobkirk v. Phœnix Ins. Co., 102 Wis. 13, 78 N. W. 160, and many other authorities cited in note to Graham v. German-American Ins. Co. (75 Ohio St. 374), in 15 L. R. A. (N. S.) 1055.

[19] National Masonic Acc. Assn. v. Burr, 44 Nebr. 256, 62 N. W. 466; Hartford Fire Ins. Co. v. Hon, 66 Nebr. 555, 92 N. W. 746, 60 L. R. A. 436, 103 Am. St. 725. See also, Hartford Fire Ins. Co. v. Bourbon County Court, 115 Ky. 109, 24 Ky. L. 1850, 72 S. W. 739.

[20] Smith v. Herd, 110 Ky. 56, 22 Ky. L. 1596, 60 S. W. 841, 1121.

[21] Scott v. Avery, 5 H. L. Cas. 811, 25 L. J. Exch. (N. S.) 308; Supreme Council Order of Chosen Friends v. Forsinger, 125 Ind. 52, 25 N. E. 129, 9 L. R. A. 501, 21 Am. St. 196; Prader v. National Masonic Accident Assn., 95 Iowa 149, 63 N. W. 601; Raymond v. Farmers' Mut. Fire Ins. Co. of Mecosta, 114 Mich. 386, 72 N. W. 254; Fox v. Masons' Fraternal Acc. Assn., 96 Wis. 390, 71 N. W. 363; Chapman v. Rockford Ins. Co., 89 Wis. 572, 62 N. W. 422, 28 L. R. A. 405.

[22] Porter v. Traders' Ins. Co., 164 N. Y. 504, 58 N. E. 641, 52 L. R. A. 424. See Montgomery v. American Cent. Ins. Co., 108 Wis. 146, 84 N. W. 175, and Moyer v. Sun Ins. Office, 176 Pa. St. 579, 35 Atl. 221, 53 Am. St. 690 (different provisions relating to arbitration and appraisal construed); Kahn v. Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. 47.

[23] Fox v. Masons' Fraternal Acc. Assn., 96 Wis. 390, 71 N. W. 363.

that an appeal must be taken to the governing body, whose decision shall be final, is valid in so far as the provision for appeal is concerned, and void so far as it attempts to oust the jurisdiction of the courts. The claimant, after having taken the required appeal to the governing body, may maintain an action in the courts to enforce his claim.[24]

§ 4316. **Where there is a total loss.**—Provisions in a policy in conflict with a valued policy statute are, to that extent at least, invalid, and hence a provision for the appointment of arbitrators in case of loss is ineffective or inapplicable where the property is wholly destroyed. In such case there can be nothing which can properly be submitted to arbitration.[25] Where the total insurance, exclusive of the foundation of the building, is less than its insurable value as designated by the insurer in the policy, it is not, under the provision of the Minnesota Valued Policy Law, necessary for the insured to submit to arbitration, although the foundation is included in the description of the property.[26] By consenting to arbitrate the amount of the loss in pursuance of a provision in a policy, the insured is not, however, necessarily precluded in a subsequent suit on the policy from claiming to recover for a total loss if the evidence sustains the claim.[27]

[24] Supreme Council Order of Chosen Friends v. Forsinger, 125 Ind. 52, 25 N. E. 129, 9 L. R. A. 501, 21 Am. St. 196. See also, Robinson v. Templar Lodge, 117 Cal. 370, 49 Pac. 170, 59 Am. St. 193; Levy v. Magnolia Lodge, 110 Cal. 297, 42 Pac. 887; Rood v. Railway Passenger & Freight Conductors' Mut. Ben. Assn., 31 Fed. 62; Van Poucke v. Netherland &c. Soc., 63 Mich. 378, 29 N. W. 863; Canfield v. Great Camp of Knights of Maccabees, 87 Mich. 626, 49 N. W. 875, 13 L. R. A. 625, 24 Am. St. 186.

[25] Ohage v. Union Ins. Co., 82 Minn. 426, 85 N. W. 212; German Ins. Co. v. Eddy, 36 Nebr. 461, 54 N. W. 856, 19 L. R. A. 707; Hinkle v. North River Ins. Co. (W. Va.), 75 S. E. 54. See also, O'Keefe v. Liverpool & L. & G. Ins. Co., 140 Mo. 558, 41 S. W. 922, 39 L. R. A. 819; Queen Ins. Co. v. Leslie, 74 Ohio St. 409, 24 N. E. 1072, 9 L. R. A. 45; Liverpool, London & Globe Ins. Co. v. Colgin (Tex.), 34 S. W. 291. But compare Williamson v. Liverpool &c. Ins. Co., 122 Fed. 59, 58 C. C. A. 241; Stout v. Phœnix Assur. Co., 65 N. J. Eq. 566, 56 Atl. 691. The submission to arbitration of the amount of the loss is not a waiver of the benefits of the statute making the amounts stated in the policy the measure of damages. Seyk v. Millers' Nat. Ins. Co., 74 Wis. 67, 41 N. W. 443, 3 L. R. A. 523. See Merchants' Ins. Co. v. Stephens, 22 Ky. L. 999, 59 S. W. 511.

[26] Ohage v. Union Ins. Co., 82 Minn. 426, 85 N. W. 212.

[27] Pennsylvania Fire Ins. Co. v. Drackett, 63 Ohio St. 41, 57 N. E. 962, 81 Am. St. 608. The court said: "The section referred to requires a company insuring any building or structure against fire to cause such building or structure to be examined by an agent, who is required to make

§ 4317. **Demand for arbitration.**—Where arbitration is provided for on the request of one of the parties, it becomes imperative only after such request is made.[28] If neither party avails himself of the right to arbitrate, in such a case, it has been held that it is waived and an action may be maintained upon the policy.[29] Policies, however, contain different provisions in this

a full description of the building or structure and fix its insurable value, and then provides that in the absence of any change increasing the risk without its consent, or any intentional fraud on the part of the insured, in case of total loss the whole amount stated in the policy on which it receives premiums shall be paid by the company, and in case of a partial loss the full amount of such loss shall be paid. Statutes similar in their provisions are common to many of the states of the Union, and it is generally agreed that they rest on grounds of public policy —the prevention of the mischief incident to overinsurance,—and that the insured cannot be held to a waiver of them." Havens v. Germania Fire Ins. Co., 123 Mo. 403, 27 S. W. 718, 26 L. R. A. 107, 45 Am. St. 570, affd. 135 Mo. 649, 37 S. W. 497; German Ins. Co. v. Eddy, 36 Nebr. 461, 54 N. W. 856, 19 L. R. A. 707; Queen Ins. Co. v. Leslie, 47 Ohio St. 409, 24 N. E. 1072, 9 L. R. A. 45; White v. Connecticut Mut. Life Ins. Co., 4 Dill. (U. S.) 177, Fed. Cas. No. 17545; Reilly v. Franklin Ins. Co. of St. Louis, 43 Wis. 449, 28 Am. Rep. 552; Seyk v. Millers' Nat. Ins. Co., 74 Wis. 67, 41 N. W. 443, 3 L. R. A. 523; St. Clara Female Academy v. Delaware Ins. Co., 93 Wis. 57, 66 N. W. 1140. "It does not necessarily follow from this that where there is a partial loss it may not be ascertained by arbitrators; and, where there is a clause in a policy requiring arbitration, the parties may be required to conform to it. But, where the insured insists that the loss is total, the agreement to arbitrate, or an arbitration had, fixing the amount, will not preclude him from bringing a suit as for a total loss, and in such case, if he establishes that there was a total one, he is entitled to recover the full amount of the policy, notwithstanding the award of the arbitrators was to the contrary, and fixed a less amount as the measure of the loss. But, on the other hand, should he fail in establishing a total loss, the amount of his recovery will be limited to the amount of the award, where there was no fraud in obtaining it."

[28] In Davis v. Anchor Mut. Fire Ins. Co., 96 Iowa 70, 64 N. W. 687, the policy provided for arbitration at the "written request of either party," and that no action should be brought until after the award. It was held that arbitration was not a condition precedent to an action in the absence of a request. And to the same effect are the following: Garretson v. Merchants' & Bankers' Fire Ins. Co., 114 Iowa 17, 86 N. W. 32; Capitol Ins. Co. v. Wallace, 48 Kans. 400, 29 Pac. 755, 50 Kans. 453, 31 Pac. 1070; American Ins. Co. v. Rodenhouse, (Okla.) 128 Pac. 502; Wright v. Susquehanna Mut. Fire Ins. Co., 110 Pa. St. 29, 20 Atl. 716; Hamilton v. Liverpool & L. & G. Ins. Co., 136 U. S. 242, 34 L. ed. 449, 10 Sup. Ct. 945. But see Probst v. Insurance Co. of North America, 2 Mo. App. Repr. 1016, 64 Mo. App. 484; Murphy v. North British & Mercantile Ins. Co., 61 Mo. App. 323. And compare Hutchinson v. Liverpool & London & Globe Ins. Co., 153 Mass. 143, 26 N. E. 439, 10 L. R. A. 558; Graham v. German American Ins. Co., 75 Ohio St. 374, 79 N. E. 930, 15 L. R. A. (N. S.) 1055n; Yeomans v. Girard Fire & Marine Ins. Co., Fed. Cas. No. 18136.

[29] Garrettson v. Merchants' & Bankers' Fire Ins. Co., 114 Iowa 17, 86 N. W. 32; Nurney v. Fireman's Fund Ins. Co., 63 Mich. 633, 30 N. W. 338, 6 Am. St. 338.

respect, and courts do not all take the same view even under similar provisions. Under the New York standard policy giving either party the right to require an appraisal when there is a disagreement as to the amount of the loss, it is held not the duty of the insured to initiate an appraisal, as an appraisal is a condition precedent to recovery only when one "has been required" by the insurer.[30] Many other courts have announced and applied the same rule, and it seems to be supported by the weight of authority.[31] In a Massachusetts case, however, it appeared that the policy provided for a submission to arbitrators, in case of a loss, "at the written request of either party," and that no suit or action could be maintained until after such award. It was held that no right of action existed prior to an arbitration or its waiver, and that the policy could not be construed as making a written request for arbitration necessary, in case of a difference as to the amount of the loss, in order to prevent the immediate institution of an action. The court recognized the right of either party to an arbitration, but, on the facts and the language of the policy, held that an arbitration, not having been demanded, might be held to have been waived.[31a]

In a case in the Circuit Court of Appeals[32] the insurance com-

[30] Chainless Cycle Mfg. Co. v. Security Ins. Co., 169 N. Y. 304, 62 N. E. 392; Silver v. Western Assur. Co., 164 N. Y. 381, 58 N. E. 284.

[31] In Kentucky it was said that the insured need not plead or prove performance of the provision of arbitration, as it is the duty of the company to propose arbitration in case of disagreement. Sun Mutual Ins. Co. v. Crist, 19 Ky. L. 305, 39 S. W. 837. In Iowa, provisions in a policy that an appraisal by arbitrators shall be made if there be a disagreement as to the loss, and that the loss shall not be payable until sixty days after notice and satisfactory proofs of loss have been given, including an award by appraisers when an appraisal has been required; and that no action on the policy can be maintained without full compliance by the assured with all the foregoing requirements, do not make an appraisal a condition precedent to the right to sue, where the company makes no demand therefor. Lesure Lumber Co. v. Mutual Fire Ins. Co., 101 Iowa 514, 70 N. W. 761. To the same effect, see Winchester v. North British &c. Ins. Co., 160 Cal. 1, 116 Pac. 63, 35 L. R. A. (N. S.) 404 (explaining earlier California cases); Germania Fire Ins. Co. v. Stewart, 13 Ind. App. 627, 42 N. E. 286; National Home Building & Loan Assn. v. Dwelling-House Ins. Co., 106 Mich. 236, 64 N. W. 21; Randall v. Phœnix Ins. Co., 10 Mont. 362, 25 Pac. 960; Nerger v. Equitable Fire Assn., 20 S. Dak. 419, 107 N. W. 531; Davis v. Atlas Assur. Co., 16 Wash. 232, 47 Pac. 436, 885. See also, Sun Mutual Ins. Co. v. Crist, 19 Ky. L. 305, 39 S. W. 837; Stephens v. Union Assur. Soc., 16 Utah 22, 50 Pac. 626, 67 Am. St. 595; Tilley v. Connecticut Fire Ins. Co., 86 Va. 811, 11 S. E. 120.

[31a] Hutchinson v. Liverpool & London & Globe Ins. Co., 153 Mass. 143, 26 N. E. 439, 10 L. R. A. 558.

[32] Kahnweiler v. Phenix Ins. Co.,

pany contended that it was the duty of the insured to take the initiative and demand an arbitration; but the court said: "Each party is entitled to demand a reference, but neither can compel it, and neither has the right to insist that the other shall first demand it, and shall forfeit any right by not doing so. If the company demands it, and the insured refuses to arbitrate, his right of action is suspended until he consents to an arbitration; and if the insured demands an arbitration, and the company refuses to accede to the demand, the insured may maintain a suit on the policy, notwithstanding the language of the twelfth section of the policy, and, where neither party demands an arbitration, both parties hereby waive it. * * * The clause is to be construed the same as if it read, 'upon the request of either party.' "

Where the policy provided that, in the event of a disagreement as to the amount of damages, the matter should, "at the written request of either party, be submitted to the judgment of two competent persons, to be mutually appointed by the assured and the company," and further, that no suit should be sustainable in a court of law or chancery until after an award should have been obtained in the manner provided, the court said: "Arbitration becomes imperative only after the written request for one has been made. The request, as it stands in this policy, is optional with either party, and, neither of them having availed themselves of the right to arbitrate, it must be deemed waived by both, and in such case the plaintiff was left to the mode of redress provided by law."[33] So, where the policy provided for arbitration "at the written request of either party," the court said:[34] "It is either optional and voluntary, or the duty rests upon each party alike, to make such a written request, and in this case both parties have neglected such duty alike, and neither party can complain of the neglect of the other."

67 Fed. 483, 14 C. C. A. 485, approved in Western Assurance Co. v. Decker, 98 Fed. 381, 39 C. C. A. 383.

[33] Nurney v. Fireman's Fund Ins. Co., 63 Mich. 633, 30 N. W. 350, 6 Am. St. 338.

[34] Phœnix Ins. Co. v. Badger, 53 Wis. 283, 10 N. W. 504. So, in Pennsylvania, it was said: "It was the right of either party to demand an arbitration; it was the right of either party to waive it, and the defendant, having made no such demand, must be presumed to have waived it." Wright v. Susquehanna Mut. Fire Ins. Co., 110 Pa. St 29, 20 Atl. 716.

Where no demand was made within five months after loss, the right was held to have been waived.[35] In Ohio, it was also formerly held that "a demand by the insurer for an appraisal within a reasonable time after proof of the loss has been furnished, is, under such a policy, a condition precedent to the right to require the insured to furnish an award of appraisers;"[36] but the decision referred to has lately been overruled and it now seems to be held that the duty is on the insured, rather than the insurer, to demand an appraisal and that he cannot recover unless he shows that he has done so.[37] There are also decisions of some other courts to the same effect.[38]

§ 4318. **Condition precedent.**—As already shown, arbitration may be made a condition precedent within proper limitations, and where the policy contains a provision to the effect that such reference, unless waived by the parties, should be a condition precedent to any right of action in law or in equity to recover for such loss, or the like, it has often been held that no right of action exists until the condition has been complied with.[39]

[35] Gere v. Council Bluffs Ins. Co., 67 Iowa 272, 23 N. W. 137, 25 N. W. 159.

[36] Germania Fire Ins. Co. v Stewart, 13 Ind. App. 627, 42 N. E. 286; Lesure Lumber Co. v. Mutual Fire Ins. Co., 101 Iowa 514, 70 N. W. 761; Sun Mutual Ins. Co. v Crist, 19 Ky. L. 305, 39 S. W. 837; National Home Building & Loan Assn. v. Dwelling-House Ins. Co., 106 Mich. 236, 64 N. W. 21; Grand Rapids Fire Ins. Co. v. Finn, 60 Ohio St. 513, 54 N. E. 545, 50 L. R. A. 555, 71 Am. St. 736; Davis Atlas Assur. Co., 16 Wash. 232, 47 Pac. 436, 885.

[37] Graham v. German Am. Ins. Co., 75 Ohio St. 374, 79 N. E. 930, 15 L. R. A. (N. S.) 1055n.

[38] See Phœnix Ins. Co. v. Lorton & Co., 109 Ill. App. 63; Lamson Consolidated Store Service Co. v. Prudential Fire Ins. Co., 171 Mass. 433, 50 N. E. 943; McNees v. Southern Ins. Co., 69 Mo. App. 232, and compare also, Old Saucelito Land & Dry Dock Co. v. Commercial Union Assur. Co., 66 Cal. 253, 5 Pac. 232, but see Winchester v. North British &c. Ins. Co., 160 Cal. 1, 116 Pac. 63, 35 L. R. A. (N. S.) 404; Phœnix Ins. Co. v. Stocks, 149 Ill. 319, 36 N. E. 408.

[39] Fisher v. Merchants' Ins. Co., 95 Maine 486, 50 Atl. 282, 85 Am. St. 428; Gasser v. Sun Fire Office, 42 Minn. 315, 44 N. W. 252; Levine v. Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855; Mosness v. German-American Ins. Co., 50 Minn. 341, 52 N. W. 932; Hamilton v. Liverpool &c. Ins. Co., 136 U. S. 242, 34 L. ed. 419, 10 Sup. Ct. 945. See also, Vernon Ins. & Trust Co. v. Maitlen, 158 Ind. 393, 63 N. E. 755; Chadwick v. Phœnix Accident & Sick Benefit Assn., 143 Mich. 481, 106 N. W. 1122; Graham v. German American Ins. Co., 75 Ohio St. 374, 79 N. E. 930, 15 L. R. A. (N. S.) 1055, and note; Grady v. Home Fire & Marine Ins. Co., 27 R. I. 435, 63 Atl. 173, 4 L. R. A. (N. S.) 288; Palatine Ins. Co. v. Morton-Scott-Robertson Co., 106 Tenn. 558, 61 S. W. 787. See also, Scott v. Avery, 5 H. L. Cas. 811, 25 L. J. Exch. (N. S.) 308; Caledonian Ins. Co. v. Gilmour (1893), App. Cas. 85; Guerin v. Manchester &c. Assur. Co., 29 Can. Sup. Ct. 139,

But a provision for arbitration is not a condition precedent to the right to maintain an action on a policy to recover for loss thereunder, unless clearly made so by the terms of the policy.[40] If this intention does not appear the provision is simply a collateral agreement, and compliance therewith is not necessary before the bringing of an action. Arbitration under such circumstances is optional with the parties, and either may decline to arbitrate.[41] In a recent case in Iowa the court said:[42] "There is nothing in the policy making submission to arbitration a condition precedent to the payment of the loss or to the maintenance of an action, nor can such a condition be inferred from its terms. The authorities recognize the rule as stated by Sir George Jessel, M. R., * * * 'First, where the action can only be brought for the sum named by the arbitrator; secondly, where it is agreed that no action shall be brought until there has been an arbitration, or that the arbitration shall be a condition precedent to the right of

and notes to German-American Ins. Co. v. Jerrils, in 28 L. R. A. (N. S.) 104, and to Southern Home Ins. Co. v. Faulkner, 57 Fla. 194, 131 Am. St. 1098.

[40] Hamilton v. Home Ins. Co., 137 U. S. 370, 34 L. ed. 708, 11 Sup. Ct. 133. See also, Case v. Manufacturers' Fire & Marine Ins. Co., 82 Cal. 263, 21 Pac. 843, 22 Pac. 1083; Ætna Ins. Co. v. McLead, 57 Kans. 95, 45 Pac. 73, 57 Am. St. 320; Chadwick v. Phœnix Accident & Sick Benefit Assn., 143 Mich. 481, 106 N. W. 1122, and cases in following note.

[41] Birmingham Fire Ins. Co. v. Pulver, 126 Ill. 329, 18 N. E. 807, 9 Am. St. 598; Garretson v. Merchants' & Bankers' Fire Ins. Co., 114 Iowa 17, 86 N. W. 32; Continental Ins. Co. v. Wilson, 45 Kans. 250, 25 Pac. 629, 23 Am. St. 720; National Home Building & Loan Assn. v. Dwelling-House Ins. Co., 106 Mich. 236, 64 N. W. 21; Randall v. American Fire Ins. Co., 10 Mont. 340, 25 Pac. 953, 24 Am. St. 50; Sergent v. Liverpool &c. Ins. Co., 155 N. Y. 349, 49 N. E. 935; McNally v. Phenix Ins. Co., 137 N. Y. 389, 33 N. E. 475; Uhrig v. Williamsburgh City Fire Ins. Co., 101 N. Y. 362, 4 N. E. 745; Grand Rapids Fire Ins. Co. v. Finn, 60 Ohio St. 513, 54 N. E. 545, 50 L. R. A. 555, 71 Am. St. 736; Phœnix Ins. Co. v. Carnahan, 63 Ohio St. 258, 58 N. E. 805, citing Old Saucelito Land & Dry Dock Co. v. Commercial Union Assur. Co., 66 Cal. 253, 5 Pac. 232; Hamilton v. Home Ins. Co., 137 U. S. 370, 34 L. ed. 708, 11 Sup. Ct. 133; Davis v. Atlas Assur. Co., 16 Wash. 232, 47 Pac. 436, 885; Chapman v. Rockford Ins. Co., 89 Wis. 572, 62 N. W. 422, 28 L. R. A. 405.

[42] Read v. State Ins. Co., 103 Iowa 307, 72 N. W. 665, 64 Am. St. 180. On the other hand, in Zalesky v. Home Ins. Co., 102 Iowa 613, 71 N. W. 566, the policy after providing for arbitration, provided that "no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements." The court said: "Nor, in the absence of statute provisions to the contrary, can it be doubted that, under a policy containing provisions like the one involved in this action, an appraisement is a condition precedent to the bringing of an action on the policy." So to the same effect is George Dee & Sons Co. v. Key City Fire Ins. Co., 104 Iowa 167, 73 N. W. 594.

action. In all other cases where there is, first, a covenant to pay, and, secondly, a covenant to refer, the covenants are distinct and collateral, and the plaintiff may sue on the first, leaving the defendant to bring an action for not referring,' etc. This court has recognized the right of parties to bind themselves to make payment of a sum to be fixed or estimated by an arbitrator or third person. * * * Also the right to make arbitration a condition precedent to the maintenance of an action. * * * A mere provision in the policy, however, that, in event of a disagreement, the amount of damage shall be ascertained by arbitrators, will not prevent the assured from maintaining an action, unless arbitration is made, by the terms of the policy or necessary inference therefrom, a condition precedent. In such a case the agreement to arbitrate is collateral to the main purposes of the policy,—an independent agreement,—a breach of which, while it will support a separate action, cannot be pleaded in bar to a suit on the principal contract."

In a leading case in the Supreme Court of the United States, it was held that a provision in a policy, that "in case differences shall arise touching any loss or damage after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the company under this policy," cannot be pleaded in bar of an action on the policy unless it is further provided that no such action shall be brought until after the award.[43]

Where the provision was that "no suit or proceeding at law or in equity shall be brought to recover any sum herein, unless the same has been first referred to the arbitration of just and competent men," and there was no reference and no request for the same, it was said:[44] "The promise is, not to pay the award,

[43] Hamilton v. Home Ins. Co., 137 U. S. 370, 34 L. ed. 708, 11 Sup. Ct. 133. See also, Roper v. Lendon, 1 El. & El. 825, 28 L. J. Q. B. 260; Mutual Fire Ins. Co. v. Alvord, 61 Fed. 752, 9 C. C. A. 623.

[44] Badenfeld v. Massachusetts &c. Acc. Assn., 154 Mass. 77, 27 N. E. 769, 13 L. R. A. 263; Reed v. Washington Fire & Marine Ins. Co., 138 Mass. 572, and cases cited. The New Hampshire form, which provides for a compulsory reference, does not require arbitration as a condition precedent to an action on the policy, although a statute permits a suit to be

but to pay the sum named, and the proviso does not make the award a condition precedent to the promise to pay, but a mode of enforcing that promise. It is well settled that such an agreement is no bar to an action on the promise."

§ 4319. **Failure of arbitration through fault of party.**—Even though the provision for arbitration is made a condition precedent to the bringing of an action by the insured, he cannot be deprived of his right of action by the misconduct of the insurance company. Thus, it has been held that a refusal by the arbitrator appointed by the company to appoint an umpire, which virtually amounts to a refusal to proceed with the appraisal, will prevent the company from objecting that the action was brought before the appraisement was concluded.[45] So, a party whose duty it is to choose an arbitrator must choose one who will act with reasonable promptness in naming an umpire, or, on his failure to do so, replace him with another. A party to a controversy, who is without fault, cannot be made to suffer through the inaction of the other party.[46] And this general doctrine has often been applied against the insured[47] as well as against the insurer.

§ 4320. **Revocation.**—A party may not at his own option or volition revoke an arbitration or submission clause any more than he may the other provisions of the contract.[48] But a contrary view obtains in Pennsylvania in cases where the persons who are to make the appraisal or award are not named in the con-

brought by the insured if not satisfied with the adjustment made by the insurer. Franklin v. New Hampshire Fire Ins. Co., 70 N. H. 251, 47 Atl. 91.

[45] Brock v. Dwelling House Ins. Co., 102 Mich. 583, 61 N. W. 67, 26 L. R. A. 623, 47 Am. St. 562. See also, Western Assurance Co. v. Hall Bros., 143 Ala. 168, 38 So. 853; Milwaukee Mechanics' Ins. Co. v. Schallman, 188 Ill. 213, 59 N. E. 12; Chapman v. Rockford Ins. Co., 89 Wis. 572, 62 N. W. 422, 28 L. R. A. 405.

[46] Read v. State Ins. Co., 103 Iowa 307, 72 N. W. 665, 64 Am. St. 180. See also, Western Assurance Co. v. Hall, 120 Ala. 547, 24 So. 936, 74 Am. St. 48; Connecticut Fire Ins. Co. v. Cohen, 97 Md. 294, 55 Atl. 675, 99 Am. St. 445.

[47] Western Assurance Co. v. Hall, 120 Ala. 547, 24 So. 936, 74 Am. St. 48; Astrich v. German-American Ins. Co., 128 Fed. 477, affd. 131 Fed. 13, 65 C. C. A. 251; Carp v. Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757.

[48] American Cent. Ins. Co. v. Landau, 62 N. J. Eq. 73, 49 Atl. 738; Chapman v. Rockford Ins. Co., 89 Wis. 572, 62 N. W. 422, 28 L. R. A. 405. And compare, Home Ins. Co. v. Ballard (Okla.), 124 Pac. 316.

tract, but are to be chosen thereafter by the parties.[49] And a similar ruling has been made in Nebraska.[50]

§ 4321. Invalidity of the award.—It has been held that an award is binding upon the parties, unless it is invalid, and the burden of proof is upon the party asserting its invalidity;[51] and the general rule is that before an award can be set aside and declared null and void, it must clearly appear that the arbitrators who made the award were guilty of misconduct, partiality or fraud.[52] Hence, where there are two methods by which a result may have been reached by arbitrators, one of which was legal and authorized, and the other illegal and unauthorized, the presumption is that the legal method was followed.[53]

It is the duty of each party to act in good faith to accomplish the appraisement in the way provided by the policy. If either acts in bad faith, so as to defeat the real object of the clause, it usually absolves the other from compliance therewith.[54]

[49] Commercial Union Assur. Co. v. Hocking, 115 Pa. St. 407, 8 Atl. 589, 2 Am. St. 562; Mentz v. Armenia Fire Ins. Co., 79 Pa. St. 478, 21 Am. Rep. 80.

[50] Home Fire Ins. Co. of Omaha v. Kennedy, 47 Nebr. 138, 66 N. W. 278, 53 Am. St. 521.

[51] Springfield Fire & Marine Ins. Co. v. Payne, 57 Kans. 291, 46 Pac. 315.

[52] Hartford Fire Ins. Co. v. Bonner Mercantile Co., 44 Fed. 151, 11 L. R. A. 623, affd. 56 Fed. 378, 5 C. C. A. 524. See also, Barnard v. Lancashire Ins. Co., 101 Fed. 36, 41 C. C. A. 170; Hartford Fire Ins. Co. v. Bonner Mercantile Co., 56 Fed. 378, 5 C. C. A. 524; Bolld v. Shine, 2 Fla. 127; Golder v. Mueller, 22 Ill. App. 527; McDonald v. Arnout, 14 Ill. 58; Tank v. Rohweder, 98 Iowa 154, 67 N. W. 106; Liverpool & London & Globe Ins. Co. v. Goehring, 99 Pa. St. 13; Karthaus v. Ferrer, 1 Pet. (U. S.) 222, 7 L. ed. 121.

[53] Barnard v. Lancashire Ins. Co., 101 Fed. 36, 41 C. C. A. 170.

[54] Uhrig v. Williamsburgh City Fire Ins. Co., 101 N. Y. 362, 4 N. E. 745; Chainless Cycle Mfg. Co. v. Security Ins. Co., 169 N. Y. 304, 62 N. E. 392. See also, Bernhard v. Rochester &c. Ins. Co., 79 Conn. 388, 65 Atl. 134; Providence Washington Ins. Co. v. Wolf, 168 Ind. 690, 72 N. E. 606, 80 N. E. 26, 120 Am. St. 395; Braddy v. New York &c. Ins. Co., 115 N. Car. 354, 20 S. E. 477. Stemmer v. Scottish Ins. Co., 33 Ore. 65, 49 Pac. 588, 53 Pac. 498, contains a full discussion of the matter of misconduct of arbitrators. In the course of the decision the court said: "It is maintained that the inadequacy of the award is so gross as to warrant the court in setting it aside. In Bradshaw v. Agricultural Ins. Co., 137 N. Y. 137, 32 N. E. 1055, the court having found that an award made by appraisers was $989.61 less than the amount of damage sustained by fire, and that an appraiser selected by the insurance company, whom it falsely represented to the insured as an impartial person, was not disinterested, set aside the award; but this result must have been reached as a consequence of the prejudice of the appraiser instead of the inadequacy of the award, or, perhaps, the combined elements of prejudice and inadequacy afforded the reason for the decree rendered. If an award is adequate, the assured could not be injured thereby, and hence it would seem that

Where, after the arbitrators disagree, the one appointed by the insured refuses to act further, or the like, it has been held that the insured should at once appoint another, and if he fails to do so, he is bound by the award of the umpire and the other appraiser.[55]

Under the provision in the Minnesota form, where two of the referees proceed to act together privately, collecting information and examining witnesses without regard to the third referee, and finally making up the award without reference to him, and where evidence is received by the full board without affording the parties sworn an opportunity to be present in person or by counsel, such conduct will invalidate the award. While allowed reasonable freedom personally to inspect the ruins of the fire and the debris and remnants, and damaged goods, for the purpose of applying their knowledge in considering the evidence, the inquiry must be conducted by the board in the usual manner of receiving evidence, and the examination of witnesses must be conducted in the presence of the interested parties and their counsel, subject to the tests of cross-examination.[56]

a court of equity would be powerless to set it aside, however prejudiced the appraisers may have been. In absence of fraud or misconduct on the part of appraisers in the discharge of their duties, their determination is final and conclusive, the rule being that an award deliberately and honestly made will not be set aside merely for excess. Nutter v. Taylor, 78 Maine 424, 6 Atl. 835; Port Huron & N. W. R. Co. v. Callanan, 61 Mich. 22, 34 N. W. 678; Goddard v. King, 40 Minn. 164, 41 N. W. 659; Ellicott v. Coffin, 106 Mass. 365; Davis v. Henry, 121 Mass. 150; Underhill v. Cortlandt, 2 Johns. Ch. (N. Y.) 339, revd. 17 Johns. (N. Y.) 405. * * * The rule is quite general that the exclusion of pertinent and material testimony by the appraisers is usually fatal to the award. Mosness v. German-American Ins. Co., 50 Minn. 341, 52 N. W. 932. Van Cortlandt v. Underhill, 17 Johns. (N. Y.) 405; Canfield v. Watertown Fire Ins. Co., 55 Wis. 419, 13 N. W. 252; Citizens' Ins. Co. v. Hamilton, 48 Ill. App. 593; Hart v. Kennedy, 47 N. J. Eq. 51, 20 Atl. 29. An exception to this rule seems to be that, if the persons selected as appraisers possess peculiar skill or knowledge concerning the subject-matter, and it appears that the parties to the submission intended to rely upon such skill or knowledge, the appraisers will be justified in refusing to hear evidence. Hall v. Norwalk Fire Ins. Co., 57 Conn. 105, 17 Atl. 356.

[55] American Cent. Ins. Co. v. Landau, 62 N. J. Eq. 73, 49 Atl. 738. See also, Fisher v. Merchants' Ins. Co., 95 Maine 486, 50 Atl. 282, 85 Am. St. 428.

[56] Christianson v. Norwich Union Fire Ins. Soc., 84 Minn. 526, 88 N. W. 16, 87 Am. St. 379. An appraiser acts in a quasi-judicial capacity, and must be free from bias in favor of either party. Hickerson v. German-American Ins. Co., 96 Tenn. 193, 33 S. W. 1041, 32 L. R. A. 172. As to what is meant by the term "disinterested," see Brock v. Dwelling House Ins. Co., 102 Mich. 583, 61 N. W. 67, 26 L. R. A. 623, 47 Am. St. 562.

In a recent case in Maryland the court said:[57] "Independently of the distinct requirement of the policy the law would require combined action by the appraisers who were selected by the parties. They occupied the position of arbitrators. And with respect to the duties of arbitrators the law is fully settled. * * * 'All must be present throughout each and every meeting, equally whether the meeting be for hearing the evidence or arguments of the parties or for consultation or determination upon the award. The disputants are entitled to the exercise of the judgment and discretion, and to the benefits of the views, arguments and influence of each one of the persons whom they have chosen to judge between them; and they are entitled to these, not only in the award, but at every stage of the arbitration, even where a majority are empowered to decide.' The fact that the umpire was not chosen until after the appraisement had been begun would not have invalidated the award. * * * Although the direction as to his appointment was not strictly followed in this particular, the variation did not interfere with any of the duties which he was appointed to perform and was not of essential importance."

Where the policy provided for an award by appraisers, and the parties subsequently, by a written instrument, provided a method of procedure for the umpire, the court said:[58] "It is obviously competent for the parties to modify or waive any provisions of their written contract by a subsequent mutual agreement not in writing." As said by a learned author, "the cases are numerous to show that an arbitrator may submit a material question affecting the merits of the case to another, and after hearing his opinion adopt it as his own, upon the credit which he gives to the judgment and skill of the person to whom he refers."[59] In a leading case, where it was claimed that an arbitrator had not exercised his own judgment, it was said: "That alone is not sufficient to prove the award bad; for a man may make use of the judgment of another upon whom he can depend; and

[57] Caledonia Ins. Co. v. Traub, 83 Md. 524, 35 Atl. 13.

[58] Bangor Sav. Bank v. Niagara Fire Ins. Co., 85 Maine 68, 26 Atl. 991, 20 L. R. A. 650, 35 Am. St. 341.

[59] Russell Power & Duty of an Arbitrator (7th ed.), 208.

the valuation of that person is his, if he chooses to adopt it."[60] But an award is avoided where the arbitrators act not upon their own volition and investigation, but under the direction of one of the parties.[61] A distinction is here made between an umpire and a third arbitrator. The latter must act in consultation with the other arbitrators, while an umpire may act and make up his decision alone.[62]

Where it is provided that, in the event of a disagreement between the appraisers, they shall submit their differences to an umpire chosen by them, there is implied a duty on the part of the umpire to examine and consider the appraisement of each party in arriving at his own decision, and the appraisement will be set aside where he refused to examine the estimate made by an appraiser selected by the insured, and perfunctorily accepted that of the appraiser selected by the insurer.[63] But it is generally held that an appraisement and estimate under the standard form of fire insurance cannot be set aside for mere inadequacy.[64]

The fact that an award was not made under oath, as provided in the policy, is not sufficient to justify setting it aside.[65] So, it has been held that an award will not be disturbed because the arbitrators considered a fact which was not a proper element of damage; as, that the knowledge of the public that the goods had been

[60] Emery v. Wase, 5 Ves. 848.

[61] Hartford Fire Ins. Co. v. Bonner Mercantile Co., 44 Fed. 151, 11 L. R. A. 623, affd. 56 Fed. 378, 5 C. C. A. 524.

[62] Hartford Fire Ins. Co. v. Bonner Mercantile Co., 44 Fed. 151, 11 L. R. A. 623, affd. 56 Fed. 378, 5 C. C. A. 524, note on Arbitration and Award. See also, Kent &c. Paint Co. v. Ætna Ins. Co. (Mo. App.), 146 S. W. 78.

[63] Strome v. London Assur. Corp., 20 App. Div. (N. Y.) 571, 47 N. Y. S. 481, affd. 162 N. Y. 627, 57 N. E. 1125.

[64] Strome v. London Assur. Corp., 162 N. Y. 627, 57 N. E. 1125. In Underhill v. Van Cortlandt, 2 Johns. Ch. (N. Y.) 339, revd. 17 Johns. (N. Y.) 405, Chancellor Kent said: "Admitting that there was no corruption or partiality in the arbitrators, * * * and admitting that there was no misconduct in them during the course of the hearing, or fraud in the opposite party, * * * then, I say, the court can not inquire into the charge of an over or undervaluation, or of the reasonableness or unreasonableness of the award, but it is binding and conclusive. * * * It is a popular, cheap, convenient, and domestic mode of trial, which the courts have always regarded with liberal indulgence; they have never exacted from these unlettered tribunals, this rusticum forum, the observance of technical rule and formality. They have only looked to see if the proceedings were honestly and fairly conducted, and if that appeared to be the case, they have uniformly and universally refused to interfere with the judgment of the arbitrators."

[65] Barnard v. Lancashire Ins. Co., 101 Fed. 36, 41 C. C. A. 170.

in a fire would affect their value.[66] So, a refusal of the arbitrators to allow the owner to furnish any information, under the mistaken impression that he had waived his right to be present, has been held not to constitute a ground for setting aside the award.[67] And where each of the two arbitrators and the umpire, pursuant to agreement, wrote on a slip of paper his estimate of the damages, and divided the aggregate of the estimates by three, it was held that the insurer could not complain where the result was the exact estimate made by the umpire, without any knowledge on his part of the opinion of the other two arbitrators.[68] The proper proceeding before a tribunal of arbitrators is determined largely by the character of the tribunal created by the terms of the policy in controversy.

§ 4322. **Waiver.**—The insurance company may waive the provision for arbitration even where made a condition precedent to recovery against it, and such a waiver has often been inferred from its conduct or even from its failure to act. Thus, the right to have the amount of damages determined by arbitration has been held waived by failing to respond to a letter of the insured demanding an appraisal;[69] or by an unreasonable demand by an appraiser for the company that an umpire be chosen who does not live in the vicinity;[70] or by neglect to demand an arbitration within a reasonable time;[71] or by failing to appoint an ap-

[66] Ætna Fire Ins. Co. v. Davis, 21 Ky. L. 1456, 55 S. W. 705.

[67] Stemmer v. Scottish &c. Ins. Co., 33 Ore. 65, 49 Pac. 588, 53 Pac. 498. But this seems questionable at least where the appraisers have to hear evidence to determine the value. See Christianson v. Norwick Union Fire Ins. Soc., 84 Minn. 526, 88 N. W. 16, 87 Am. St. 379; Carlston v. St. Paul &c. Ins. Co., 37 Mont. 118, 94 Pac. 756, 127 Am. St. 715, and cases cited.

[68] Ætna Fire Ins. Co. v. Davis, 21 Ky. L. 1456, 55 S. W. 705.

[69] Milwaukee Mechanics' Ins. Co. v. Schallman, 188 Ill. 213, 59 N. E. 12. See also, McDowell v. Ætna Ins. Co., 164 Mass. 444, 41 N. E. 665; Gnau v. Masons' &c. Assn., 109 Mich. 527, 67 N. W. 546.

[70] Brock v. Dwelling House Ins. Co., 102 Mich. 582, 61 N. W. 67, 26 L. R. A. 623, 47 Am. St. 562; Hickerson v. German-American Ins. Co., 96 Tenn. 193, 33 S. W. 1041, 32 L. R. A. 172.

[71] Hayes v. Milford Mut. Fire Ins. Co., 170 Mass. 492, 49 N. E. 754; Tilley v. Connecticut Fire Ins. Co., 86 Va. 811, 11 S. E. 120; Vangindertaelen v. Phenix Ins. Co., 82 Wis. 112, 51 N. W. 1122, 33 Am. St. 29. Or by unreasonable delay in the appraisement, or in disputing the claim or the like, Providence Washington Ins. Co. v. Wolf, 168 Ind. 690, 72 N. E. 606, 80 N. E. 26, 120 Am. St. 395; Hayes v. Milford Mutual Fire Ins. Co., 170 Mass. 492, 49 N. E. 754; Zimeriski v. Ohio Farmers' Ins. Co., 91 Mich. 600, 52 N. W. 55. Compare also, Harrison v. Hartford Fire Ins. Co., 112 Iowa 77, 83 N. W. 820.

praiser after request;[71a] or by a refusal to permit an agreement of submission to arbitrators to be changed so as to embrace certain property claimed by the insured to be covered by the policy, although the company denied that such property was within the policy;[72] or where, after a failure of the arbitrators to agree, the company requests the insured to make out proofs of loss in a certain amount, which is complied with;[73] or by a refusal to submit to an appraisal upon an offer by the insured after a previous refusal by the insured to enter into an arbitration;[74] or by accepting proofs of loss;[75] or by a denial of all liability;[76] or by an admission of liability, except for goods which it claims were not covered by the policy.[77] Where the insured made and submitted proofs of loss and notified the company that, unless it adjusted the loss or agreed to an appraisal by a named date, it

[71a] Continental Ins. Co. v. Wilson, 45 Kans. 250, 25 Pac. 629, 23 Am. St. 720; Schonweiler v. Merchants' Mut. Ins. Assn., 11 S. Dak. 401, 78 N. W. 356. See also, Fire Assn. of Philadelphia v. Appel, 76 Ohio St. 1, 80 N. E. 952; Northern Assur. Co. v. Samuels, 11 Tex. Civ. App. 417, 33 S. W. 239.

[72] George Dee & Sons' Co. v. Key City Fire Ins. Co., 104 Iowa 167, 73 N. W. 594.

[73] Manchester Fire Assur. Co. v. Koerner, 13 Ind. App. 372, 40 N. E. 1110, 41 N. E. 848, 55 Am. St. 231.

[74] Schrepfer v. Rockford Ins. Co., 77 Minn. 291, 79 N. W. 1005. In this case it was held that a refusal of the insured to enter into arbitration, which was a condition precedent to any right of action on the policy, was a waiver of her right to an appraisal, but not an extinguishment of her right to recover on the policy, where the insurer had not been deprived of any legal right or suffered any damage by the delay. But it has been held that the insurer can not insist on an arbitration after once having waived the right. Continental Ins. Co. v. Vallandingham, 116 Ky. 287, 25 Ky. L. 468, 76 S. W. 22, 105 Am. St. 218.

[75] Manchester Fire Assur. Co. v. Koerner, 13 Ind. App. 372, 40 N. E. 1110, 41 N. E. 848, 55 Am. St. 231; Virginia Fire & Marine Ins. Co. v. Cannon, 18 Tex. Civ. App. 588, 45 S. W. 945; Hartford Fire Ins. Co. v. Cannon, 19 Tex. Civ. App. 305, 46 S. W. 851; American F. Ins. Co. v. Stuart (Tex.), 38 S. W. 395. See also, Farmers v. Phœnix Ins. Co., 83 Cal. 246, 23 Pac. 869, 17 Am. St. 233.

[76] Milwaukee Mechanics' Ins. Co. v. Stewart, 13 Ind. App. 640, 42 N. E. 290; Lewis Baillie Co. v. Western Assur. Co., 49 La. Ann. 658, 21 So. 736; Hamberg v. St. Paul Fire & Marine Ins. Co., 68 Minn. 335, 71 N. W. 388; Moore v. Sun Ins. Co., 100 Minn. 374, 111 N. W. 260; Savage v. Phœnix Ins. Co., 12 Mont. 458, 31 Pac. 66, 33 Am. St. 591; Baldwin v. Fraternal &c. Assn., 21 Misc. (N. Y.) 124, 46 N. Y. S. 1016; Ætna Ins. Co. v. Simmons, 49 Nebr. 811, 69 N. W. 125; Stephens v. Union Assur. Soc., 16 Utah 22, 50 Pac. 626, 67 Am. St. 595; Stoddard v. Cambridge Mutual Fire Ins. Co., 75 Vt. 253, 54 Atl. 284; Bailey v. Ætna Ins. Co., 77 Wis. 336, 46 N. W. 440. But see Murphy v. Northern British & Mercantile Co., 61 Mo. App. 323. An arbitration and award merely as to the amount of loss has been held not to preclude the insurer from a subsequent denial of all liability. Johnson v. American Fire Ins. Co., 41 Minn. 396, 43 N. W. 59.

[77] Westfield Cigar Co. v. Insurance Co. of North America, 169 Mass. 382, 47 N. E. 1026.

would be deemed to have waived such appraisal, and the damaged property would be sold, and an agent of the company stated that he did not demand an appraisal by which to settle the controversy, and the plaintiff, relying on such refusal, sold the property and thereafter the company demanded an appraisal, it was held that the matter of waiver should be submitted to the jury.[78]

§ 4323. Second arbitration—Resubmission.—Where the policy makes arbitration of the amount of damages a condition precedent to the right to maintain an action on the policy, it has been held in a number of cases that a failure of the arbitrators selected by the parties to agree on an umpire or to arrive at a conclusion, without the fault of either party, does not justify the insured in refusing to proceed with the arbitration by the selection of a new arbitrator. In such cases the provision for arbitration is regarded as still in force, and the necessary steps should be taken to secure a new appraisal.[79] There is conflict of authority upon this question and there are almost an equal number of decisions to the contrary.[80]

[78] Chainless Cycle Mfg. Co. v. Security Ins. Co. 52 App. Div. (N. Y.) 104, 64 N. Y. S. 1060. See also, Providence Washington Co. v. Wolf, (Ind.) 72 N. E. 606, 168 Ind. 690, 80 N. E. 26, 120 Am. St. 395. And compare, Kent &c. Paint Co. v. Ætna Ins. Co. (Mo. App.), 146 S. W. 78.

[79] Westenhaver v. German-American Ins. Co., 113 Iowa 726, 84 N. W. 717. See Levine v. Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855. (Citing Carroll v. Girard Fire Ins. Co., 72 Cal. 297, 13 Pac. 863; Hood v. Hartshorn, 100 Mass. 117, 1 Am. Rep. 89; Thorndike v. Wells Memorial Assn., 146 Mass. 619, 16 N. E. 747; Davenport v. Long Island Ins. Co., 10 Daly (N. Y.) 535; Hiscock v. Harris, 80 N. Y. 402; Uhrig v. Williamsburgh City Fire Ins. Co., 101 N. Y. 362, 4 N. E. 745.) See also, Vernon Ins. & Trust Co. v. Maitlen, 158 Ind. 393, 63 N. E. 755; Baumgarth v. Firemen's Fund Ins. Co., 152 Mich. 479, 116 N. W. 449; Early v. Providence &c. Ins. Co., 31 R. I. 225, 76 Atl. 753, 140 Am. St. 750. In a later Minnesota case, the same court held that when one of the parties to such controversy refuses to abide by the award on the ground of misconduct of the referees, and notifies the other party of that fact, stating the grounds of the objection and demanding a resubmission, the party so notified has the option to stand by the award or submit to a reappraisement, and if he so elects to abide by the award, and the same is adjudged illegal for the cause assigned, then there can be no resubmission to other referees, but the damages may be determined in an action brought to set aside the award. Christiansen v. Norwich F. Ins. Co., 84 Minn. 526, 86 N. W. 16, 87 Am. St. 379.

[80] Western Assurance Co. v. Decker, 98 Fed. 381, 39 C. C. A. 383; Lancashire Ins. Co. v. Lyon, 124 Ill. App. 491; Fire Assn. of Philadelphia v. Appel, 76 Ohio St. 1, 80 N. E. 952; Chapman v. Rockford Ins. Co., 89 Wis. 572, 62 N. W. 422, 28 L. R. A. 405. See also, Pretzfelder v. Merchants' Ins. Co., 116 N. Car. 491, 21 S. E. 302.

In support of the first view it is said in substance: Not only is a party who is not at fault and who has not waived his right entitled to a resubmission of the amount of his damages to arbitrators, but, after an unsuccessful attempt, arbitration or excuse for not arbitrating is still a condition precedent to the right of the insured to maintain an action on the policy. This is on the theory that until an offer has been made, the plaintiff has not in good faith done all that is reasonably within his power to have the agreement carried into effect, and the damages ascertained in the mode provided for in the contract. Hence, where the determination by arbitration of the amount of the loss is a condition precedent to a right of action, the plaintiff in an action on the policy must prove performance or a valid excuse for nonperformance. If the award is invalid it is the duty of the insured to seek a new determination of the amount of the loss in the manner provided by the contract. He must, therefore, allege and prove either that the amount of the plaintiff's loss has been determined by arbitrators chosen in the manner stipulated by the parties or some sufficient reason why such determination has become unnecessary or impossible.[81]

But in a case in the Circuit Court of Appeals it was held that the insured discharged his obligations when he appointed an appraiser in good faith; and if the appraisement failed without his fault, he was not required to propose the selection of other appraisers, but might resort to the courts to have his damages assessed.[82] So, it was said in Maryland that "if the appraisement failed without the fault of the insured, the failure would not be any impediment to their right of recovery if they could maintain their suit on other grounds."[83] So, in North Carolina it was said: "Where the arbitrators, or a majority of them, fail to agree upon an award, the plaintiff, unless he is shown to have acted in bad faith in selecting his arbitrator, is not

[81] Fisher v. Merchants' Ins. Co., 95 Maine 486, 50 Atl. 282, 85 Am. St. 428.

[82] Western Assurance Co. v. Decker, 98 Fed. 381, 39 C. C. A. 383; Caledonia Ins. Co. v. Traub, 83 Md. 524, 35 Atl. 13.

[83] Caledonia Ins. Co. v. Traub, 83 Md. 524, 35 Atl. 13. Compare Shawnee Fire Ins. Co. v. Pontfield, 110 Md. 353, 72 Atl. 835, 132 Am. St. 449; Home Ins. Co. v. M. Schiff's Sons, 103 Md. 648, 64 Atl. 63.

compelled to submit to another arbitration and another delay, but may forthwith bring his action in the courts."[84] But where the arbitration fails through the misconduct of one of the parties, he is not, after the award is set aside, entitled to a resubmission. This is recognized by all the courts.[85] Where the policy provides that the loss shall be ascertained by arbitration, and that any proceeding relative to such arbitration shall not be deemed a waiver of any condition of the policy, it has been held that the company, by denying liability after an appraisement of the loss, does not waive its right to insist upon the appraisement as conclusive of the amount of the loss.[86]

§ 4324. Demand for arbitration as admission of liability.— It is inconsistent for an insurance company to demand an appraisal and arbitration of the amount of the loss, and at the same time deny all liability under its policy, and as already shown, such denial is a waiver of the right to arbitration. It has also been said that "a demand for appraisal by the insurer is a waiver of other defenses going to the question of liability."[87] But the standard form provides that the company shall not be held to have waived any condition or conditions of the policy, or any

[84] Pretzfelder v. Merchants' Ins. Co., 116 N. Car. 491, 21 S. E. 302.

[85] "Any attempt on the part of either party to misuse or pervert the provisions of the standard policy for an appraisal, so as to unreasonably delay an adjustment, or to secure an unjust abatement of an honest loss, is a breach of good faith, and should be treated as a waiver of the condition, and as dispensing with the necessity of an appraisal, or warranting a resort to an action without one, if the party thus prejudiced has used all fair and reasonable means and diligence on his part to secure it. To hold otherwise would be to permit the party in fault to profit by his own wrong." McCullough v. Phœnix Ins. Co. of Hartford, 113 Mo. 606, 21 S. W. 207; Hickerson v. German-American Ins. Co., 96 Tenn. 193, 33 S. W. 1041, 32 L. R. A. 172; Chapman v. Rockford Ins. Co., 89 Wis. 572, 62 N. W. 422, 28 L. R. A. 405. See also, Western Assurance Co. v. Hall Bros., 143 Ala. 168, 38 So. 853; Niagara Fire Ins. Co. v. Bishop, 154 Ill. 9, 39 N. E. 1102, 45 Am. St. 105; Shawnee Fire Ins. Co. v. Pontfield, 110 Md. 353, 72 Atl. 835, 132 Am. St. 449; O'Rourke v. German Ins. Co., 99 Minn. 293, 109 N. W. 401; Glover v. Rochester-German Ins. Co., 11 Wash. 143, 39 Pac. 380.

[86] Pretzfelder v. Merchants' Ins. Co., 116 N. Car. 491, 21 S. E. 302, citing Howard Ins. Co. v. Hocking, 115 Pa. St. 415, 8 Atl. 592.

[87] Hickerson v. German-American Ins. Co., 96 Tenn. 193, 33 S. W. 1041, 32 L. R. A. 172. (Citing Farnum v. Phœnix Ins. Co., 83 Cal. 246, 23 Pac. 869, 17 Am. St. 233; Wainer v. Milford Mut. Fire Ins. Co., 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598, and note; Savage v. Phœnix Ins. Co., 12 Mont. 458, 31 Pac. 66, 33 Am. St. 591; German-American Ins. Co. v. Etherton, 25 Nebr. 505, 41 N. W. 406; Western Horse & Cattle Ins. Co. v. Putnam, 20 Nebr. 331, 30 N. W. 246; Lasher v. Northwestern Nat. Ins. Co., 18 Hun (N. Y.) 98, 57

forfeiture thereof, by any requirement, act or proceeding on its part relating to the appraisal;[88] and certainly where the policy so provides, an arbitration and award merely as to the amount of the loss, does not necessarily waive or forbid a subsequent denial of all liability upon the ground that the policy was void for reasons known to the insured when the arbitration was had.[89]

§ 4325. Right of mortgagee.—It has been held that where a policy is taken out by a mortgagor and delivered to a mortgagee, with an indorsement to the effect that loss, if any, should be payable to the mortgagee, the mortgagee need not be a party to the arbitration. The theory is that the contract is between the mortgagor and the insurance company, and, unless it contains provisions to the contrary, is under the control of the mortgagor,[90] but, as shown in the note, there is some conflict of authority upon the subject.

§ 4326. Right to repair, rebuild or replace.—It is generally provided that "it shall be optional, however, with this company to take all, or any part of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the prop-

How. Prac. (N. Y.) 222; Rosenwald v. Phœnix Ins. Co., 50 Hun (N. Y.) 172, 19 N. Y. St. 732, 3 N. Y. S. 215; Bailey v. Ætna Ins. Co., 77 Wis. 336, 46 N. W. 440.)

[88] See § 4295, n. 47.

[89] See Johnson v. American Fire Ins. Co., 41 Minn. 396, 43 N. W. 59.

[90] Erie Brewing Co. v. Ohio Farmers' Ins. Co., 81 Ohio St. 1, 89 N. E. 1065, 25 L. R. A. (N. S.) 740n, 135 Am. St. 735n; Chandos v. American Fire Ins. Co., 84 Wis. 184, 54 N. W. 390, 19 L. R. A. 321. See also, Scania Ins. Co. v. Johnson, 22 Colo. 476, 45 Pac. 431; Collinsville Sav. Soc. v. Boston Ins. Co., 77 Conn. 676, 60 Atl. 647, 69 L. R. A. 924. In Hathaway v. Orient Ins. Co., 134 N. Y. 409, 32 N. E. 40, 17 L. R. A. 514, it was held that the rights of a mortgagee could not be defeated by an accord and satisfaction between the insurer and the owner of the premises, who took out the policy in his own name. See generally, as to the question of the effect, upon an assignee of an insurance policy, of acts of forfeiture by the assignor, note to Hall v. Niagara Fire Ins. Co., 93 Mich. 184, 53 N. W. 727, 18 L. R. A. 135. Contra, Bergman v. Commercial Assur. Co., 92 Ky. 494, 13 Ky. L. 720, 18 S. W. 122, 15 L. R. A. 270. See Harrington v. Fitchburg &c. Ins. Co., 124 Mass. 126; Brown v. Rodger Williams Ins. Co., 5 R. I. 394. The last three cases supply strong reasons for holding that the mortgagee is not bound in such a case at least under the "union mortgage clause" which is stronger than an ordinary "loss payable" clause, and provides that the mortgagee shall not be affected by the act or neglect of the mortgagor. See also, Hartford Life Ins. Co. v. Olcott, 97 Ill. 439; Georgia Home Ins. Co. v. Stein, 72 Miss. 943, 18 So. 414; Hall v. Fire Assn. of Philadelphia, 64 N. H. 405, 13 Atl. 648. And compare Scottish Union &c. Ins. Co. v. Field, 18 Colo. App. 68, 70 Pac. 149.

erty lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention to do so; but there can be no abandonment to this company of the property described."[91] The right to rebuild does not exist unless reserved by the terms of the contract.[92] The insurer can elect either of the privileges reserved to it by this provision of the policy, but by the selection of one it abandons the others. Thus, where the policy contained a provision for the submission of certain matters to arbitration, and provided that it "should be optional with the company to repair, rebuild or replace the property with other of like kind and quality within a reasonable time," the company elected to repair the injury and restore the house to its former condition. After some work was done, defendant was informed that the repairs were completed. The insured claimed that the repairs were insufficient, but declined to specify in what particu-

[91] This is found in the standard policies in use in New York, New Jersey, Connecticut, Rhode Island, Michigan, South Dakota, Louisiana, North Dakota, Wisconsin and North Carolina. The Iowa clause is similar to that of New York, except that the company is not authorized to repair, or rebuild in case of the total loss of the building. The following provision is found in the standard policies of the states of Massachusetts, Minnesota and Maine: "In case of any loss or damage, the company, within sixty days, * * * shall either pay the amount * * * or replace the property with other of the same kind and goodness, or it may, within fifteen days after such statement is submitted, notify the insured of its intention to rebuild or repair the premises, or any portion thereof separately insured by this policy, and shall thereupon enter upon said premises and proceed to rebuild or repair the same with reasonable expedition. It is moreover understood that there can be no abandonment of the property insured to the company, and that the company shall not in any case be liable for more than the sum insured, with interest thereon from the time when the loss shall become payable as above provided." The New Hampshire provision is similar to the above except that it limits the time within which the company can give notice of its intention to rebuild in ten days.

[92] Wynkoop v. Niagara Fire Ins. Co., 91 N. Y. 478, 43 Am. Rep 686. See Wallace v. Ins. Co., 4 La. 289. "The insurers had the right to determine the manner in which they would perform their contract, and this right did not depend upon the assent of the insured. Neither his assent nor dissent could affect the power of the defendant under the contract. The rights of the parties rested altogether in contract, and the defendant assumed the responsibility of performing it according to its terms, subject to the right of the insured to damages for any breach of performance. * * * One mode looked to the compensation of the insured by the payment of damages for his loss, and the other to the restoration of the subject of insurance to its former condition. It could not have been contemplated by the parties that both methods of performance were to be pursued. The selection by the defendant of one of these alternatives necessarily constituted an abandonment of the other. * * * From the time of such election the contract between the parties became an under-

lar. The company made several attempts to complete the repairs, which were unsatisfactory to the defendant, who made and served proofs of loss and claimed payment of the money. The defendant then requested that the matter of damages be submitted to arbitration, but it was held that by electing to repair and restore, the company had abandoned the right to discharge its liability by payment of damages and all provisions having reference to the latter method.[93]

After the company elects to rebuild it is held that the contract becomes one for rebuilding, and the obligation which looks to the payment of money becomes obsolete and inapplicable, and the case then becomes what it would have been if the contract had simply obligated the defendant to rebuild in case of loss.[94] According to the provision quoted, the option must be exercised within a reasonable time, and notice must be given within thirty days after the receipt of the proofs, so that an offer by the company, more than a year after the proofs of loss were furnished, to rebuild, is too late.[95]

It has been held that where two separate companies elect to rebuild, and there is a breach of the new contract to rebuild, the owner may recover his full damages against either of them, leaving the one which pays to secure contribution from the other in a separate action;[96] and where separate companies have separate policies on a single building, a general election to repair and rebuild makes the obligation to repair and rebuild joint or several at the option of the insured.[97]

There is some doubt as to whether the insurer is deprived of the right to rebuild reserved in the policy from the fact that there is a statute requiring the use of a valued policy. In Wisconsin the standard form limits the liability of the insured to the

taking on the part of the defendant to build or repair the subject insured and to restore it to its former condition, and the measure of damages for a breach of the substituted contract did not necessarily depend upon the amount of damages inflicted upon the house by the peril insured against."

[93] Wynkoop v. Niagara Fire Ins. Co., 91 N. Y. 478, 43 Am. Rep. 686.

[94] Morrell v. Irving Fire Ins. Co., 33 N. Y. 429, 88 Am. Dec. 396. See also, Beals v. Home Ins. Co., 36 N. Y. 522; Heilmann v. Westchester Ins. Co., 75 N. Y. 7.

[95] Maryland Home Fire Ins. Co. v. Kimmell, 89 Md. 437, 43 Atl. 764.

[96] Morrell v. Irving Fire Ins. Co., 33 N. Y. 429, 88 Am. Dec. 396.

[97] Hartford Fire Ins. Co. v. Peebles' Hotel Co., 82 Fed. 546, 27 C. C. A. 223.

" ' actual cash value of the property at the time any loss or damage accrues,' 'except when otherwise provided by statute;' and then provides that such liability should 'in no event exceed what it would then cost the insured to repair or replace the same with material of the like kind and quality,' " and that " 'it shall be optional, however, with this company * * * to rebuild or replace the property lost or damaged with other of like kind and quality.' " When the policy was issued there was in force a statute which declared that the amount of insurance written in the policy on real estate which has been wholly destroyed shall be taken conclusively to be the true value of the property when insured, and the true measure of damages when destroyed. It was held that these acts should be construed together, and that the provision for a valued policy was not in conflict with the provision giving the insurer the right to rebuild although the building was wholly destroyed.[98] But in Ohio the right to rebuild is regarded as inconsistent with the valued policy statute, as it changes the measure of liability from the amount named in the policy to the cost of rebuilding.[99]

Where there was a controversy between the insured and insurer as to whether the latter had lost its right to elect to rebuild, the former brought an action to recover a money indemnity, and the insurer set up its election and alleged its willingness to rebuild. It was held that the company had not lost its right, and could not thereafter rescind the position assumed in the pleading and deny liability on its contract of insurance because pending the controversy the cost of building had increased.[1] It was also held under the provisions of the policy in question that appraisal was preliminary to or a part of the final proof of loss required, and that participation by the company in the appraisal to ascertain the damage done to the insured building did not constitute an election on its part to pay the damages in money, which precluded it from

[98] Temple v. Niagara Fire Ins. Co., 109 Wis. 372, 85 N. W. 361. Compare also, Melancon v. Phœnix Ins. Co., 116 La. 324, 40 So. 718.

[99] Milwaukee Mechanics' Ins. Co. v. Russell, 65 Ohio St. 230, 62 N. E. 338, 56 L. R. A. 159.

[1] Langan v. Ætna Ins. Co., 99 Fed. 374, affd. 108 Fed. 985, 48 C. C. A. 174.

thereafter exercising its option to rebuild or repair upon the giving of proper notice.[2]

No deduction can be made for difference in value between the old and the new building constructed by the company under the option reserved in this policy. Thus, where the company elected to rebuild and it was claimed that as a new store of similar dimensions and plan as the old, of new materials, would be worth more than the old one, a deduction ought to be made from the estimate of the cost of the new store for the difference in value between the old and the new store, analogous to the deduction of new for the old in the adjustment of losses on marine policies, the court said:[3] "Such rule is not supported by any principle of justice, or by the authority of any adjudged case. It is founded upon an erroneous construction of the contract. It supposes that the insurers are bound to repair the building, or to pay the expenses of the repairs. But no such obligation is imposed on them by the policy. They have the privilege to make the requisite repairs, if they see fit, to protect themselves against the recovery of excessive damages, or for any other reason. But if they elect not to make repairs, they are liable only to pay a fair indemnity for the loss. But whatever may be the rule when the building insured is partially injured by the peril insured against, it has no application to cases like the present, where the building is totally destroyed and is to be replaced by a new one."

§ 4327. **Time within which loss is payable.**—It is generally provided that the "loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required."[4]

The insurance company has sixty days after due proof of loss

[2] Langan v. Ætna Ins. Co., 96 Fed. 705.

[3] Brinley v. National Ins. Co., 11 Metc. (Mass.) 195.

[4] This provision is found in the standard policies of New York, New Jersey, Rhode Island, Connecticut, South Dakota, North Dakota, Michigan, Louisiana and North Carolina. Massachusetts, Minnesota, Maine and New Hampshire have the following provision: "In case of any loss or damage, the company, within sixty days after the insured shall have submitted a statement, as provided in the preceding clause, shall either pay the amount for which it shall be liable, * * * or replace," etc.

and award by appraisers, when appraisal has been required, within which to pay the amount found due, and a suit commenced before the expiration of the sixty days is prematurely brought.[5] The Michigan Statute provides that suits at law may be maintained against the insurer for claims which may have accrued, if payments are withheld more than sixty days after such claims become due. Where the sum for which the company might be liable was payable sixty days after due notice, it was held that an action commenced on November 24 for a loss by fire, proofs of which were furnished on September 9, was premature, as the action did not lie until the expiration of one hundred and twenty days from the time the proofs of loss were filed.[6] But where the policy provided that the loss should be paid within sixty days after receiving proofs of loss, and a complaint was filed August 30, which alleged that the plaintiff notified the company of the loss on June 23, and that its adjuster two or three days thereafter made inquiry into the facts and notified the plaintiff that the loss could not be paid, it was held that the action was not prematurely brought.[7]

Where the policy contains no reference to the charter of a mutual company, the rights of the parties are determined by this provision in the policy, and not by some charter provision which provides for a different procedure.[8] An action may be brought without waiting for the expiration of the sixty days after proofs of loss where the company denies all liability, and refuses to ascertain or adjust the loss, and its officer states that the only way a settlement can be obtained is "at the end of a lawsuit,"[9] and the same view was taken in a Colorado case where the company refused the preliminary proofs and demanded proof not contemplated by the policy.[10]

[5] Gillon v. Northern Assur. Co., 127 Cal. 480 59 Pac. 901.

[6] Putze v. Saginaw Valley Mut. Fire Ins. Co. 132 Mich. 670, 86 N. W. 814, 94 N. W. 191.

[7] Home Ins. Co. v. Sylvester, 25 Ind. App. 207, 57 N. E. 991.

[8] First Baptist Church v. Citizens' Mut. Fire Ins. Co., 119 Mich. 203, 77 N. W. 702.

[9] Hosmer Bros. v. St. Joseph Town Mut. Fire Ins. Co., 80 Mo. App. 419; Oklahoma Fire Ins. Co. v. McKay (Tex. Civ. App.), 152 S. W. 440. See also, Jennings v. Brotherhood Acc. Co., 44 Colo. 68, 96 Pac. 982, 18 L. R. A. (N. S.) 109n, 130 Am. St. 109; Modern Brotherhood of America v. Cummings, 68 Nebr. 256, 94 N. W. 144.

[10] Preferred Acc. Ins. Co. v. Fielding, 35 Colo. 19, 83 Pac. 1013. See

§ 4328. Time of bringing suit—Generally.—It is also commonly provided that "no suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after the full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."[11]

It is generally held that a provision in a policy of insurance limiting the time for an action thereon to a period less than that prescribed by the Statute of Limitations is valid and enforcible,[12] unless it contravenes a statute,[13] although in a few instances such provisions have been held void as against public policy.[14]

The provision does not apply to an action to enforce a com-

also, Prudential Ins. Co. v. Hummer, 36 Colo. 208, 84 Pac. 61. But compare Curry v. Empire Life Ins. Co., 49 Misc. (N. Y.) 65, 98 N. Y. S. 6.

[11] This provision is found in the standard policies of New York, New Jersey, Rhode Island, Connecticut, Michigan, Louisiana, South Dakota and North Carolina. The clause does not appear in the Wisconsin standard policy, and North Dakota has no time limit other than the Statute of Limitations within which suit must be brought. The Iowa form is somewhat different. The Massachusetts, Minnesota and Maine policies provide that: "No suit or action against this company for the recovery of any claim by virtue of this policy shall be sustained in any court of law or equity in this commonwealth unless commenced within two years from the time the loss occurred." New Hampshire limits the time for bringing the action to one year.

[12] Brown v. Savannah &c. Ins. Co., 24 Ga. 97; Peoria Marine & Fire Ins. Co. v. Whitehill, 25 Ill. 382; Carter v. Humboldt Fire Ins. Co., 12 Iowa 287; Stout v. City Fire Ins. Co., 12 Iowa 371, 79 Am. Dec. 539; Mead v. Phœnix Ins. Co., 68 Kans. 432, 75 Pac. 475, 64 L. R. A. 79, 104 Am. St. 412; Amesbury v. Bowditch &c. Ins. Co., 6 Gray (Mass.) 596; Lewis v. Metropolitan Life Ins. Co. 180 Mass. 317, 62 N. E. 369; Fullam v. New York Union Ins. Co., 7 Gray (Mass.) 61, 66 Am. Dec. 462; Gooden v. Amoskeag Fire Ins. Co., 20 N. H. 73; Ames v. New York &c. Ins. Co., 14 N. Y. 253; Sullivan v. Prudential Ins. Co., 172 N. Y. 482, 65 N. E. 268; Ripley v. Ætna Ins. Co., 29 Barb. (N. Y.) 552, 17 How. Prac. (N. Y.) 444, revd. 30 N. Y. 136, 86 Am. Rep. 362; Portage &c. Ins. Co. v. West, 6 Ohio St. 599; Northwestern Ins. Co. v. Phœnix Oil & Candle Co., 31 Pa. St. 448; Brown v. Roger Williams Ins. Co., 5 R. I. 394; Guthrie v. Connecticut Indemnity Assn., 101 Tenn. 643, 49 S. W. 829; Riddlesbarger v. Hartford Fire Ins. Co., 7 Wall. (U. S.) 386, 19 L. ed. 257; Morrill & Co. v. New England Fire Ins. Co., 71 Vt. 281 44 Atl. 358. See also, Luckenbach v. Home Ins. Co., 142 Fed. 1023; Tolmie v. Fidelity &c. Co., 95 App. Div. (N. Y.) 352, 88 N. Y. S. 717, affd. in 183 N. Y. 581, 76 N. E. 1110. But see Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind. 443; Shawnee Fire Ins. Co. v. Bayha, 8 Kans. App. 169, 55 Pac. 474; French v. Lafayette Ins. Co., 5 McLean (U. S.) 461, Fed. Cas. No. 5102, affd. 18 How. (U. S.) 404, 15 L. ed 451. See also, Harvey v. Fidelity &c. Co., 200 Fed. 925; Maxwell Bros. v. Liverpool &c. Ins. Co. (Ga. App.), 76 S. E. 1036.

[13] Caywood v. Supreme Lodge &c., 171 Ind. 410, 86 N. E. 482, 23 L. R. A. (N. S.) 304n; 131 Am. St. 253; Insurance Co. of North America v. Brim, 111 Ind. 281, 12 N. E. 315.

[14] Omaha Fire Ins. Co. v. Drennan, 56 Nebr. 623, 77 N. W. 67.

promise agreement made between the parties after the property is destroyed.[15] And the failure of a mortgagee to bring an action within the time limited by the mortgage clause has been held not to be a bar to an action brought by the mortgagor within the time.[16] It has also been held that limitation in contracts of insurance will not be applied with the same degree of rigidity as ordinary statutes of limitation, and is not applicable where the performance of the conditions precedent is, without fault or laches on the part of the insured, rendered impossible by the acts of the insurer, or by the act of God, or of the government, or of the courts.[17] And the rule of the New York Code, that an attempt to commence an action is equivalent to its actual commencement so far as the Statute of Limitations is concerned, applies to limitations created by contract as well as those imposed by statute.[18]

This provision has been held waived by a representation of an agent that the company will pay without suit.[19] So, where the conduct of the insurer is such as to mislead the insured and prevent him from prosecuting his claim within the time limited in the policy, the limitation is waived.[20] It was held in a carefully considered federal case that such a waiver is not necessarily an entire abandonment or annulment of the limitation, where the company is investigating, and that the limitation begins to run on

[15] Hanover Fire Ins. Co. v. Hatton, 21 Ky. L. 1533, 55 S. W. 681; Strampre v. Minnesota Farmers' &c. Ins. Co., 109 Minn. 364, 123 N. W. 1083, 26 L. R. A. (N. S.) 999n, 134 Am. St. 781.

[16] Shawnee Fire Ins. Co. v. Bayha, 8 Kans. App. 169, 55 Pac. 474.

[17] Jackson v. Fidelity & Casualty Co., 75 Fed. 359, 21 C. C. A. 394, 41 U. S. App. 552.

[18] "The law," says the court, "establishes the period of limitation, and forbids the parties from disregarding it. The law as effectually established the period of limitation as if it had declared in express terms that the limitation of time for the commencement of an action upon a fire insurance policy should be the period of one year. Practically, then, the limitation in this case was specially prescribed by law, and hence falls directly within the principle of the decisions of this court." Hamilton v. Royal Ins. Co. of Liverpool, Eng., 156 N. Y. 327, 50 N. E. 863, 42 L. R. A. 485; Hayden v. Pierce, 144 N. Y. 512, 39 N. E. 638; Titus v. Poole, 145 N. Y. 414, 40 N. E. 228.

[19] Scottish Union &c. Ins. Co. v. Enslie, 78 Miss. 157, 28 So. 822.

[20] De Farconnet v. Western Ins. Co., 110 Fed. 405, affd. 122 Fed. 448, 58 C. C. A. 612. See also, Prudential Ins. Co. v. Hummer, 36 Colo. 208, 84 Pac. 61.

its announcement of refusal to pay or settle;[21] but this case received further consideration and was reversed on appeal.[22]

§ 4329. Time when limitation begins to run.—The provision in question states that an action must be brought within twelve months next after a fire. Formerly it was customary to use the expression, "after a loss occurs." There are two directly opposing lines of authorities upon the question whether, under such a policy, the year of limitation begins to run from the time of the fire, or from the time when the loss is ascertained and established and the right to bring an action exists.[23] As said by the Supreme Court of Wisconsin,[24] "doubtless the tendency of so many courts to construe the term 'loss' as meaning the time when liability was fixed, induced many insurance companies to substitute the word 'fire,' as in the policy before us. It would seem as if the phrase 'twelve months next after the fire' was susceptible of but one meaning; yet the courts have disagreed upon this question also." Some of the decisions are to the effect "that the

[21] Lynchburg Cotton Mill Co. v. Travelers' Ins. Co., 140 Fed. 718, revd. 149 Fed. 954, 79 C. C. A. 464, 9 L. R. A. (N. S.) 654.

[22] Lynchburg Cotton Mill Co. v. Travelers' Ins. Co., 149 Fed. 954, 79 C. C. A. 464, 9 L. R. A. (N. S.) 654n. See also, Illinois Live Stock Ins. Co. v. Baker, 153 Ill. 240, 38 N. E. 627; Galloway v. Standard Fire Ins. Co., 45 W. Va. 237, 31 S. E. 969.

[23] That the time begins to run from the date when a right to bring an action exists, see Steen v. Niagara Fire Ins. Co., 89 N. Y. 315, 42 Am. Rep. 297. See Ellis v. Council Bluffs Ins. Co., 64 Iowa 507, 20 N. W. 782; Miller v. Hartford Fire Ins. Co., 70 Iowa 704, 29 N. W. 411; Chandler v. St. Paul Fire & Marine Ins. Co., 21 Minn. 85, 18 Am. Rep. 385; German Ins. Co. v. Fairbank, 32 Nebr. 750, 49 N. W. 711, 29 Am. St. 459; Spare v. Home Mut. Ins. Co., 9 Sawy. (U. S.) 142, 17 Fed. 568; Barber v. Fire & M. Ins. Co., 16 W. Va. 658, 37 Am. Rep. 800. See also, Kiisel v. Mutual Reserve Life Ins. Co., 131 Iowa 54, 107 N. W. 1027. To the contrary, see Peoria Sugar Refining Co. v. Canada &c. Ins. Co., 12 Ont.-App. 418; Blair v. Sovereign Fire Ins. Co., 19 Nova Scotia (7 Russ. & Geld.) 372; Chambers v. Atlas Ins. Co., 51 Conn. 17, 50 Am. Rep. 1; Johnson v. Humboldt Ins. Co., 91 Ill. 92, 33 Am. Rep. 47; Fullam v. New York Union Ins. Co., 7 Gray (Mass.) 61, 66 Am. Dec. 462; Glass v. Walker, 66 Mo. 32; Bradley v. Phœnix Ins. Co., 28 Mo. App. 7; Travelers' Ins. Co. v. California Ins. Co., 1 N. Dak. 151, 45 N. W. 703, 8 L. R. A. 769; Schroeder v. Keystone Ins. Co., 2 Phila. (Pa.) 286; Virginia Fire & Marine Ins. Co. v. Wells, 83 Va. 736, 3 S. E. 349. See authorities in note to 27 L. R. A. 48. See as to complaint held sufficient to show that sixty days had elapsed after required proof of loss. Nerger v. Equitable Fire Assn., 20 S. Dak. 419, 107 N. W. 531.

[24] Case v. Sun Ins. Co., 83 Cal. 473, 23 Pac. 534, 8 L. R. A. 48; Friezen v. Allemania Fire Ins. Co., 30 Fed. 352; Hong Sling v. National Ins. Co., 7 Utah 441, 27 Pac. 171; Hart v. Citizens' Ins. Co., 86 Wis. 77, 56 N. W. 332, 21 L. R. A. 743, 39 Am. St. 877.

word 'fire' is to be construed as meaning not the date of the fire, but the time when liability is fixed and an action accrues to the insured." But the better authorities seem to "hold that the limitation begins to run from the day of the fire."[25]

Under the Minnesota form of policy, which provides that no suit shall be sustained unless commenced within two years from the time the loss occurs, it is held that the limitation begins to run from the time of the fire or actual destruction of the property.[26] And in an Illinois case where the policy provided that the action must be commenced within twelve months after the fire, and the fire and loss occurred on April 9, 1896, an action begun on April 9, 1897, was held in time.[27]

[25] Steel v. Phœnix Ins. Co., 47 Fed. 863, revd. 51 Fed. 715, 2 C. C. A. 463; McElroy v. Continental Ins. Co., 48 Kans. 200, 29 Pac. 478; King v. Watertown Fire Ins. Co., 47 Hun (N. Y.) 1, 14 N. Y. St. 93; Travelers' Ins. Co. v. California Ins. Co., 1 N. Dak. 151, 45 N. W. 703, 8 L. R. A. 769; State Ins. Co. v. Meesman, 2 Wash. 459, 27 Pac. 77, 26 Am. St. 870; Hart v. Citizens' Ins. Co., 86 Wis. 77, 56 N. W. 332, 21 L. R. A. 743, 39 Am. St. 877.

[26] Rottier v. German Ins. Co., 84 Minn. 116, 86 N. W. 888.

[27] Colonial Mut. Fire Ins. Co. v. Ellinger, 112 Ill. App. 302.

CHAPTER CXXVIII.

OTHER PROVISIONS OF THE STANDARD POLICY.

§ 4335. Measure of damages—Valued policy legislation.
4336. Meaning of total loss.
4337. Total loss to frame building within fire limits.
4338. Amount of recovery—Illustrations.
4339. Prorating loss with other insurers.
§ 4340. Subrogation.
4341. Reinsurance.
4342. Conditions affecting mortgagees.
4343. Special provisions.
4344. Other provisions — Construction of terms—Indorsement.

§ 4335. Measure of damages—Valued-policy legislation—

The provision in the standard policy in regard to the measure and ascertainment of damages,[1] is in some respects in conflict with the

[1] "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by the appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy." This provision is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Michigan, South Dakota, Iowa, North Dakota, Louisiana and North Carolina. Wisconsin inserts, "Except when otherwise provided by statute," in referring to liability beyond the actual cash value of the property. Massachusetts and Maine have the following clause: "This company shall not be liable beyond the value of the insured property at the time any loss or damage happens. * * * In case of any loss or damage, the company, within sixty days after the insured shall have submitted a statement, as provided in the preceding clause, shall either pay the amount for which it shall be liable, which amount if not agreed upon shall be ascertained by award of referees as hereinafter provided, or replace the property with other of the same kind and goodness * * * and that the company shall not in any case be liable for more than the sum insured, with interest thereon from the time when the loss shall become payable, as above provided." The Minnesota clause is similar to the above except that the first paragraph, relieving the company from liability beyond the actual value of the insured property at the time any loss or damage happens, is omitted. The New Hampshire clause is somewhat different.

valued policy laws in force in many states, and it must be construed in connection with such statutes. A consideration of such legislation is therefore in order. Where the policy is valued and there is a total loss, the amount of recovery is determined by the face of the policy.[2] Whether it is a valued one must be determined by the language of the contract and by existing statutes. The policy must be regarded as an open one, unless it appears to be the intention of the parties to the policy, upon a fair and reasonable construction of its terms, to value the loss and thereby fix by contract the amount of the recovery. The question must be determined by the intention of the parties gathered from the whole instrument.[3] But where a statute requires all policies to be valued, the language of the policy becomes immaterial,[4] and the amount written in the policy must be taken conclusively to be the true value of the property, and the amount of the recovery where there is a total loss.[5] Thus, a fire insurance company is liable, in case of a total loss, for the full amount of the policy, notwithstanding the provision in the policy by which it agrees to pay only three-fourths of the value in case of loss, where a statute provides that such company shall be liable for the full estimated value of the property insured, as the same is fixed on the face of the policy.[6] Valued policy laws are now in force in a majority of the states, and the question of the constitutionality of such statutes may be regarded as settled by decision of the Supreme Court of the United States.[7] These statutes vary in phraseology, but that of Wisconsin, which was the first enacted, may be used as an illustration. It provides that, "Whenever any policy of insurance shall be written to insure real property and the property insured

[2] Phœnix Insurance Co. v. McLoon, 100 Mass. 475. See also, Insurance Co. of N. Am. v. Willey, 212 Mass. 75, 98 N. E. 75; Spickard v. Fire Assn. of Phila., 164 Mo. App. 1, 146 S. W. 108; Springfield F. &c. Co. v. Homewood (Okla.), 122 Pac. 196.

[3] Insurance Co. v. Butler, 38 Ohio St. 128. See also, Riley v. Hartford Ins. Co., 2 Conn. 368; Brown v. Quincy Mut. Fire Ins. Co., 105 Mass. 396, 7 Am. Rep. 538.

[4] Oshkosh Gas-Light Co. v. Germania Fire Ins. Co., 71 Wis. 454, 37 N. W. 819, 5 Am. St. 233. See also, Queen Ins. Co. v. Leslie, 47 Ohio St. 409, 24 N. E. 1072, 9 L. R. A. 45; Milwaukee Mechanics' Ins. Co. v. Russell, 65 Ohio 230, 62 N. E. 338, 56 L. R. A. 159, and cases cited.

[5] Temple v. Niagara Fire Ins. &c. Co., 109 Wis. 372, 85 N. W. 361. Compare also, Wild Rice Lumber Co. v. Royal Ins. Co., 99 Minn. 190, 108 N. W. 871.

[6] Caledonian Ins. Co. v. Cooke, 101 Ky. 412, 19 Ky. L. 651, 41 S. W. 279; Phœnix Insurance Co. v. Peak, 20 Ky. L. 1035, 47 S. W. 1089.

[7] Orient Insurance Co. v. Daggs, 172

shall be wholly destroyed, without criminal fault on the part of the insured or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property when insured and the true amount of loss and measure of damages when destroyed." This provision of the standard policy must be construed in connection with the valued policy law, which, in the event of a total loss, determines conclusively that the amount named in the policy is the "true value of the property."[8] Overvaluation under a valued policy, unless fraudulent, does not affect the right to recover. The valued policy laws do not as a rule apply to personal property.[9] But they have been held to apply to a policy taken out by a builder, his interest in the building being regarded as one in real estate.[10]

§ 4336. Meaning of total loss.—Under a valued policy, the amount named therein is recoverable when there is a total loss. A building is totally destroyed within the meaning of such policy when it no longer exists as a building, although some of the material may have value as material. As said by the New York Court of Appeals:[11] "A total destruction, within the meaning

U. S. 557, 19 Sup. Ct. 281, 43 L. ed. 552.

[8] Temple v. Niagara Fire Ins. Co., 109 Wis. 372, 85 N. W. 361; Wis. Stat. (1898), § 1943; Reilly v. Franklin Ins. Co., 43 Wis. 449, 28 Am. Rep. 552; Seyk v. Millers' Nat. Ins. Co., 74 Wis. 67, 41 N. W. 443, 3 L. R. A. 523; Oshkosh Gas-Light Co. v. Germania Fire Ins. Co., 71 Wis. 454, 37 N. W. 819, 5 Am. St. 233.

[9] Cushman v. Northwestern Ins. Co., 34 Maine 487; Havens v. Germania Fire Ins. Co., 123 Mo. 403, 27 S. W. 718, 26 L. R. A. 107, 45 Am. St. 570, affd. 135 Mo. 649, 37 S. W. 497; German Ins. Co. v. Jansen, 18 Tex. Civ. App. 190, 45 S. W. 220; Vergeront v. German Ins. Co., 86 Wis. 425, 56 N. W. 1096. See also, Joy v. Security Fire Ins. Co., 83 Iowa 12, 48 N. W. 1049; Sharp v. Niagara F. Ins. Co., 164 Mo. App. 475, 147 S. W. 154; Home Fire Ins. Co. v. Bean, 42 Nebr. 537, 60 N. W. 907, 47 Am. St. 711; Ginner's Mut. Underwriters v. Wiley (Tex. Civ. App.), 147 S. W. 629; Orient Insurance Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. 281.

[10] King v. Phœnix Ins. Co., 195 Mo. 290, 92 S. W. 892, 113 Am. St. 678.

[11] Corbett v. Spring Garden Ins. Co., 155 N. Y. 389, 50 N. E. 282, 41 L. R. A. 318. See also, Oshkosh Packing &c. Co. v. Mercantile Ins. Co., 31 Fed. 200; Hamburg-Bremen Fire Ins. Co. v. Garlington, 66 Tex. 103, 18 S. W. 337, 59 Am. Rep. 613. In Pennsylvania Fire &c. Ins. Co. v. Drackett, 63 Ohio St. 41, 57 N. E. 962, 81 Am. St. 608, the court said: "It seems to be agreed that it is not necessary, to constitute a total loss, that all the material composing the building should be destroyed. It is sufficient, though some parts of it remain standing, if the building has lost its identity and specific character as a building; the insurance not being upon the material composing the building, but upon the building as such. When the loss by fire is such that its character as a building is destroyed, and it remains simply as a

of the policy, must mean the complete destruction of the insured property by fire, so that nothing of value remains of it, as distinguished from a partial loss, where the property is damaged but not entirely destroyed. This does not mean that the materials of which the building was composed were all utterly destroyed or obliterated, but that the building, though some part of it may be left standing, has lost its character as a building, and, instead thereof, has become a broken mass, or so far in that condition that it cannot properly any longer be designated as a building."

A building may well be considered a total loss where the remnant is inconsiderable compared with the part entirely destroyed, and does not constitute a sufficient basis to restore the burnt building.[12] And it has been held that a building is a total loss where three of the walls are entirely destroyed, and none of the joists, floor and window sills are left, although the other wall was used in erecting a new building after being condemned as unfit for use;[13] but not where the remaining wall or part was reasonably sufficient as a basis for restoration.[14] The foundation of the building is not within the contemplation of the parties, and hence the question of injury to the foundation should not be considered in reaching a conclusion as to a total loss.[15] There is a total loss, although the building was not sound when it was insured, where it is so injured by fire as to be ren-

mass of ruins, parts of which may remain standing, but of no value in repairing or rebuilding the structure, though something might be realized from the material by removing it, the loss is regarded as total." See also, Williams v. Hartford Ins. Co., 54 Cal. 442, 35 Am. Rep. 77; Northwestern Mutual Ins. Co. v. Rochester &c. Ins. Co., 85 Minn. 48, 88 S. W. 265, 56 L. R. A. 108; Seyk v. Millers' Nat. Ins. Co., 74 Wis. 67, 41 N. W. 443, 3 L. R. A. 523; Lindner v. St. Paul Fire &c. Ins. Co., 93 Wis. 526, 67 N. W. 1125.

[12] Murphy v. American Cent. Ins. Co., 25 Tex. Civ. App. 241, 54 S. W. 407. See also, O'Keefe v. Liverpool &c. Ins. Co., 140 Mo. 558, 41 S. W. 922, 39 L. R. A. 819; Hinkle v. North River Ins. Co. (W. Va.), 75 S. E. 54.

[13] American Central Ins. Co. v. Murphy (Tex. Civ. App.), 61 S. W. 956. See also, German Ins. Co. v. Eddy, 36 Nebr. 461, 54 N. W. 856, 19 L. R. A. 707; Seyk v. Millers' Nat. Ins. Co., 74 Wis. 67, 41 N. W. 443, 3 L. R. A. 523.

[14] Royal Insurance Co. v. McIntyre, 90 Tex. 170, 37 S. W. 1068, 35 L. R. A. 672, 59 Am. St. 797. See also, Ampleman v. Citizens' Ins. Co., 35 Mo. App. 308; Providence Washington Ins. Co. v. Board of Education, 49 W. Va. 360, 38 S. E. 679.

[15] Murphy v. American Cent. Ins. Co., 25 Tex. Civ. App. 241, 54 S. W. 407. See also, German-Am. Ins. Co. v. McBee (Ohio), 97 N. E. 378.

dered insecure and a menace to life, and for that reason is condemned by the proper authorities.[16]

Under the Minnesota standard policy, total loss is to be ascertained as of the date of its occurrence, and is determined by the following tests: A building is not a total loss unless it has been so far destroyed by the fire that no substantial part of it above the foundation remains in place capable of being safely utilized in restoring the building to the condition in which it was before the fire. The words "total loss," when applied to a building, mean totally destroyed as a building—that is, that the walls, although some portions of them remain standing, are unsafe to use for the purpose of rebuilding and would have to be torn down and a new building erected throughout. There can be no total loss of a building so long as the remnant of the structure left standing above the foundation is reasonably and safely adapted for use (without being taken down) as a basis upon which to restore the building to the condition in which it was immediately before the fire; and whether it is so adapted depends upon the question whether a reasonably prudent owner of a building uninsured, desiring such a structure as the one in question was before the fire, would, in proceeding to restore the building, utilize such standing remnant as such basis. If he would, then the loss is not total.

A cold storage plant was insured under the following description: "Four-story and basement brick building, with composition roof, and brick engine and boiler house attached, including steam heating and hoisting apparatus, steam, brine, water, gas pipes and fixtures, and all other permanent fixtures occupied for warehouse purposes." The engine house consisted of a small one-story brick structure attached to the main building, and the whole was considered and operated as an entirety. It was held that, conceding the engine house was but slightly damaged by the fire, the question of total loss must be applied to the structure as a whole.[17]

[16] Monteleone v. Royal Ins. Co., 47 La. Ann. 1563, 18 So. 472, 56 L. R. A. 784.

[17] Northwestern Mutual Life Ins. Co. v. Rochester &c. Ins. Co., 85 Minn. 48, 88 N. W. 265, 56 L. R. A. 108. See also, Poppitz v. German Ins. Co., 85 Minn. 118, 88 N. W. 438; Havens v. Germania Fire Ins. Co., 123 Mo. 403, 27 S. W. 718, 26 L. R. A. 107, 45 Am. St. 570, affd. 135 Mo. 649, 37 S. W. 497.

§ 4337. **Total loss to frame building within fire limits.**—Where a policy covers a building located within the fire limits of a city, of a class which, under certain conditions, cannot be repaired without violating the city ordinances, it has been held that there is a total loss when the repairing of the building insured is prevented by reason of such ordinances, but the value of what remains of the building after a fire, over and above the cost of removing it from the premises, should be deducted from the face of the policy.[18] The court, however, declined to pass upon the question whether the determination of the building inspector, or of the board of arbitration, on appeal from his decision, that the building had been damaged to the extent of fifty per cent. of its value, and therefore was not subject to repair under the ordinance, was final and conclusive.

§ 4338. **Amount of recovery—Illustrations.**—There are numerous cases which construe provisions similar to that of the standard policy. The purpose of the clause providing that, "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs" is to prevent a recovery of damages beyond the prescribed limitation. It does not affect the right of the plaintiff to prove and recover damages in an amount less than the actual cash value of the property destroyed or injured. It is held that the value at the date of the loss is the limit of recovery, but not a constituent element of a cause of action on the policy, and need not be stated in the complaint.[19] Where the policy provided that the company should not be liable beyond the actual cash value of the property at the time of the loss or damage, which should be ascertained according to such actual cash value, with proper deduction for depreciation, however caused, but in no event to exceed what it would cost the insured to repair or replace the same with

[18] Montelcone v. Royal Ins. Co., 47 La. Ann. 1563, 18 So. 472, 56 L. R. A. 784; Brady v. Northwestern Ins. Co., 11 Mich. 425; Larkin v. Glens Falls Ins. Co., 80 Minn. 527, 83 N. W. 409, 81 Am. St. 286; Fire Assn. of Philadelphia v. Rosenthal, 108 Pa. St. 474, 1 Atl. 303; Hamburg-Bremen Fire Ins. Co. v. Garlington, 66 Tex. 103, 18 S. W. 337, 59 Am. Rep. 613. Compare also, Manchester Fire Assur. Co. v. Feibelman, 118 Ala. 308, 23 So. 759.

[19] Osborne v. Phœnix Ins. Co., 23 Utah 428, 64 Pac. 1103.

material of like kind and quality, it was held that the measure of damages was the sum it would cost the insured to repair or replace the building with one of like kind and quality.[20] The insurance company is not bound by the value placed on the property in the application.[21] A company which, upon an application for additional insurance, increases the amount of the risk, cannot, after a loss, restrict its liability to three-fifths of the additional insurance because a stipulation in the original policy provides that it shall cover but a three-fifths' interest in the property designated.[22] The amount of the government tax on whisky destroyed by fire in a bonded warehouse cannot be deducted from the amount of the loss in an action by the owner, upon a policy of insurance against all direct loss or damage by fire to the whisky.[23] Where a part of the property was removed to other premises and was there destroyed by fire, and the loss amounts to the face of the policy, the company is not entitled to reduce the loss in the proportion that the value of the property remaining bears to that destroyed, but must indemnify the insured for the whole loss.[24] Interest is also recoverable in a proper case after the time fixed for payment.[25]

§ 4339. Prorating loss with other insurers.—Provision is generally made for prorating the loss with other insurers.[26] In

[20] McCready v. Hartford Fire Ins. Co., 61 App. Div. (N. Y.) 583, 70 N. Y. S. 778. In computing the loss sustained by the insured and chargeable to the insurer under a fire policy, the cost of rebuilding up to the amount designated in the policy is to be included, though increased beyond the original cost of construction by reason of an act of the assembly regulating the construction of buildings, passed before the fire, but after the policy was issued, where the improved construction of the building caused by the legislation does not increase its market value. Pennsylvania Co. for Ins. on Lives v. Philadelphia Contributionship for Ins. of Houses, 201 Pa. 497, 51 Atl. 351, 57 L. R. A. 510. See generally as to evidence, 3 Elliott Ev., §§ 2317, 2318, 2319, 2321, 2322.

[21] Brown v. Quincy Mut. Fire Ins. Co., 105 Mass. 396, 7 Am. Rep. 538.

[22] London Assur. Corp. v. Paterson, 106 Ga. 538, 32 S. E. 650.

[23] Queen Insurance Co. v. McCoin, 105 Ky. 806, 20 Ky. L. 1633, 49 S. W. 800.

[24] Westchester Fire Ins. Co. v. McAdoo (Tenn.), 57 S. W. 409.

[25] Home Ins. Co. v. M. Schiff's Sons, 103 Md. 648, 64 Atl. 63.

[26] This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of

the absence of a provision of this character, the insured may recover either a proportionate part of the loss from each insurer or the entire amount from one insurer.[27] An insurer who pays the entire amount is entitled to contribution from the other insurers.[28]

This provision of the standard policy is new in form and arrangement. It relates to double or other insurance, and not to insurance on different interests.[29] Under it there is no right of contribution between companies, as the insured can recover from each only its full pro rata share. Where there are several policies which cover in part the same and in part different property, and contain different and inconsistent provisions, it is practically impossible to prorate the loss by this or by any other rule. Mr. Richards, after referring to the fact that these matters are generally settled by the companies out of court, says that the courts have endeavored to apply the following principles: 1. The different policies are placed as far as possible upon an equality, and special conditions and limitations in one policy are not brought over into another policy. 2. The object of the contribution clause is construed to be a restriction of the amount recovered from each insurer to its equitable contributory share, and

loss, may be provided for by agreement or condition written hereon or attached or appended hereto. This provision is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Louisiana, Wisconsin, North Dakota, South Dakota, Michigan and North Carolina. Massachusetts, Maine and New Hampshire have the following clause: "If there shall be any other insurance on the property insured, whether prior or subsequent, the insured shall recover on this policy no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon." The Minnesota clause is similar, but provides that it shall not apply in case of total loss on buildings.

[27] See Norwich Union Fire Ins. Co. v. Wellhouse, 113 Ga. 970, 39 S. E. 397.

[28] "As between 'the insurer and the insured,' upon the foot of commutative justice merely, there is no colour why the insurers should not pay the insured the whole; for they have received a premium for the whole risque * * * If the insured is to receive but one satisfaction, natural justice says, that the several insurers shall all of them contribute pro rata, to satisfy that loss against which they have all insured, * * * and if the whole should be recovered from one, he ought to stand in the place of the insured, to receive contribution from the other, who was equally liable to pay the whole." Godin v. London Assur. Co., 1 Burr. 489.

[29] Fire Ins. Assn. v. Merchants' & Miners' Transp. Co., 66 Md. 339, 7 Atl. 905, 59 Am. Rep. 162; McMaster v. Insurance Co. of North America, 64 Barb. (N. Y.) 536, affd. 55 N. Y. 222, 14 Am. Rep. 239. See note to 15 L. R. A. 127, for cases as to what constitute double insurance for the purpose of the apportionment of the loss.

must not be permitted to operate so as to reduce the aggregate amount of indemnity which the insured might otherwise recover. No arrangement of the clauses in the policy should be used to the disadvantage of the insured. He must be paid, and the dispute, if any, settled among the underwriters.[30]

Liability is reduced pro rata by other insurance, whether valid or not, or by solvent or insolvent insurers.[31] But it is held that the provision with reference to valid or invalid insurance refers only to other insurance obtained with the consent of the company, and has no application to other policies.[32] Where there is double insurance, and the total loss exceeds the total insurance, there can be no apportionment, and each insurer must pay in full the amount for which he is individually liable.[33]

§ 4340. **Subrogation.**—Provision is also made for subrogation of the insurer.[34] The common-law right of subrogation has been referred to elsewhere.[35] If the insured destroys the

[30] Richards Ins., § 164, citing Lucas v. Jefferson Ins. Co., 6 Cowen (N. Y.) 635.

[31] Cassity v. New Orleans Ins. Assn., 65 Miss. 49, 3 So. 138.

[32] London & L. Fire Ins. Co. v. Turnbull, 89 Ky. 230, 9 Ky. L. 544, 5 S. W. 542.

[33] Lebanon Mut. Ins. Co. v. Kepler, 106 Pa. St. 28.

[34] "If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment." This provision is found in the standard policies of New York, New Jersey, Rhode Island, Connecticut, Michigan, Louisiana, Wisconsin, South Dakota, North Dakota and North Carolina. The standard policies of Massachusetts, Minnesota, Maine and New Hampshire contain the following clause: "And whenever the company shall pay any loss, the insured shall assign to it, to the extent of the amount so paid, all rights to recover satisfaction for the loss or damage from any person, town, or other corporation, excepting other insurers; or the insured, if requested, shall prosecute therefor at the charge and for the account of the company."

[35] "It is well settled that, if a loss under a policy of insurance is occasioned by the wrongful act of a third party, the insurer occupies the position of a mere surety, and the wrongdoer that of a principal debtor; and all the incidents of suretyship attach to the position of the underwriter in such a case, including the right of subrogation. * * * The same principle is applicable to a contract of insurance, if the surety [assured] destroys the remedy of subrogation, and relieves the assurer to the full extent to which the wrongdoer could have been made liable for the loss." Packham v. German Fire Ins. Co., 91 Md. 515, 46 Atl. 1066, 50 L. R. A. 828, 80 Am. St. 461; Dilling v. Draemel, 16 Daly (N. Y.) 104, 30 N. Y. St. 435, 9 N. Y. S. 497. See also Chicago &c. A. R. Co. v. Glenny, 175 Ill. 238, 51 N. E. 896; Egan v. British &c. Ins. Co., 193 Ill. 295, 61 N. E. 1081, 86 Am. St. 342; Gerlach v. Grain Shippers' Mut. F. Ins. Co. (Iowa), 136 N. W. 691; Phœnix Insurance Co. v.

insurer's right of subrogation to a claim against the person causing the loss, he cannot recover against the insurance company. Thus, where the insured consented to exclude a claim for certain fixtures covered by the policy from the consideration of the jury, in an action against the wrongdoer to recover damages to other larger interests than the fixtures, it was held that he thereby lost his right of action against the insurer on account of the fixtures under a policy which provided that upon payment of the loss the assured should assign his claim against the wrongdoer to the insurer, or prosecute it at the request and expense, and for the benefit of such insurer.[36] In a subsequent case in the same state it was held that the settlement of a suit for unliquidated damages, brought by the insured against the wrongdoer, when made with the approval of the majority of the insurance companies inter-

Erie &c. Transp. Co., 117 U. S. 312, 29 L. ed. 873, 6 Sup. Ct. 750. In Leavitt v. Canadian Pac. R. Co., 90 Maine 153, 37 Atl. 886, 38 L. R. A. 152, it was held that the right of recovery against a person causing a loss, which is thus reserved, depends upon the law existing at the time of the fire. In Freed v. American Fire Ins. Co., 90 Miss. 72, 43 So. 947, 11 L. R. A. (N. S.) 368n, 122 Am. St. 307, it is held that the right of the insurance company to subrogation is not impaired by the fact that it was a party to an unlawful combination to fix rates. And in Burton-Lingo Co. v. Patton (N. Mex.), 107 Pac. 679, 27 L. R. A. (N. S.) 420, it is held that payment of insurance taken by the property owner for the benefit of a lienholder, to the latter, does not entitle the insurer to enforce the lien in displacement of the claims of other creditors of the property owner; and that a clause entitling the insurer to subrogation on payment to the mortgagee notwithstanding a forfeiture as to the property owner because of a foreclosure proceeding, will not effect a subrogation where the forfeiture is by foreclosure of a mechanic's lien.

[36] Packham v. German &c. Ins. Co., 91 Md. 515, 46 Atl. 1066, 50 L. R. A. 828, 80 Am. St. 461, where the court said: "Now, there was in this case but one tortious or negligent act of the gas company resulting in one fire which occurred at one and the same time, as well the loss incurred under this policy as the loss incurred under the other policies for which recovery was had against the gas company. For a single indivisible tort but one suit can be brought. The plaintiff in this case could not now bring another suit against the gas company for his own benefit to recover the loss incurred under this policy, nor could such suit be brought in his name for the benefit of the defendant. * * * The plaintiff had one indivisible cause of action against the gas company, and that cause of action has been merged in the judgment he obtained. When he excluded from that judgment so much of that cause of action as relates to this policy, he as effectually released so much of his right of action as if he had executed and delivered a release under seal therefor, and as clearly and unequivocally destroyed the defendant's right of subrogation as he would have destroyed it by such release. Any act which makes performance of the agreement to assign either impossible or useless must relieve the insurance company from its concurrent obligation to pay. The plaintiff in the present case, in order to protect his larger interests under the other policies, and his interest in recovery for loss of profits which were uninsured, has seen fit, for reasons doubtless

ested in the matter, cannot be complained of by the other companies that refused to come into the suit.[37]

The fact that the insurance company has paid the amount of the policy to the insured is no defense to an action by the insured against the wrongdoer for damages.[38] It results from the principle of indemnity that the insured cannot recover compensation for his loss from both the insurance company and the wrongdoer; hence, where the property is destroyed by fire negligently caused by a railroad company, and the owner settles with the company, and afterward, without informing the insurer of such fact, receives from it payment for the loss, the insurance company may recover back the money so paid.[39] But it is said that as a general rule the insurer can recover only the excess received by the insured and where the insurance company is informed by the insured of proceedings brought by him against the wrongdoer and of a proposed settlement and does nothing, it is held that the insurer in an action against the insured cannot recover the money paid if the insured settled in good faith for less than he would have received if he had recovered the amount of the loss and returned the insurance paid less the expenses of his suit.[40]

satisfactory to him, to sacrifice his own and defendant's interest under the policy in question, and cannot now be heard to complain of the result of his own course of conduct."

[37] Svea Assurance Co. of Gothenberg v. Packham, 92 Md. 464, 48 Atl. 359, 52 L. R. A. 95, where the court said: "It may be conceded that the insured cannot fritter away the rights of an insurer entitled to be subrogated, and that he cannot ordinarily make a compromise without being responsible to the insurer for the amount paid by him; but under such circumstances as we have stated there can, in our opinion, be no question about his right to thus settle a suit for unliquidated damages, when the majority of those interested not only approved it, but urged it." Where a compromise is made, the insured may "retain out of the fund his costs and reasonable expenses incurred in the litigation," and this may include a contingent fee to attorneys.

[38] Anderson v. Miller, 96 Tenn. 35, 33 S. W. 615, 31 L. R. A. 604, 54 Am. St. 812. See also, Kansas City &c. R. Co. v. Shutt, 24 Okla. 96, 104 Pac. 51, 138 Am. St. 870 (where the value of the property destroyed exceeds the insurance paid). To the same effect as this last case see Kansas City, Ft. S. & M. R. Co. v. Blaker, 68 Kans. 244, 75 Pac. 71, 64 L. R. A. 81, and numerous cases cited. In Lake Erie & W. R. Co. v. Falk, 62 Ohio St. 297, 56 N. E. 1020, it was held that the insurance company should intervene in an action brought by the owner against the railroad company to recover damages for the destruction of the insured property by fire, and that in the action the amount recovered should be adjudged to the owner and the insurer according to their respective interests.

[39] Chickasaw County Farmers' Mut. Fire Ins. Co. v. Weller, 98 Iowa 731, 68 N. W. 443.

[40] Shawnee Fire Ins. Co. v. Cosgrove, 85 Kans. 296, 116 Pac. 819, on rehearing in 121 Pac. 488.

A common carrier may, by agreement with the owner of the property, secure the benefit of the insurance procured by such owner. Thus, where the bill of lading provides that the carrier, when liable for a loss, shall have the full benefit of any insurance upon the goods, the payment of the loss by the company extinguishes the shipper's right of action against the carrier and destroys the insurance company's right to subrogation.[41] But it has been held that, under a policy providing that the insurance would not inure to the benefit of any carrier, but should be null and void so far as concerned the carrier, a cargo insurer who had advanced to the insured the amount of a loss as a loan and taken an assignment of a claim for the loss against the carrier, may recover thereon, notwithstanding the bill of lading provided that the carrier should have the benefit of any insurance effected by the owner.[42]

§ 4341. **Reinsurance.**—It is provided in most of the forms that "liability for reinsurance shall be as specifically agreed upon."[43] Unless an obligation in favor of the original insured is specifically created by the contract of reinsurance, he is generally regarded as a stranger to such a contract, and has, therefore, no claim on the reinsurer. This is the rule declared by the older authorities, and is based strictly on the principle of indemnity.[44] But some recent cases regard the contract as made for the benefit of the original insured. In New Hampshire it is held that when the original insurer is insolvent the reinsurer must pay the amount for which it is liable directly to the party ultimately entitled to the money. In an action brought by the receiver of an insolvent company against the reinsurer, the court said:[45]

[41] Roos v. Philadelphia, Wilmington & Baltimore R. Co., 13 Pa. Super. Ct. 563; Mercantile Mut. Ins. Co. v. Calebs, 20 N. Y. 173; Phœnix Insurance Co. v. Erie &c. Transp. Co., 117 U. S. 312, 29 L. ed. 873, 6 Sup. Ct. 750. Compare Inman v. South Carolina R. Co., 129 U. S. 128, 32 L. ed. 612, 9 Sup. Ct. 249.

[42] Bradley v. Lehigh Valley R. Co., 145 Fed. 569, affd. 153 Fed. 350, 82 C. C. A. 426.

[43] This provision is found in the standard policies of New York, New Jersey, Rhode Island, Connecticut, Michigan, Wisconsin, Louisiana, Iowa, South Dakota, North Dakota and North Carolina. No such provision is found in the standard policies of Massachusetts, Minnesota, Maine and New Hampshire.

[44] See § 4023.

[45] Hunt v. New Hampshire &c. Assn., 68 N. H. 305, 38 Atl. 145, 38 L. R. A. 514, 73 Am. St. 602.

"The defendants received a full consideration for the risk against which they insured, and there is no reason why they should not be required to pay the full amount of the loss. * * * The premiums received by them and the sum to be paid by them in case of loss were intended to be, and in the theory of law are, precisely equivalent." So, in a recent case in North Carolina, it was held that the insured had an interest in the contract of reinsurance and could sue the reinsurer, notwithstanding the fact that he was not a party to the contract of reinsurance, which expressly provided that no such action could be maintained.[46]

But the better opinion is that the simple contract of straight reinsurance is a contract of indemnity, under which the insurer, in the absence of anything else, is liable solely to the reinsured company, and not to the policy-holders.[47] Of course, where such a contract also includes a promise or agreement to assume and pay losses to the original insured, a policy-holder may proceed directly against the reinsurer upon such promise or undertaking;[48] and the reinsurer may also be liable to the insured where it takes over all the assets of the original insurer, receives premiums and the like or is otherwise made liable to the insured by the governing statute.[49]

§ 4342. **Conditions affecting mortgagees.**—"If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and

[46] Shoaf v. Palatine Ins. Co., 127 N. Car. 308, 37 S. E. 451, 80 Am. St. 804, citing Johannes v. Phœnix Ins. Co., 66 Wis. 50, 27 N. W. 414, 57 Am. Rep. 249, as decisive.

[47] Barnes v. Hekla Fire Ins. Co., 56 Minn. 38, 57 N. W. 314, 45 Am. St. 438; Strong v. Phœnix Ins. Co., 62 Mo. 289, 21 Am. Rep. 417; Carrington & Dougherty v. Commercial Fire & Marine Ins. Co., 1 Bosw. (N. Y.) 152; Delaware Ins. Co. v. Quaker City Ins. Co., 3 Grant Cas. (Pa.) 71;

[48] Barnes v. Hekla Fire Ins. Co., 56 Minn. 38, 57 N. W. 314, 45 Am. St. 438; Glen v. Hope Mut. Life Ins. Co., 56 N. Y. 379; Cahen v. Continental Life Ins. Co., 69 N. Y. 300; Travelers' Ins. Co. v. California Ins. Co., 1 N. Dak. 151, 45 N. W. 703, 8 L. R. A. 769; Ruohs v. Traders' Fire Ins. Co., 111 Tenn. 405, 78 S. W. 85, 102 Am. St. 790.

[49] Federal Life Ins. Co. v. Kerr, 173 Ind. 613, 89 N. E. 398, 91 N. E. 230; Federal Life Ins. Co. v. Arnold, 46 Ind. App. 114, 90 N. E. 493, 91 N. E. 357; Federal Life Ins. Co. v. Risinger, 46 Ind. App. 146, 91 N. E. 533; Milborne v. Royal Ben. Soc., 14 App.

conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto."[50]

§ 4343. **Special provisions.**—The relations between the insurer and a mortgagee, to whom the policy is made payable as his interest may appear, are to be determined by such special provisions as are in or attached to the policy. In the absence of such provisions a mortgagee to whom a policy is made payable stands in the position of the mortgagor, as far as the insurance company is concerned, and, being bound by his acts, can recover only when there has been no forfeiture by such mortgagor.[51] A mortgagee, in the absence of any provision making the policy payable to him, has no interest in a policy held by the mortgagor.[52]

A common form of mortgage clause provides that, "Loss or damage, if any, under this policy, shall be payable to ———, as mortgagee (or trustee) as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein,

Div. (N. Y.) 406, 43 N. Y. S. 1026; Fischer v. Hope Mut. Life Ins. Co., 69 N. Y. 161; National Mutual Ins. Co. v. Home Benefit Soc., 181 Pa. St. 443, 37 Atl. 519, 59 Am. St. 666. And see upon the general subject, including liability on the contract and extent of recovery, the note to Traders' Ins. Co. v. Aachen &c. Ins. Co. (150 Cal. 370), in 8 L. R. A. (N. S.) 844. And also note in 38 L. R. A. (N. S.) 459.

[50] This clause is found in the standard policies in New York, New Jersey, Rhode Island, Connecticut, Michigan, Louisiana, Wisconsin, Iowa, North Dakota, South Dakota and North Carolina. Massachusetts, Minnesota, Maine and New Hampshire have a clause with reference to mortgagees as follows: "If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate; provided, that the mortgagee shall, on demand, pay according to the established scale of rates for any increase of risks not paid for by the insured; and whenever this company shall be liable to a mortgagee for any sum for loss under this policy, for which no liability exists as to the mortgagor or owner, and this company shall elect by itself or with others, to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the companies interested, upon such payment, the said mortgage, together with the note and the debt thereby secured."

[51] Harrington v. Fitchburg Mut. Fire Ins. Co., 124 Mass. 126; Security Co. v. Panhandle Nat. Bank, 93 Tex. 575, 57 S. W. 22; Bates v. Equitable Ins. Co., 10 Wall. (U. S.) 33, 19 L. ed. 882. See also, Continental Ins. Co. v. Hulman, 92 Ill. 145, 34 Am. Rep. 122; Sun Ins. Co. v. Greenville &c. Assn., 58 N. J. L. 367, 33 Atl. 962; Grosvenor v. Atlantic Fire Ins. Co., 17 N. Y. 391. And see, even under loss payable clause, note in 135 Am. St. 746, et seq.

[52] Lindley v. Orr, 83 Ill. App. 70; Ryan v. Adamson, 57 Iowa 30, 10 N. W. 287; Carpenter v. Providence-Washington Ins. Co., 16 Pet. (U. S.) 495, 10 L. ed. 1044.

shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall on demand pay the same."[53] A rider of this character is an independent contract between the company and the mortgagee,[54] and it is held that a policy with a standard mortgage clause making it payable to a first mortgage cannot be shown by extrinsic evidence, in an action at law by a second mortgagee to recover thereon, to have been intended to include the second mortgagee.[55] It is also often provided that the mortgagee shall notify the insured of any change in ownership coming to his knowledge, but it has been held that this provision is directory merely, and that a change to the mortgagee's knowledge which did not increase the risk did not invalidate the policy, although the company was not notified.[56] It has been held that a mortgagee to whom a policy is payable in case of loss, as his interest may appear, may, when the mortgagor has forfeited his right to recover, collect only the amount due on the mortgage when the contract was made, and that such a provision contemplates a possible diminution of the interest of the mortgagee by part payment of his debt, but does not include additional claims.[57] An action on a policy payable to a mort-

[53] See note in 135 Am. St. 751-760, giving that form, and reviewing the authorities on various questions arising under it.

[54] Dwelling House Ins. Co. v. Kansas Loan & Trust Co., 5 Kans. App. 137, 48 Pac. 891; Reed v. Firemen's Insurance Co., 76 N. J. L. 11, 69 Atl. 724; Smith v. Union Ins. Co., 25 R. I. 260, 55 Atl. 715, 105 Am. St. 882. See also, Magoun v. Firemen's Fund Ins. Co., 86 Minn. 486, 91 N. W. 5, 91 Am. St. 370; Bacot v. Phenix Ins. Co., 96 Miss. 223, 50 So. 729, 25 L. R. A. (N. S.) 1226n, and note to Brecht v. Law &c. Ins. Co., 18 L. R. A. (N. S.) 197, where the authorities on both sides are reviewed as to the effect of the "union mortgage clauses," also note in 135 Am. St. 752, et seq. Hastings v. Westchester Fire Ins. Co., 73 N. Y. 141; Eddy v. London Assur. Corp., 143 N. Y. 311, 322, 38 N. E. 307, 25 L. R. A. 686.

[55] Kupferschmidt v. Agricultural Ins. Co., 80 N. J. L. 441, 78 Atl. 225, 34 L. R. A. (N. S.) 503n. See also, Weinberger v. Agricultural Ins. Co., 80 N. J. L. 202, 76 Atl. 343. And compare, Kissire v. Plunkett &c. Co. (Ark.), 145 S. W. 567.

[56] Whitney v. American Ins. Co. (Cal.), 56 Pac. 50. But see, Continental Ins. Co. v. Anderson, 107 Ga. 541, 33 S. E. 887.

[57] Attleborough Sav. Bank v. Secur-

gagee, as his interest may appear, may, however, be begun before the debt secured by the mortgage is due and payable; [58] and it seems to be both his right and his duty, in the absence of any agreement to the contrary, to hold the fund and apply it upon the indebtedness as it falls due.[59] The insurance company must pay the loss to the creditor, and cannot require him first to proceed against his debtor.[60] The fact that the mortgagee holds collateral security which is ample to pay his debt is no defense in an action by the mortgagee against the insurance company.[61] But the contract generally provides that upon payment of the insurance to the mortgagee, the insurer shall be subrogated to the rights of the mortgagee in such collaterals.[62] Where insurance is procured by a mortgagee on his own interest, the mortgagor has no interest in the proceeds, and cannot compel their application to the reduction of his debt.[63]

Where the policy is payable to a mortgagee, as his interest may appear, the balance, if any, to the mortgagor, and the indebtedness equals the total amount of the loss, it has been held that the action must be brought by the mortgagee; for after loss the obligation of the insurance company is a contract for the payment of money, and suit must be brought in the name of the beneficial owner.[64]

§ 4344. Other provisions—Construction of terms—Indorsement.—Other clauses usually found in the standard

ity Ins. Co., 168 Mass. 147, 46 N. E. 390, 60 Am. St. 373; Palmer Sav. Bank v. Insurance Co., 166 Mass. 189, 44 N. E. 211, 32 L. R. A. 615, 55 Am. St. 387; Foster v. Van Reed, 70 N. Y. 19, 26 Am. Rep. 544.

[58] Planters' Mutual Ins. Assn. v. Southern Savings &c. Co., 68 Ark. 8, 56 S. W. 443.

[59] Kortlander v. Elston, 52 Fed. 180, 2 C. C. A. 657; Larrabee v. Lumbert, 32 Maine 97; Thorp v. Croto, 79 Vt. 390, 65 Atl. 562, 10 L. R. A. (N. S.) 1166 and note, 118 Am. St. 961n.

[60] Excelsior Fire Ins. Co. v. Royal Ins. Co., 55 N. Y. 343, 14 Am. Rep. 271.

[61] Kernochan v. New York Bowery Fire Ins. Co., 17 N. Y. 428.

[62] Alamo Fire Ins. Co. v. Davis, 25 Tex. Civ. App. 342, 60 S. W. 802.

[63] Ely v. Ely, 80 Ill. 532; Concord Union Mut. Fire Ins. Co. v. Woodbury, 45 Maine 447; Foster v. Van Reed, 70 N. Y. 19, 26 Am. Rep. 544; Dunbrack v. Neall, 55 W. Va. 565, 47 S. E. 303, note in 118 Am. St. 969.

[64] Capital City Ins. Co. v. Jones, 128 Ala. 361, 30 So. 674, 86 Am. St. 152. See also, German Ins. Co. v. Gibbs, 42 Tex. Civ. App. 407, 92 S. W. 1068, 96 S. W. 760. See generally to the effect that the mortgagee is the proper plaintiff and the mortgagor not a necessary party, Westchester Fire Ins. Co. v. Coverdale, 48 Kans. 446, 29 Pac. 682; Palmer Sav. Bank v. Insurance Company, 166 Mass. 189, 44 N. E. 211, 32 L. R. A. 615, 55 Am. St. 387; Smith v. Union Ins. Co.,

form are the following: "Wherever in this policy the word 'insured' occurs, it shall be held to include the legal representatives of the insured, and wherever the word 'loss' occurs, it shall be deemed the equivalent of 'loss or damage.'"[65] "If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto."[66] "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto."[67] These clauses seem plain and need no particular treatment further than has already been given to the general subject.

25 R. I. 260, 55 Atl. 715, 105 Am. St. 882.

[65] Found in the standard policies in use in New York, New Jersey, Connecticut, Michigan, Rhode Island, Wisconsin, Iowa, South Dakota, Louisiana, North Dakota and North Carolina. It is not in the standard policies of Massachusetts, Minnesota, Maine and New Hampshire.

[66] This provision is in the standard policies of New York, New Jersey, Connecticut, Michigan, Louisiana, Wisconsin, Iowa, North Dakota, North Carolina and Rhode Island. It is not in the standard policies of Massachusetts, Minnesota and Maine. New Hampshire provides in the cancellation clause that "mutual companies may vary this clause to suit their methods of business."

[67] This is found in the standard policies of New York, New Jersey, Rhode Island, Connecticut, Louisiana, Iowa, Michigan, Wisconsin, South Dakota, North Dakota and North Carolina. The standard policies of Massachusetts, Minnesota, Maine and New Hampshire do not have it.

CHAPTER CXXIX.

LIFE INSURANCE AND STIPULATIONS IN POLICIES.

§ 4350. General Statement.
4351. Parties.
4352. The beneficiary—Manner of designation—Right to fund.
4353. Transmission of interest of beneficiary.
4354. Rights of beneficiary.
4355. Reservation of a right to change beneficiary.
4356. Manner of changing beneficiary.
4357. Right to proceeds — Bankruptcy.
4358. Payment of premium a condition precedent.
4359. Time when premium is due——Construction by agent—Estoppel.
4360. Powers of agent.
4361. Statement of age.
4362. Assignment of policy.
4363. Notice to company.
4364. Manner of making assignment.
§ 4365. Assignment of policy by assignee.
4366. Incontestable clause.
4367. Special privileges.
4368. Provisions in the application.
4369. Suicide—Sane or insane.
4370. Where there is no provision as to the effect of suicide.
4371. Suicide—Construction.
4372. Presumption — Burden of proof.
4373. Residence and occupation.
4374. Death in violation of law or at the hands of justice.
4375. Habits.
4376. Health and freedom from disease.
4377. Bodily injuries.
4378. Medical attendance.
4379. Family relationship.
4380. Other insurance.
4381. Rejection of former application.
4382. Proof of death.

§ 4350. **General statement.**—There is no standard form of life insurance policy. Each company uses the form which seems best adapted to its own manner of doing business; but, as in fire insurance, the tendency is toward the adoption of a simple form, with liberal provisions and stipulations for the benefit of the insured. There is more variation in the forms of endowment, term policies and the like than in the case of straight life policies, and, in some forms, certain questions and answers are embodied in or attached to the policies, and conditions or warranties are printed therein, while in others there are schedules or terms with certain options, and the like. Many of the provisions, however, in most forms are very similar in substance.

§ 4351. **Parties.**—There are usually but two parties to a fire insurance contract, although there may be a third party to

whom the fund or a part thereof has been assigned. In life insurance contracts, however, there are often four parties who must be considered,— the insured, the insurer, the beneficiary, and the holder of the policy. The rules governing the rights and capacities of the parties in general have already been considered.[1]

§ 4352. The beneficiary—Manner of designation—Right to fund.—A beneficiary is a person to whom the insured directs the payment of the fund upon his death.[2] This belongs to the person so designated as beneficiary in the policy, although a different person is named in the application.[3] The language used in designating the beneficiary will, if possible, be so construed as to carry out the intention of the parties.[4] When it is payable to the "children" of the insured it includes his children by a former wife,[5] but not a child of his wife by a former husband.[6] Under a policy payable to the wife of the insured, and, upon her death before the insured, to "their children," it has been held that a child by a woman to whom the insured is married after the death of his first wife is not a beneficiary.[7] But

[1] As to the right of an infant to make a contract of insurance, see note to Craig v. Van Bebber, 18 Am. St. 569; Hanner v. Prudential Ins. Co., 137 App. Div. (N. Y.) 504, 122 N. Y. S. 35; Union Cent. L. Ins. Co. v. Hilliard, 63 Ohio St. 478, 59 N. E. 230, 53 L. R. A. 462, 81 Am. St. 644.

[2] As to who may be a beneficiary, see Langdon v. Union Mut. Life Ins. Co., 14 Fed. 272, and elaborate note in 128 Am. St. 302-326. Where the statute prescribes who shall be beneficiaries of fraternal insurance it governs. Meinhardt v. Meinhardt, 117 Md. 426, 83 Atl. 715; Umberger v. Modern Brotherhood, 162 Mo. App. 141, 144 S. W. 898.

[3] Hunter v. Scott, 108 N. Car. 213, 12 S. E. 1027. A promise by a wife to her husband that she will pay debts does not create a lien upon the proceeds of a benefit certificate on his life of which she is the beneficiary. Fisher v. Donovan, 57 Nebr. 361, 77 N. W. 778, 44 L. R. A. 383. The payment of premiums by a person other than the insured does not, in the absence of an agreement to that effect, create a lien on the proceeds. Lennon v. Metropolitan Life Ins. Co., 20 Misc. (N. Y.) 403, 45 N. Y. S. 1033.

[4] Thus, the word "and" in a clause making the policy payable to "A, trustee and the children of H," the latter being the insured, will be read "for" in order to carry out the apparent intention of the insured to make his children the beneficiaries. Atkins v. Atkins, 70 Vt. 565, 41 Atl. 503.

[5] McDermott v. Centennial &c. Assn., 24 Mo. App. 73; Evans v. Opperman, 76 Tex. 293, 13 S. W. 312.

[6] Koehler v. Centennial Mut. Life Ins. Co., 66 Iowa 325, 23 N. W. 687. See also, Supreme Lodge, O. of M. P. v. Dewey, 142 Mich. 666, 10 N. W. 140, 3 L. R. A. (N. S.) 334, 113 Am. St. 596.

[7] Ætna Mut. Life Ins. Co. v. Clough, 68 N. H. 298, 44 Atl. 520. See also, In re Griffith's Policy (1903), 1 Ch. 739, 72 L. J. (N. S.) 330. But compare first cases cited in next following note.

"widow," or even "wife" may mean or include the surviving subsequent wife in such a case.[8]

"Children" has been held to include an adopted child,[9] but not a grandchild.[10] Where the by-laws of the company require that the insured shall designate as beneficiary some one who is "dependent" upon him, the term is usually confined to those who are actually dependent upon him for support.[11] It includes a wife,[12] but not a concubine[13] or creditor.[14]

"Relatives" may include those by marriage as well as by blood,[15] but not an illegitimate child.[16] Under a policy which directs payment to any relative of the insured, or to any person equitably entitled to it by having incurred expenses on behalf of the insured, it was held that a son of the insured not designated as beneficiary cannot enforce payment although he has paid the premiums, and that a suit can only be maintained by

[8] In re Browne's Policy (1903), 1 Ch. 188, 72 L. J. Ch. (N. S.) 85, 87 L. T. (N. S.) 588; In re Parker's Policies (1906), 1 Ch. 526, 75 L. J. (N. S.) 297, 94 L. T. (N. S.) 477; Riley v. Riley, 75 Wis. 464, 44 N. W. 112. And see also, Meeker v. Draffen, 201 N. Y. 205, 94 N. E. 626, 33 L. R. A. (N. S.) 816, and note as to gift to "husband," "wife" or "widow."

[9] Martin v. Ætna &c. Ins. Co., 73 Maine 25.

[10] United States Trust Co. v. Mutual &c. Ins. Co., 115 N. Y. 152, 21 N. E. 1025; Cutchin v. Johnston, 120 N. Car. 51, 26 S. E. 698; Winsor v. Odd Fellows' &c. Assn., 13 R. I. 149. Contra, Estate of Conrad, 89 Iowa 396, 56 N. W. 535, 48 Am. St. 396; Duvall v. Goodson, 79 Ky. 224, 1 Ky. L. (abstract) 319.

[11] McCarthy v. Supreme Lodge, 153 Mass. 314, 26 N. E. 866, 11 L. R. A. 144, 25 Am. St. 637; Ballou v. Gile, 50 Wis. 614, 7 N. W. 561. See also, Morey v. Monk, 145 Ala. 301, 40 So. 411. It does not include a member's fiancee unless dependent as a matter of fact. Alexander v. Parker, 144 Ill. 355, 33 N. E. 183, 19 L. R. A. 187. See also, Supreme Council v. Perry, 140 Mass. 580, 5 N. E. 634.

[12] Ballou v. Gile, 50 Wis. 614, 7 N. W. 561.

[13] Keener v. Grand Lodge A. O. U. W., 38 Mo. App. 543. See also, Severa v. Beranak, 138 Wis. 144, 119 N. W. 814. Compare Rice v. Rice's Admr., 23 Ky. L. 635, 63 S. W. 586; Bolton v. Bolton, 73 Maine 299; Tutt v. Jackson, 87 Miss. 207, 39 So. 420; Woodson v. Colored Grand Lodge, 97 Miss. 210, 52 So. 457 Compare also, Meinhardt v. Meinhardt, 117 Md. 426, 83 Atl. 715.

[14] Skillings v. Massachusetts Ben. Assn., 146 Mass. 217, 13 N. E. 566; Lavigne v. Ligue des Patriotes, 178 Mass. 25, 59 N. E. 674, 54 L. R. A. 814, 86 Am. St. 460; also Modern Woodmen v. Comeaux, 79 Kans. 493, 101 Pac. 1, 25 L. R. A. (N. S.) 814n, and Murphy v. Nowak, 223 Ill. 301, 79 N. E. 112, 7 L. R. A. (N. S.) 393n; Supreme Lodge K. of H. v. Nairn, 60 Mich. 44, 26 N. W. 826. But compare Wilber v. Supreme Lodge of New Eng. (Mass.), 78 N. E. 445; and Emmons v. Supreme Conclave, 6 Pennew. (Del.) 115, 63 Atl. 871.

[15] Simcoke v. Grand Lodge, 84 Iowa 383, 51 N. W. 8, 15 L. R. A. 114. But the son of the insured's wife was held not a relative of his, in Morey v. Monk, 145 Ala. 301, 40 So. 411.

[16] Lavigne v. Ligue des Patriotes, 178 Mass. 25, 59 N. E. 674, 54 L. R. A. 814, 86 Am. St. 460.

the executor or administrator of the insured, with whom the contract was made.[17]

It has been held that the provision does not give such persons a vested interest as beneficiaries; it merely gives the company an option to pay the insurance to them.[18] Where a policy was payable to the "executors, administrators, or assigns of the person named as the insured in said policy, unless settlement shall be made under provisions of article second hereinafter contained," and this article provided that "the company may pay the sum of money insured hereby to any relative by blood, or connection by marriage of the insured, or to any other person appearing to said company to be equitably entitled to the same, by reason of having incurred expenses in any way or on behalf of the insured for his or her burial, or for any other purpose," it was held that the company might pay the policy to the widow of the insured, and, in the absence of fraud, this would discharge its obligation.[19]

The word "heirs" describes those who take under the statute of descent and distribution. By the weight of authority, when used in an instrument to designate the persons to whom personal property is thereby transferred, given, or bequeathed, and the context does not explain it otherwise, it means those who would under the statute of distribution be entitled to the personal estate in the event of death or intestacy.[20] It generally includes the widow, but does not include executors.[21]

It has been held that a wife who is separated from her husband may receive benefits under a certificate which the insured is entitled to hold for the benefit of his family.[22] And an adult

[17] Lewis v. Metropolitan Life Ins. Co., 178 Mass. 52, 59 N. E. 439, 86 Am. St. 463.

[18] Wokal v. Belsky, 53 App. Div. (N. Y.) 167, 65 N. Y. S. 815, 31 Civ. Proc. (N. Y.) 130.

[19] American Security &c. Co. v. Prudential Ins. Co., 16 App. D. C. 318.

[20] Johnson v. Supreme Lodge of Knights of Honor, 53 Ark. 255, 13 S. W. 794, 8 L. R. A. 732, and cases cited. See also, Walsh v. Walsh, 66 Hun (N. Y.) 297, 20 N. Y. S. 933, 49 N. Y. St. 231, affd. 143 N. Y. 662, 39 N. E. 21; Thomas v. Covert, 126 Wis. 593, 105 N. W. 922, 3 L. R. A. (N. S.) 904, and note.

[21] Loos v. John Hancock Mut. Life Ins. Co., 41 Mo. 538. It has been construed under conflicting provisions as meaning next of kin. Britton v. Supreme Council, 46 N. J. Eq. 102, 18 Atl. 675, 19 Am. St. 376. But sometimes the widow is held not included. See first case cited in last preceding note; also Phillips v. Carpenter, 79 Iowa 600, 44 N. W. 898, and Burke v. Modern Woodmen, 2 Cal. App. 611, 84 Pac. 275.

[22] Smith v. Boston &c. R. Assn., 168 Mass. 213, 48 N. E. 626.

daughter living with the insured belongs to his "immediate family" within the meaning of a charter provision so limiting those who may be named as beneficiaries.[23]

The words "legal representatives" refer to the executors and administrators[24] rather than to the heirs or next of kin of the insured.[25] But this is not always the case. Thus it was said in Minnesota:[26] "We are satisfied that the heirs (including the widow) of the deceased are the benficiaries of the policy, and that the words 'legal representatives,' as therein used, must be construed as meaning heirs or next of kin, and not executors or administrators. * * * They will be construed in that way more readily in policies of life insurance than in almost any other kind of an instrument for the reason that such insurance is very commonly intended as a provision for the family of the insured. A controlling fact in this case is that, whenever the words 'personal representatives' are used, they have reference, not to the person entitled merely to receive the money, but to those for whose 'benefit' or 'use' the policy is taken or the money is payable. It is not to be supposed that the insured intended his executors or administrators personally to be the beneficiaries of the policy." So, it was said in Maryland:[27] "The term 'legal representatives' is sufficiently broad to cover all persons who, with respect to his property, stand in his place, and represent his interests, whether transferred to them by his act, or by operation of law. It may in this case include assigns, as well as executors and administrators."

[23] Dalton v. Knights of Columbus, 80 Conn. 212, 67 Atl. 510, 125 Am. St. 116. See also, Davin v. Davin, 114 App. Div. (N. Y.) 396, 99 N. Y. S. 1012. See generally as to who is a "member of the family," note to Bankers' & Merchants' Mut. Ben. Assn. v. Stapp, 77 Tex. 517, 19 Am. St. 772.

[24] Waters v. Kopp, 34 App. D. C. 575; Johnson v. Van Epps, 110 Ill. 551; Hunt v. Remsberg, 83 Kans. 665, 112 Pac. 590, 32 L. R. A. (N. S.) 246.

[25] Pittel v. Fidelity &c. Assn., 86 Fed. 255, 30 C. C. A. 21. See also, New York Life Ins. Co. v. Kansas City Bank, 121 Mo. App. 479, 97 S. W. 195, and Fisher v. Fisher, 28 Ont. Rep. 459.

[26] Schultz v. Citizens' &c. Ins. Co., 59 Minn. 308, 61 N. W. 331, and cases cited. See also, Hall v. Ayer's Guardian, 32 Ky. L. 288, 105 S. W. 911; In re Harton's Estate, 213 Pa. 499, 62 Atl. 1058, 4 L. R. A. (N. S.) 939; Nashville Trust Co. v. First Nat. Bank, 123 Tenn. 617, 134 N. W. 311.

[27] Robinson v. Hurst, 78 Md. 59, 26 Atl. 956, 20 L. R. A. 761, 44 Am. St. 266, quoted from New York Life Ins. Co. v. Flack, 3 Md. 341, 56 Am. Dec. 742, approved in New York &c. Ins. Co. v. Armstrong, Admrx., 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. 877. In Griswold v. Sawyer, 125 N.

Where the policy is payable to "estate," it is collectible by the legal representatives of the insured.[28] But it is held that it may be assigned by the insured.[29] The surrender value of a policy which the statute provides shall be payable in cash, when, after the payment of two full annual premiums, the insurable interest in the life of the insured is terminated, is payable to the insured, and not to the beneficiaries named in the policy.[30]

Where the policy is for the benefit of the wife and children of the insured, and is payable to "the beneficiary or their executors, administrators, or assigns," and "in case of the death of said beneficiary," before the death of the insured, the amount is to be paid to the executors or administrators of the insured, it has been held that the personal representatives of the insured take the money only after the death of all the beneficiaries before the insured.[31]

Where the policy provides that if the assured lives beyond a certain date, a fractional part of the amount shall be payable to him, his executors, or assigns, it has been held that a beneficiary who, in the absence of the insured, has paid premiums up to that time may recover the full amount of the policy upon the presumption of the death of the insured, after his absence from the state for seven years without being heard from, and that if the assured should thereafter return, he would be estopped from making any claim under the policy.[32]

§ 4353. Transmission of interest of beneficiary.—According to what is, perhaps, the weight of authority, where the policy is payable to a wife and children, the heirs of a child who dies before the death of the insured take the interest of such deceased child. Thus, where the policy was payable to the children of the

Y. 411, 26 N. E. 464, it was held that a policy payable to his "legal representatives" can only be assigned by the consent of the beneficiary named therein, and the term "legal representative" as employed in the policy means the children or heirs at law of the deceased.

[28] Basye v. Adams, 81 Ky. 368, 5 Ky. L. 91.

[29] Southern Mut. Life Ins. Assn. v. Durin, 132 Ga. 495, 64 S. E. 264, 131 Am. St. 210.

[30] Hazen v. Massachusetts Mut. Life Ins. Co., 170 Mass. 254, 49 N. E. 119.

[31] Clark v. Dawson, 195 Pa. St. 137, 45 Atl. 674.

[32] Mutual &c. Ins. Co. v. Martin, 108 Ky. 11, 21 Ky. L. 1465, 55 S. W. 694. See also, Miller v. Sovereign Camp, 140 Wis. 505, 122 N. W. 1126, 28 L. R. A. (N. S.) 178n, 133 Am. St. 1095.

insured if the mother was not living at his death, it was held that the children had a vested though contingent interest in the policy, and on the death of one of them before the mother's death, his interest descended to his widow and children.[33] So, where the wife insures her interest in the life of her husband for her own benefit if she survives him, otherwise for the benefit of her children, and dies during his lifetime, leaving children surviving her who also die during his life, the proceeds of the policy go to the administrator of the children, and not to the estate of the insured.[34]

A policy was made payable to the wife of the insured if living at the time of his death, but in the event she should die before his decease, then "to their children for their use, or to their guardian, if under age." At the time the policy was issued the parties had nine living children, three of whom died before their mother. Upon the death of the insured, leaving the six children surviving, the question was whether the children each took an interest in the policy immediately upon its delivery, and, if so, were the interests of the three whose deaths antedated that of their mother transmitted to their distributees and representatives. The court held that each child, upon the delivery of the policy, took a transmissible interest in it, and that, the mother having died before the father, at his death the distributee of the dead child stood in the place of its parent and was entitled to share with the living children in the insurance fund.[35] So, there are many other cases holding that upon the death of the beneficiary before the insured, and failure of other designation, the heirs or representatives of the beneficiary are entitled to the fund as against those of the member of a mutual benefit association.[36]

[33] Voss v. Connecticut &c. Ins. Co., 119 Mich. 161, 77 N. W. 697, 44 L. R. A. 689. Compare Dennis v. Modern Brotherhood, 119 Mo. App. 210, 95 S. W. 967.

[34] Millard v. Brayton, 177 Mass. 533, 59 N. E. 436, 52 L. R. A. 117, 83 Am. St. 294. See Smith v. Ætna Life Ins. Co., 68 N. H. 405, 44 Atl. 531 And compare also, In re Dobbel, 104 Cal. 432, 38 Pac. 87, 43 Am. St. 123.

[35] Glenn v. Burns, 100 Tenn. 295, 45 S. W. 784. See also, Continental Life Ins. Co. v. Palmer, 42 Conn. 60, 19 Am. Rep. 530; In re Conrad's Estate, 89 Iowa 396, 56 N. W. 535, 48 Am. St. 396; Hooker v. Sugg, 102 N. Car. 115, 8 S. E. 919, 3 L. R. A. 217, 11 Am. St. 717n; Conigland v. Smith, 79 N. Car. 303. And see also, Perry v. Tweedy, 128 Ga. 402, 57 S. E. 782, 119 Am. St. 393.

[36] Thomas v. Cochran, 89 Md. 390, 43 Atl. 792, 46 L. R. A. 160; Anderson v. Supreme Council, 69 N. J. Eq.

Other courts, however, take a different view of the general subject and hold that on the delivery of the policy the children then alive have a contingent interest, but say that it is not transmissible.[37] And where there is no valid designation of a beneficiary, the member's heirs or representatives are usually held to take under various provisions of the charter or by-laws of mutual benefit associations,[38] although in the absence of any such provision it has been held that the fund in such a case reverts to the association.[39]

§ 4354. Rights of beneficiary.—In ordinary life insurance, where no power of disposition is reserved to the insured, the beneficiary, immediately upon the issuance of the policy, acquires a vested right therein which cannot be impaired without his consent.[40] This general rule has been well stated by the Supreme

176, 60 Atl. 759; and note in 17 L. R. A. (N. S.) 1083, affd. 70 N. J. Eq. 810, 67 Atl. 1103.

[37] Continental Life Ins. Co. v. Webb, 54 Ala. 688; Walsh v. Mutual Life Ins. Co., 133 N. Y. 408, 31 N. E. 228, 28 Am. St. 651; United States Trust Co. v. Mutual &c. Ins. Co., 115 N. Y. 152, 21 N. E. 1025. See also, Supreme Council v. Gehrenbeck, 124 Cal. 43, 56 Pac. 640; Modern Woodmen v. Puckett (Kans.), 94 Pac. 132, 17 L. R. A. (N. S.) 1083; Michigan Mutual Ben. Assn. v. Rolfe, 76 Mich. 146, 42 N. W. 1094; Supreme Council v. Adams, 68 N. H. 236, 44 Atl. 380; Smith v. Metropolitan Life Ins. Co., 222 Pa. St. 226, 71 Atl. 11, 20 L. R. A. (N. S.) 928n, 128 Am. St. 799.

[38] Modern Woodmen v. Puckett (Kans.), 94 Pac. 132, 17 L. R. A. (N. S.) 1083, and numerous cases there cited in note, among which are: Haskins v. Kendall, 158 Mass. 224, 33 N. E. 495, 35 Am. St. 490; Doherty v. Ancient Order of Hibernians, 176 Mass. 285, 57 N. E. 463; Fischer v. American Legion, 168 Pa. St. 279, 31 Atl. 1089; Speegle v. Soverign Camp, 77 S. Car. 517, 58 S. E. 435; Schonfield v. Turner, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189. See also, Supreme Lodge v. Menkhausen, 209 Ill. 277, 70 N. E. 567, 65 L. R. A. 508, 101 Am. St. 239; Newman v. Covenant &c. Assn., 76 Iowa 56, 40 N. W. 87, 1 L. R. A. 659, 14 Am. St. 196.

[39] Maryland Mut. &c. Soc. v. Clendinen, 44 Md. 429, 22 Am. Rep. 52; Warner v. Modern Woodmen, 67 Nebr. 233, 93 N. W. 397, 61 L. R. A. 603, 108 Am. St. 634, and note in 17 L. R. A. (N. S.) 1083.

[40] Ricker v. Charter Oak Life Ins. Co., 27 Minn. 193, 6 N. W. 771, 38 Am. Rep. 289; Allis v. Ware, 28 Minn. 166, 9 N. W. 666; City Sav. Bank v. Whittle, 63 N. H. 587, 3 Atl. 645. See also, Boyden v. Massachusetts Mut. Life Ins. Co., 153 Mass. 544, 27 N. E. 669; Lockwood v. Michigan Mut. Life Ins. Co., 108 Mich. 334, 66 N. W. 229; Ferndon v. Canfield, 104 N. Y. 143, 10 N. E. 146, affg. 39 Hun (N. Y.) 571; In re Brown's Appeal, 125 Pa. St. 303, 17 Atl. 419, 11 Am. St. 90. See Weston v. Richardson, 47 L. T. (N. S.) 514; Glanz v. Gloeckler, 104 Ill. 573, 44 Am. Rep. 94; Wilmaser v. Continental Life Ins. Co., 66 Iowa 417, 23 N. W. 903, 55 Am. Rep. 277; Lambert v. Penn Mut. Life. Ins. Co., 50 La. Ann. 1027, 24 So. 16; Jackson Bank v. Williams, 77 Miss. 398, 26 So. 965, 78 Am. St. 530. For nature of beneficiary's interest, see Harley v. Heist, 86 Ind. 196, 44 Am. Rep. 285. That consent of beneficiary to assignment is not required, see Mutual Life Ins.

Court of the United States,[41] and prevails almost everywhere. In Wisconsin the insured may dispose of the policy, by will, to the exclusion of the beneficiary, when he has paid the premiums and kept control of the policy.[42]

In many states there are statutes which protect the interests of married women and their children in the proceeds of life insurance policies upon the lives of their husbands as against the claims of creditors of the husband.[43] These statutes have undoubtedly had some effect in inducing the courts to adopt the rule above stated, although it is generally accepted without reference to the statutes.[44]

This rule does not apply to certificates issued by mutual benefit associations, and beneficiaries under such certificates acquire no vested rights in the same,[45] in the absence of an agreement founded on a consideration. "The essential difference between a certificate of membership in a beneficiary association and an ordinary life policy is that in the latter the rights of the beneficiary are fixed by the terms of the policy, while in the former they depend upon the certificate and the rights of the member under the constitution and by-laws of the society. In the one case the rights of the beneficiary are fixed and vested from the

Co. v. Twyman, 122 Ky. 513, 28 Ky. L. 1153, 92 S. W. 335, 121 Am. St. 471; Nixon v. Malone (Tex. Civ. App.), 95 S. W. 577.

[41] Central Bank v. Hume, 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. 41.

[42] Foster v. Gile, 50 Wis. 603, 7 N. W. 555, 8 N. W. 217; Berg v. Damkoehler, 122 Wis. 587, 88 N. W. 606. See also, Rison v. Wilkerson, 3 Sneed (Tenn.) 565; Clark v. Durand, 12 Wis. 223; Kerman v. Howard, 23 Wis. 108. See also, Gambs v. Covenant Mut. Life Ins. Co., 50 Mo. 44, and cases cited in preceding notes.

[43] For consideration of these statutes, see Eadie v. Slimmon, 26 N. Y. 9, 82 Am. Dec. 395. See also, Connecticut &c. Ins. Co. v. Burroughs, 34 Conn. 305, 91 Am. Dec. 725; Smedley v. Felt, 43 Iowa 607; Wirgman v. Miller, 98 Ky. 620, 33 S. W. 937; Troy v. Sargent, 132 Mass. 408; Ionia County Sav. Bank v. McLean, 84 Mich. 625, 48 N. W. 159; Fraternal Mut. Life Ins. Co. v. Applegate, 7 Ohio St. 293; McNeil v. United Order of Golden Cross, 131 Pa. St. 339, 18 Atl. 899.

[44] Hubbard v. Stapp, 32 Ill. App. 541; Ætna Life Ins. Co. v. Mason, 14 R. I. 583; New York &c. Ins. Co. v. Ireland (Tex.), 17 S. W. 617, 14 L. R. A. 278; Central Bank v. Hume, 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. 41.

[45] Longer v. Carter (Ark.), 143 S. W. 575; Robinson v. United States Mut. Acc. Assn., 68 Fed. 825; Martin v. Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. 620; Presbyterian Mut. Assur. Fund v. Allen, 106 Ind. 593, 7 N. E. 317; Marsh v. Supreme Council, 149 Mass. 512, 21 N. E. 1070, 4 L. R. A. 382; Metropolitan Life Ins. Co. v. O'Brien, 92 Mich. 584, 52 N. W. 1012; Finch v. Grand Grove, 60 Minn. 308, 62 N. W. 384; Sabin v. Phinney, 134 N. Y. 423, 31 N. E. 1087, 30 Am. St. 681; Thomas v. Grand Lodge, 12 Wash. 500, 41 Pac. 882.

moment the policy takes effect; in the other, they are subject to such changes as the law of the association authorizes the member to make. All that a beneficiary has during the lifetime of the member, owing to his right of revocation, is a mere expectancy, dependent upon the will and pleasure of the holder of the certificate. This expectancy is not property."[46]

In some states the rule that the beneficiary may dispose of the policy does not apply to policies taken under statutes which authorize a policy to be taken out by the husband for the benefit of the wife.[47] The rule was established in New York under the original statute which made policies on the lives of husbands payable to married women free from claims of the creditors of the husbands, but under a later statute the wife may assign such a policy with the written consent of her husband.[48] It has been held that the beneficiary may also dispose of his interest in the policy by pledge,[49] mortgage,[50] or gift.[51]

§ 4355. Reservation of a right to change beneficiary.— The contract may reserve to the insured the right to change the beneficiary at will, and when this is done the original beneficiary acquires no vested interest in the policy or its proceeds, and until

[46] Masonic Mutual Ben. Soc. v. Burkhart, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449; Schoenau v. Grand Lodge, 85 Minn. 349, 88 N. W. 999. See also, Modern Woodmen v. Puckett (Kans.), 94 Pac. 132, 17 L. R. A. (N. S.) 1083.

[47] Smith v. Head, 75 Ga. 775; Godfrey v. Wilson, 70 Ind. 50; Eadie v. Slimmon, 26 N. Y. 9, 82 Am. Dec. 395.

[48] Eadie v. Slimmon, 26 N. Y. 9, 82 Am. Dec. 395; Brick v. Campbell, 122 N. Y. 337, 25 N. E. 493, 10 L. R. A. 259. See N. Y. Laws (1879), ch. 248.

[49] Martin v. Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. 620.

[50] Dungan v. Mutual &c. Ins. Co., 46 Md. 469.

[51] In re Madeira's Appeal, 1 Sad. (Pa.) 491, 4 Atl. 908. A beneficiary who murders the insured cannot recover on the policy. Filmore v. Metropolitan Life Ins. Co., 82 Ohio St. 208, 92 N. E. 26, 28 L. R. A. (N. S.) 675, 137 Am. St. 778. But the insurance may go to the estate of the insured. Schmidt v. Northern L. Assn., 112 Iowa 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. 323. In Holdom v. Ancient Order of United Workmen, 159 Ill. 619, 43 N. E. 772, 31 L. R. A. 67, 50 Am. St. 183, the court said: "The only question of law presented in this record is, does an insane beneficiary in a life insurance policy, who kills the insured under such circumstances as would cause the killing to be murder if the beneficiary were sane, thereby forfeit his right to recover the insurance money? This presents a question of first impression. The causing the death of the assured by felonious means by a sane assignee of a policy of life insurance, has been held sufficient to defeat a recovery on the policy." New York Ins. Co. v. Armstrong, Admrx., 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. 877. Prince &c. Assn. Co. v. Palmer, 25 Beav. 605.

after the death of the insured he has a mere expectancy.[52] This right to change the beneficiary may be reserved in the policy, certificate, or in the charter or by-laws, where the insurance is by mutual or benefit associations. In the latter case it has been held the right may be conferred by an amendment to the by-laws, which by its terms may act retroactively on certificates issued before such amendment.[53] But it seems clear that the vested interest of a beneficiary in an ordinary life policy, where no right to change is reserved, cannot be taken away by a statute subsequently enacted authorizing a change of beneficiary.[54]

In ordinary life policies the beneficiary takes a vested interest the moment the policy is issued, and the insured cannot change the beneficiary unless the express power to do so is reserved. It is equally well settled that when the right to change the beneficiary is reserved, in either the ordinary contract or a benefit certificate, the beneficiary named acquires no vested interest until the death of the insured, and prior to that time the insured may change the beneficiary at will.[55]

In this respect there is a material difference between an ordinary policy of life insurance and a benefit certificate issued by a fraternal organization. The general rule is that the power to change the beneficiary in the latter case is vested in the member of the society, in the absence of any restrictions in the charter, statute, by-laws, or certificate.[56]

We hold: where an insane beneficiary in a life policy kills the assured under such circumstances as would cause the killing to be murder if the beneficiary were sane, such killing does not cause a forfeiture of the policy nor bar his right of recovery for the insurance money.

[52] Hopkins v. Northwestern Life Assur. Co., 99 Fed. 199, 40 C. C. A. 1; Bilbro v. Jones, 102 Ga. 161, 29 S. E. 118.

[53] Catholic Knights v. Franke, 137 Ill. 118, 27 N. E. 86; Fugure v. Mutual Society of St. Joseph, 46 Vt. 362. But see Supreme Commandery K. of G. R. &c. v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332; Thibert v. Supreme Lodge, 18 Minn. 448, 81 N. W. 220, 47 L. R. A. 136, 79 Am. St. 412; Locomotive Engineers' Mut. Life Assn. v. Winterstein, 58 N. J. Eq. 189, 44 Atl. 199; Pellazzino v. German &c. Soc., 16 Wkly. Law Bul. (Ohio) 27, 9 Ohio Dec. 635.

[54] Blum v. New York Life Ins. Co., 197 Mo. 513, 95 S. W. 317, 8 L. R. A. (N. S.) 923.

[55] Mente v. Townsend, 68 Ark. 391, 59 S. W. 41; Smith v. National Ben. Soc., 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616; Hamilton v. Royal Arcanum, 189 Pa. St. 273, 42 Atl. 186. It is so held that when the insured survives the beneficiary he may change the policy for the benefit of some other person. Smith v. Metropolitan Life Ins. Co., 222 Pa. St. 226, 71 Atl. 11, 20 L. R. A. (N. S.) 928n, 128 Am. St. 799.

[56] "Appellant contends that the insured in the case at bar is given

And where the insured has the right to change the beneficiary, it is immaterial, so far as the original beneficiary is concerned, that he was induced to make the change by fraud.[57] But there is generally held to be an exception to the rule that the members

no authority by the certificate, by-laws or articles of incorporation to change the beneficiary; hence the beneficiary named in the certificate had a vested interest in it the moment it was issued. In other words, he says that no right has been reserved to the insured in the contract or laws of the association to change the beneficiary; therefore, none exists; and the rights of the beneficiary would be the same, as to the assignment of the policy, as in the case of an ordinary life policy. Appellant's conclusions do not necessarily follow, even if the fact be as he claims. It is true that the rights of the assured are to be determined from the contract, and the contract embraces the certificate, by-laws, articles of incorporation, statute law, if any, either providing expressly for a change of beneficiaries or prohibiting such change; * * * but by reason of the character and purpose of such associations, it should be held that the power to change the beneficiary is vested in the member insured during his lifetime." Carpenter v. Knapp, 101 Iowa 712, 70 N. W. 764, 38 L. R. A. 128 (citing Hoeft v. Supreme Lodge, 113 Cal. 91, 45 Pac. 185, 33 L. R. A. 174; Masonic Mutual Ben. Soc. v. Burkhart, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449; Presbyterian Mut. Assur. Fund v. Allen, 106 Ind. 593, 7 N. E. 317; Thomas v. Grand Lodge, 12 Wash. 500, 41 Pac. 882; Fischer v. American Legion of Honor, 168 Pa. St. 279, 31 Atl. 1089).

[57] Hoeft v. Supreme Lodge Knights of Honor, 113 Cal. 91, 45 Pac. 185, 33 L. R. A. 174. In this case the court said: "Defendants do not plead any contract with their deceased father, or any special equities which would deprive him of the right to make a change, but stand upon the ground that they may contest because the change was procured by fraud. But, if it was a fraud, did they have a right to complain? Clearly they had not, unless either by contract or in law they had some vested interest or right in the certificate which had formerly been taken out in their favor. They claim no such vested interest by contract. * * * The beneficiary's interest is the mere expectancy of an incompleted gift, which is revocable at the will of the insured, and which does not and can not become vested as a right until fixed by his death. If it is said that a devisee under a will has, during the life of the testator, a like naked expectancy, it may be freely conceded that it is so; but to the heirs and devisees is confirmed a right of action for fraud, etc., by the provisions of the Code. Otherwise, they, too, would come within the scope of the general principle that a right of action for fraud is personal and untransferable. One can not be defrauded of that in which he has no vested right. A vested right is property, which the law protects, while a mere expectancy is not property, and therefore is not protected. These views will be found supported without conflict by a multitude of authorities from which may be cited: Nibl. Mut. Ben. Soc. (2d ed.), § 234a; Brown v. Grand Lodge, 80 Iowa 287, 45 N. W. 884, 20 Am. St. 420; Schillinger v. Boes, 85 Ky. 357, 9 Ky. L. 18, 3 S. W. 427; Robinson v. United States Mut. Acc. Assn. 68 Fed. 825; Supreme Conclave v. Cappella, 41 Fed. 1; Lamont v. Grand Lodge, 31 Fed. 177; Knights of Honor v. Watson, 64 N. H. 517, 15 Atl. 125; In re Beatty's Appeal, 122 Pa. St. 428, 15 Atl. 861; Martin v. Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. 620. In our own state the cases of Swift v. San Francisco Stock &c. Board, 67 Cal. 567, 8 Pac. 94; Order of Mutual Companions v. Griest, 76 Cal. 494, 18 Pac. 652; Bowman v. Moore, 87 Cal. 306, 25 Pac. 409; and McLaughlin v. McLaughlin, 104 Cal. 171, 37 Pac. 865, 43 Am. St. 83, recognize the same

of a mutual benefit association may change the beneficiary, and that exception is where there is an agreement on consideration moving from the original beneficiary.[58]

§ 4356. Manner of changing beneficiary.—A change in the beneficiary in a mutual benefit certificate must be made in the manner provided by the rules of the society, and any material departure therefrom may invalidate the transaction.[59] But to this rule there are several exceptions:[60] (1) If the society has waived a strict compliance with its rules, and, in pursuance of a request of the insured to change his beneficiary, has issued a new certificate to him, the original beneficiary will not be heard to complain that the course indicated by the regulations was not pursued.[61] (2) If it is beyond the power of the insured to com-

general principles. Jory v. Supreme Council, 105 Cal. 20, 38 Pac. 524, 26 L. R. A. 733, 45 Am. St. 17, and cases involving a like consideration, differ radically from the case at bar."

[58] Savage v. Modern Woodmen, 84 Kans. 63, 113 Pac. 802, 33 L. R. A. (N. S.) 733, and note; Stronge v. Supreme Lodge, 189 N. Y. 346, 82 N. E. 433, 12 L. R. A. (N. S.) 1206, and note, 121 Am. St. 902. Unless there are countervailing equities, or the beneficiary has failed to perform as by failure to continue paying assessments or the like, Masonic Mutual Ben. Assn. v. Tolles, 70 Conn. 537, 40 Atl. 448; Eatman v. Eatman (Tex. Civ. App.), 135 S. W. 165. The only substantial conflict is whether there may be a payment of assessments by the beneficiary in pursuance of an understanding with the insured, most of the courts seeming to hold that there may be, but that voluntary payment without any agreement or understanding is not sufficient. The authorities are reviewed in the notes above referred to. In the recent case of Knights of the Modern Maccabees v. Sharp, 163 Mich. 449, 128 N. W. 786, 33 L. R. A. (N. S.) 780, it is held that children can not enforce a contract between their parents that on insuring their lives for the benefit of each other the survivor will continue the insurance for the benefit of the children, so as to prevent the survivor from changing the beneficiary. McKeon v. Ehringer (Ind. App.), 95 N. E. 604.

[59] Milner v. Bowman, 119 Ind. 448, 21 N. E. 1094, 5 L. R. A. 95; Masonic Mutual Ben. Soc. v. Burkhart, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449; Duvall v. Goodson, 79 Ky. 224, 1 Ky. L. (abstract) 319; National Mut. Aid Soc. v. Lupold, 101 Pa. St. 111, and cases there cited; Berg v. Damkoehler, 112 Wis. 587, 88 N. W. 606. See also Modern Woodmen v. Puckett (Kans.), 94 Pac. 132, 17 L. R. A. (N. S.) 1083; Abbott v. Supreme Colony, 190 Mass. 67, 76 N. E. 234; Ancient Order of Gleaners v. Bury, 165 Mich. 1, 130 N. W. 191, 34 L. R. A. (N. S.) 277, and note; Fink v. Fink, 171 N. Y. 616, 64 N. E. 506; Flowers v. Sovereign Camp, 40 Tex. Civ. App. 593, 90 S. W. 526; Berg v. Damkoehler, 112 Wis. 587, 88 N. W. 606.

[60] Supreme Conclave v. Cappella, 41 Fed. 1; Woodruff Ins. Cas. 381.

[61] Martin v Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. 620; Presbyterian Mut. Assur. Fund v. Allen, 106 Ind. 593, 7 N. E. 317; Holland v. Taylor, 111 Ind. 121, 12 N. E. 116; Wendt v. Iowa, 72 Iowa 682, 34 N. W. 470; Duvall v. Goodson, 79 Ky. 224, 1 Ky. L. (abstract) 319; Supreme Council, Am. L. of H. v. Perry, 140 Mass. 580, 5 N. E. 634; National Mut. Aid Soc. v. Lupold, 101 Pa. St. 111. As to waiver by in-

ply literally with the regulations, a court of equity may treat the change as having been made. (3) If the insured has pursued the course pointed out by the laws of the association and has done all in his power to change the beneficiary, but before a new certificate is actually issued he dies, a court of equity will decree that to be done which ought to be done, and act as though the certificate had in fact been issued.[62] But where all has not been done that was required and could have been done, courts have applied the general rule rather than any exception,[63] and in the case of ordinary old-line insurance it has been held that equity cannot treat the change as accomplished where the contract or statute requires the consent of the insurer to be indorsed on the policy and the insured dies before such consent is given or indorsement made.[64]

According to a number of decisions, a change of beneficiaries in a mutual benefit certificate may be made by will in which the proceeds of the certificate are bequeathed to a certain person named. Where this was done the court said that, "in case a certificate is destroyed, without fault of the assured, so that it is impossible to exercise the right of naming a new beneficiary in accordance with the method prescribed by the by-laws of the corporation, a court of equity would recognize a designation of a beneficiary by any other method which may manifest his intention to exercise the right which he unquestionably possessed, of changing the beneficiary."[65] But, as will be seen from the

surer, see Schoenau v. Grand Lodge, 85 Minn. 349, 88 N. W. 999.

[62] Jory v. Supreme Council, 105 Cal. 20, 38 Pac. 524, 26 L. R. A. 733, 45 Am. St. 17; Supreme Lodge v. Terrell, 99 Fed. 330; State v. Lomlinson, 16 Ind. App. 662, 45 N. E. 1116, 59 Am. St. 335; Hirschl v. Clark, 81 Iowa 200, 47 N. W. 78, 9 L. R. A. 841; Schmidt v. Iowa &c. Ins. Assn., 82 Iowa 304, 47 N. W. 1032, 11 L. R. A. 205; Heydorf v. Conrack, 7 Kans. App. 202, 52 Pac. 700; Schoenau v. Grand Lodge, 85 Minn. 349, 88 N. W. 999; Hall v. Allen, 75 Miss. 175, 22 So. 4, 65 Am. St. 601; Walsh v. St. Louis Union Trust, 148 Mo. App. 179, 127 S. W. 645; Jinks v. Banner Lodge, 139 Pa. St. 414, 21 Atl. 4; Waldum v. Homstad, 119 Wis. 312, 96 N. W. 806. See further cases collected in note to Grand Lodge A. O. U. W. v. Noll, 90 Mich. 37, 51 N. W. 268, 15 L. R. A. 350, 30 Am. St. 419.

[63] Modern Woodmen v. Little, 114 Iowa 109, 86 N. W. 216; Kemper v. Modern Woodmen, 70 Kans. 119, 78 Pac. 452; Ancient Order of Gleaners v. Bury, 165 Mich. 1, 130 N. W. 191, 34 L. R. A. (N. S.) 277; Stringham v. Dillon, 42 Ore. 63, 69 Pac. 1020.

[64] Freund v. Freund, 218 Ill. 189, 75 N. E. 925, 109 Am. St. 283, and note.

[65] Grand Lodge v. Noll, 90 Mich. 37, 51 N. W. 268, 15 L. R. A. 350, 30 Am. St. 419; Grand Lodge v.

cases cited in the note, there is conflict on the subject, and in the case of ordinary old-line life insurance it is generally held that the insured cannot change the beneficiary by will.[66]

§ 4357. Right to proceeds—Bankruptcy.—The bankruptcy law provides that where the bankrupt has an insurance policy which has a cash surrender value payable to himself, his estate, or legal representatives, he may, within thirty days after such surrender value has been ascertained, pay the amount thereof to the trustee, and keep the policy free from all claims of creditors. If he does not do this the policy passes to the trustee as assets for the benefit of his creditors. If the policy has no surrender value the trustee has no interest therein, and it has been held to be immaterial that the bankrupt has within four months prior to the filing of the petition in bankruptcy assigned such policy to his wife.[67] There is considerable confusion and some conflict

Child, 70 Mich. 163, 38 N. W. 1; Woodruff v. Tilman, 112 Mich. 188, 70 N. W. 420; Masonic Benevolent Assn. v. Bunch, 109 Mo. 560, 19 S. W. 25. See also, Raub v. Masonic Mut. Relief Assn., 3 Mackey (D. C.) 68; High Court Catholic Order v. Malloy, 169 Ill. 58, 48 N. E. 392. But see the following cases apparently contra, although in some instances the same decisions were influenced by statute, by-laws, or the like: Holland v. Taylor, 111 Ind. 121, 12 N. E. 116; McClure v. Johnson, 56 Iowa 620, 10 N. W. 217; Mineola Tribe v. Lizer, 117 Md. 136, 83 Atl. 149; Supreme Council v. Perry, 140 Mass. 580, 5 N. E. 634; Daniels v. Pratt, 143 Mass. 216, 10 N. E. 166; In re Harton's Estate, 213 Pa. 499, 62 Atl. 1058, 4 L. R. A. (N. S.) 939; Schardt v. Schardt, 100 Tenn. 276, 45 S. W. 340.

[66] Wilmaster v. Continental Life Ins. Co., 66 Iowa 417, 23 N. W. 903, 55 Am. St. 277; Virgin v. Marwick, 97 Maine 578, 55 Atl. 520. And it is held that a member of a beneficial association cannot by will make a beneficiary of one not within the class authorized to be beneficiaries under the laws of the association. Hawkins v. Duberry (Miss.), 57 So. 919.

[67] Morris v. Dodd, 110 Ga. 606, 36 S. E. 83, 50 L. R. A. 33, with cases in note. But compare In re White, 174 Fed. 333, 98 C. C. A. 205, 26 L. R. A. (N. S.) 451, and note. "A policy of insurance on the life of a bankrupt which has no cash surrender value, and no value for any purpose except contingency of its being valuable at the death of bankrupt if the premiums are kept paid, does not vest in the trustee as assets of the estate." In re Buelow, 98 Fed. 86. Policy is payable to the insured if living, otherwise to his estate. See In re Lange, 91 Fed. 361. Policy is payable to the insured if living, otherwise to his wife or children. In re Boardman, 103 Fed 783; In re Diack, 100 Fed. 770; Bassett v. Parsons, 140 Mass. 169, 3 N. E. 547. As to the rights of creditors when the policy is taken by a solvent creditor and made payable to his wife, see Central Bank v. Hume, 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. 41. See review of this case by Prof. Williston in 25 Am. Law Rev. 185, where the authorities are cited. See also, Pullis v. Robison, 73 Mo. 201, 39 Am. Rep. 497. And see generally, upon the rights of the parties and creditors and purchasers, in case of bankruptcy or in case of judicial sale, National Bank of Commerce v. Appel Clothing Co., 35 Colo. 149, 83 Pac. 965, 4 L. R. A. (N. S.) 456n, 117 Am. St. 186; and In re

among the decisions upon the general subject, especially as to whether section 70a qualifies section 6 of the Bankruptcy Act, but it now seems to be settled by recent decisions of the Supreme Court of the United States that the former section does not qualify the latter and that endowment insurance is included under a statute exempting the proceeds or avails of all life insurance from liability for debt.[68]

§ 4358. Payment of premium a condition precedent.—It is generally provided that the policy shall not take effect until the first premium shall have been actually paid during the lifetime of the insured, and that in case the premium shall not be paid on or before the times specified, at the office of the company, or to agents when they produce receipts signed by the president or other proper officer, then, and in every such case, the policy shall cease and determine, subject, as provided in some policies, to the provisions of the company's nonforfeiture system as indorsed on the policy, with accompanying table. This general subject, including waiver or estoppel, has already been so fully treated that it is sufficient to merely refer here to a few of the decisions, without at this place trying to reconcile them or to lay down any general rule.

Where an insurance company delivers a policy which on its face acknowledges the receipt of the first premium, it has been said that it is estopped thereafter to assert that the premium was not in fact paid,[69] and, while this may be too broad a statement,

Orear, 178 Fed. 632, 102 C. C. A. 78, 30 L. R. A. (N. S.) 990, and note; In re White, 174 Fed. 333, 98 C. C. A. 205, 26 L. R. A. (N. S.) 451, and note; Irons v. United States Life Ins. Co., 128 Ky. 640, 108 S. W. 904, 129 Am. St. 318; Townsend's Assignee v. Townsend (Ky.), 105 S. W. 937, 16 L. R. A. (N. S.) 316, and note.

[68] Holden v. Stratton, 198 U. S. 202, 49 L. ed. 1018, 25 Sup. Ct. 656. See also, Hiscock v. Mertens, 205 U. S. 202, 51 L. ed. 771, 27 Sup. Ct. 488. But where there is a right to change the beneficiary it seems that the policy may pass to the trustee. In re Orear, 178 Fed. 632, 102 C. C. A. 78, 30 L. R. A. (N. S.) 990, and note; In re Herr, 182 Fed. 716.

[69] Dobyns v. Bay State &c. Assn., 144 Mo. 95, 45 S. W. 1107. As to liability on a receipt for the first premium which states that the applicant is to be insured from date of the receipt, where the applicant dies before the policy is delivered, see Lee v. Union Cent. Life Ins. Co., 19 Ky. L. 608, 41 S. W. 319. As to effect of acceptance of premium where policy contains a provision that there is no liability unless the policy has been in force twelve months prior to the death, see Summers v. Fidelity &c. Assn., 84 Mo. App. 605.

it is at least true that the burden of showing nonpayment or meeting the prima facie case thus made would be upon the insurer.[70] Where the policy provides that it shall not take effect until the first premium shall have been actually paid during the lifetime of the insured, its legal effect dates from the time of payment of the first premium, and not from the date it bears;[71] but it becomes a binding contract where the agent accepts the note of the insured in pursuance of a practice which is known to the company.[72] Thus, where it appeared that upon the issuance and delivery of a policy a note was executed and delivered by the insured to the general agent of the company for the first premium, and the policy was found among the effects of the insured at the time of his death, it was held that the presumption was that the policy was delivered at the time it bore date, and that the difference between the face of the note and the amount of the premium was paid in cash or arranged for by the insured. The giving and delivery of the note and the receiving of the policy were treated as payment of the first annual premium.[73]

But the burden of proof is upon the party who asserts that a note was accepted as payment of the first premium. Where the defense was that the first premium was not paid, nor payment thereof waived, and that the policy never went into effect, it was held that there could be no recovery, although the evidence showed, among other things, that the application was accompanied by the applicant's note for the amount of the first premium, together with a memorandum indorsed on the note that it was to be returned if not accepted; that the application and the policy both provided that the insurance should not become binding until the first premium was actually paid, but that the risk was accepted by a general agent having power to bind the company by a waiver of this provision; that the agent, upon receiving the policy and the customary voucher or receipt, tendered them to the applicant and demanded payment of the note; that the maker excused the

[70] Lee v. Fraternal Mut. Ins. Co., 1 Handy (Ohio) 217, 12 Ohio Dec. 109.

[71] Methvin v. Fidelity &c. Assn., 129 Cal. 251, 61 Pac. 1112.

[72] Porter v. Mutual Life Ins. Co., 70 Vt. 504, 41 Atl. 970. As to what is payment, see Mallette v. British Am. Assur. Co., 91 Md. 471, 46 Atl. 1005; Baldwin v. Provident Sav. Life Assur. Soc., 162 N. Y. 636, 57 N. E. 1103.

[73] Thum v. Wolstenholme, 21 Utah 446, 61 Pac. 537.

nonpayment, and the agent delivered the policy to him, but retained the voucher and note; that the agent then left the note with the voucher in a bank for collection, with instructions that the voucher be delivered upon the payment of the note; that at the maker's request the time for the payment of the note was extended, such extension being made, however, as an extension of the time for the payment of the premium; and that the applicant died without paying the note.[74]

As elsewhere shown, this provision may, of course, be waived by the company or its duly authorized agent.[75] Thus, where the agent gave the policy to the insured, although he stated that he could not pay for it at the time, it was held that the company was liable on the policy where the death of the insured occurred but two months after such delivery.[76] But where the policy provided that it should not go into effect until the first premium had been actually received by the company or its authorized agent during the good health of the applicant, and further that no agent of the company had power to make, alter, or discharge contracts, or grant credit, and that no alteration of the terms of the contract should be valid unless in writing and signed by the president of the association, it was held that an agent of the company could not waive payment of the premium during the good health of the insured, as this was a condition precedent to the liability of the association.[77]

It has been held where the company retains a note for the unearned premiums after its maturity and sends it to an attorney for collection, that it waives the forfeiture provided for in the

[74] McDonald v. Provident &c. Assur. Soc., 108 Wis. 213, 84 N. W. 154, 81 Am. St. 885.

[75] See note to Griffith v. New York Life Ins. Co., 101 Cal. 627, 36 Pac. 113, 40 Am. St. 96.

[76] Berliner v. Travelers' Ins. Co., 121 Cal. 451, 58 Pac. 922. See also, as to waiver, Haupt v. Phœnix Mut. Life Ins. Co., 110 Ga. 146, 35 S. E. 342; Citizens' Life Ins. Co. v. Coleman, 148 Ky. 750, 147 S. W. 414; Sick v. Covenant &c. Ins. Co., 79 Mo. App. 609; Griffin v. Prudential Ins. Co., 43 App. Div. (N. Y.) 499, 60 N. Y. S. 79; McGee v. Felter, 75 Misc. (N. Y.) 349, 135 N. Y. S. 267; New York Life Ins. Co. v. Scott, 23 Tex. Civ. App. 541, 57 S. W. 677. As to effect of agreement of agent to change date of premium payment, see Mutual Life Ins. Co. v. Clancy, 111 Ga. 865, 36 S. E. 944.

[77] Reese v. Fidelity Mut. Life Assn., 111 Ga. 482, 865, 36 S. E. 637, 944. See also, St. Louis &c. Ins. Co. v. Kennedy, 6 Bush (Ky.) 450; Russell v. Prudential Ins. Co., 176 N. Y. 178, 68 N. E. 252, 98 Am. St. 656; Oliver v. Mutual Life Ins. Co., 97 Va. 134, 33 S. E. 536.

policy for failure to pay such note at maturity.[78] But where the policy exempts the company from liability while a premium note remains past due and unpaid, it is not revived by a confession of judgment on the note;[79] and, under a policy providing that failure to pay the note at maturity the policy should become void without notice, a failure to pay has been held to work a forfeiture.[80] It is held, however, that if the company accepts a note for the first annual premium, and delivers the policy, it is a payment of the premium, although the note is never paid.[81] Thus, where the policy provided that it should not take effect until the first premium had been actually paid during the lifetime and good health of the insured, and that agents could not alter or discharge a contract, or receive for premiums anything but cash, and the local agent accepted a note for the premium which was unpaid at the death of the insured, and it appeared that the general agent of the company for several years prior to the time of the issuing of the policy had permitted such local agents to accept notes for premiums, and that the insured had previously taken out like policies in the same company through the same agent and given notes for premiums, which were collected by the general agent, it was held that the local agent had authority to waive the provision which required the payment of the premium in cash.[82]

The burden is on the party claiming under the policy to show that the first premium has in fact been paid, or the payment waived, and it is not sufficient for him to show the execution of

[78] Union Cent. L. Ins. Co. v. Moreland, 22 Ky. L. 14, 56 S. W. 653.

[79] Proebstel v. State Ins. Co., 14 Wash. 669, 45 Pac. 308. As to construction of forfeiture clause in a premium note, see Union Cent. L. Ins. Co. v. Buxer, 62 Ohio St. 385, 57 N. E. 66, 49 L. R. A. 737.

[80] Sexton v. Greenbors Life Ins. Co., 157 N. Car. 142, 72 S. E. 863. See also, note to Johnson v. Ætna Ins. Co., 123 Pa. 405, 51 S. E. 339, in 107 Am. St. 99. But compare Franklin Life Ins. Co. v. Wallace, 93 Ind. 7.

[81] Stewart v. Union &c. Ins. Co., 155 N. Y. 257, 49 N. E. 876, 42 L. R. A. 147; Thum v. Wolstenholme, 21 Utah 446, 61 Pac. 537. See also, Tabor v. Michigan Mut. Life Ins. Co., 44 Mich. 324, 6 N. W. 830 (distinguished in Kinne v. Michigan Mut. Life Ins. Co., 92 Wis. 335, 66 N. W. 359).

[82] Provident Sav. Life Assur. Soc. v. Oliver, 22 Tex. Civ. App. 8, 53 S. W. 594. See also, Symonds v. Northwestern Mut. Life Ins. Co., 23 Minn. 491; Brooklyn Life Ins. Co. v. Dutcher, 95 U. S. 269, 24 L. ed. 410; Life Ins. Co. of Virginia v. Hairston, 108 Va. 832, 62 S. E. 1057, 128 Am. St. 989, and note. But compare Batson v. Fidelity Mut. Life Ins. Co., 155 Ala. 265, 46 So. 578, 130 Am. St. 21.

a note for the amount, which recites that it is accepted on condition that if not paid at maturity, the policy shall be void.[83]

Payment to an agent has been held sufficient under a policy providing that if payment is not made into the home office within thirty days after the date of the policy, it shall be void and of no effect.[84] It was held in North Carolina that the time of mailing a check for the premium on an insurance policy is the time of payment,[85] although it does not reach the company until past due.[86] So, the placing of a policy of life insurance in the mail with postage prepaid, so that it would in due course reach the insured before he was taken sick, is a delivery of the policy within the meaning of a provision to the effect that it shall not be in force until "payment in cash of the first payment, and delivery of the policy to the applicant during his life and in good health."[87]

Under the New York statute it was held that notice of the maturing of a premium, properly mailed as required, which never reached the insured, did not prevent a forfeiture of the policy for nonpayment of the premium when it was due.[88]

§ 4359. Time when premium is due—Construction by agent—Estoppel.—In a recent case the Supreme Court of the United States considered the question of the power of an agent to waive the condition of the policy with reference to the payment of the premium, and the duty of the insured to read the policy. An application was made on December 12, and the policy was dated December 18. The premium was paid and the policy delivered on December 26, 1893, and the agent stated to the insured that under certain provisions the policy would be in force for thirteen months from the time of the payment of the first premium. By the terms of the policy the next premium was

[83] Manhattan Life Ins. Co. v. Myers, 109 Ky. 372, 22 Ky. L. 875, 59 S. W. 30. See also, Sexton v. Greensboro Life Ins. Co., 157 N. Car. 142, 72 S. E. 863; McDonald v. Provident &c. Soc., 108 Wis. 213, 84 N. W. 154, 81 Am. St. 885.

[84] Pulaski Mut. Fire Ins. Co. v. Dawson, 87 Ill. App. 514.

[85] Kendrick v. Mutual Ben. Life Ins. Co., 124 N. Car. 315, 32 S. E. 728, 70 Am. St. 592.

[86] Hollowell v. Life Ins. Co. of Virginia, 126 N. Car. 398, 35 S. E. 616.

[87] Mutual Reserve Fund Life Assn. v. Farmer, 65 Ark. 581, 47 S. W. 850.

[88] McConnell v. Provident &c. Soc., 92 Fed. 769, 34 C. C. A. 663. As to construction of the New York statute requiring notice of maturity of premium, see article by Robert J. Brennen in 52 Cent. L. J. 4.

payable on December 12, 1894, with thirty days' grace, making January 12, 1895, the last day for payment. The insured died January 18, 1895, having paid but the one premium. It appeared that the insured had the policy in his possession after its delivery, and the company claimed that his representatives were estopped from denying that the date of the contract was not that which appeared in the policy, and from claiming that the words, "Please date policy same as application," were not in the application when it was signed by the insured, and that by accepting the policy the insured waived his right to object if the words were inserted as alleged, after the signing of the application. The policy on its face expressly required payment of the premium on December 12 of each year. It was held that the insured was not estopped and that the company was liable.[89]

[89] McMaster v. New York life Ins. Co., 183 U. S. 25, 22 Sup. Ct. 10, 46 L. ed. 64, and the court said: "McMaster was justified in assuming, and on the findings must be held to have assumed, that if he paid the first annual premium in full he would be entitled to one year's protection, and to one month of grace in addition, that is, to thirteen months' immunity from forfeiture. And the findings show that the company, by its agent, gave that meaning to the clause, and that McMaster was induced to apply for the insurance by reason of the protection he supposed would be thus obtained. * * * Bearing in mind that McMaster had made no request of the company in respect to antedating the policies, and was ignorant of the interpolation of the agent, and ignorant in fact, and not informed or notified in any way, of the insertion of December 12 as the date for subsequent payments, he had the right to suppose that the policies accorded with the applications as they had left his hands, and that they secured to him, on payment of the first annual premiums in advance, immunity from forfeiture for thirteen months. And the agent assured him that this was so. The situation being thus, we are unable to concur in the view that McMaster's omission to read the policies when delivered to him and the payment of the premiums made constituted such negligence as to estop the plaintiff from denying that McMaster by accepting the policies, agreed that the insurance might be forfeited within thirteen months from December 12 1893." Citing Supreme Lodge v. Withers, 177 U. S. 260, 44 L. ed. 762, 20 Sup. Ct. 611, and cases cited; Fitchner v. Fidelity Fire Assn., 103 Iowa 276, 72 N. W. 530; Hartford Steam Boiler &c. Co. v. Cartier, 89 Mich. 41, 50 N. W. 747. As to the construction of contract by agent, the court also said: "In Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304, 33 L. ed. 341, 10 Sup. Ct. 87, it was decided that a person procuring an application for life insurance in Iowa became by force of the statute the agent of the company in so doing, and could not be converted into the agent of the assured by any provision in the application. In that case the applicant was required to state whether he had any other insurance on his life. He was in fact a member of several co-operative associations, and therefore did have other insurance; but the soliciting agent of the company, to whom he stated the facts, believing that insurance of that kind was not insurance within the meaning of the question, wrote 'No other' as the proper answer, at the same time assuring the applicant

§ 4360. **Powers of agent.**—It is commonly provided that agents are not authorized to make, alter, or discharge the contract, or to waive any forfeiture, or to grant permits. The effect of such a provision in a policy has been already considered.[90] It has been held in Missouri that an agent of a life insurance company may waive a forfeiture for non-payment of the premium, although the policy provided that there could only be a waiver of forfeiture for a breach of conditions in writing, signed by the president or vice-president and one of the other officers of the company, where the receipts which were given by an agent provided on their face that they should not be valid unless countersigned by the agent.[91] Where a company, whose general manager is also a director, receives proofs of loss which show that the condition of the policy as to residence of the insured has been violated, and returns the proofs for minor corrections without claiming a forfeiture on account of such violation, the company is estopped from claiming a forfeiture on account thereof.[92] So, where a general agent modified a condition of the application for insurance, and the policy subsequently issued required full prepayment of the premium, by accepting a portion of the premium and giving sixty days' credit for the balance, in violation of the terms of the policy, it was held that the company was estopped to assert the invalidity of the contract, notwithstanding the fact that the policy which was issued contained a provision prohibiting the modification of its terms other than by a written agreement signed by its president or secretary. This condition appeared in the policy, but the insured was not informed of the fact that it would be in the policy when he made the application.[93] Other decisions are to much the same effect.[94]

that it was such. And this court held that the company was bound by the interpretation put upon the question by its soliciting agent. When, then, McMaster signed these applications he understood, and the company by its agent understood, that if the risks were accepted at the home office he would, by paying one year's premium in full, obtain contracts of insurance which could not be forfeited until after the expiration of thirteen months."

[90] See note, Johnson v. Ætna Ins. Co., 123 Ga. 405, 51 S. E. 339, in 107 Am. St. 92, and notes in 10 L. R. A. (N. S.) 1064, 13 L. R. A. (N. S.) 832, 16 L. R. A. (N. S.) 1168.

[91] James v. Mutual Reserve Fund Life Assn., 148 Mo. 1, 49 S. W. 978.

[92] Kidder v. Knights Templars &c. Co., 94 Wis. 538, 69 N. W. 364.

[93] Cole v. Union &c. Ins. Co., 22 Wash. 26, 60 Pac. 68, 47 L. R. A. 201.

[94] See generally, Germania Life Ins. Co. v. Bouldin, 100 Miss. 660, 56 So. 609.

§ 4361. **Statement of age.**—A liberal provision is sometimes found to the effect that error in understating the age of the insured will be adjusted by paying such amount as the premiums paid would purchase at the table rate, or the like. In the absence of such a provision the understatement of his age by an applicant for life insurance increases the risk as a matter of law.[95] Thus, it was held that a statement by an applicant that his age was fifty-nine, when in fact it was sixty-four, avoided the policy.[96] A statement that the age of the applicant is thirty, when in fact he is thirty-five, is a material variation.[97] So, it has been held that a misrepresentation by a member of a benefit society as to his age invalidates the insurance contract, although the applicant entered the society before its constitution and regulations as to age were finally adopted.[98] But where the applicant stated his age "to the best of his knowledge and belief," and stipulated that any untrue and fraudulent statement would forfeit his right to recovery, it was held that the contract was not invalidated by the fact that he was three or four years older than he stated unless there was evidence of fraud or knowledge on his part that his statement was untrue.[99]

§ 4362. **Assignment of policy.**—A life insurance contract, being in the nature of a chose in action and unlike the ordinary fire insurance contract, is assignable in the absence of restrictive provisions. The accepted rule is that a policy of life insurance without restrictive words is assignable by the assured for a valuable consideration like any other chose in action where the assignment is not made to cover a mere speculative risk and thus evade the law against wager policies.[1] Payment of a policy thus as-

[95] Dolan v. Mutual &c. Assn., 173 Mass. 197, 53 N. E. 398. See also, Logia Suprema De La Alianza Hispano-Americana v. De Aguirre (Ariz.), 129 Pac. 503.

[96] Swett v. Citizens &c. Soc., 78 Maine 541, 7 Atl. 394.

[97] Ætna Life Ins. Co. v. France, 91 U. S. 510, 23 L. ed. 401.

[98] Marcoux v. Society, 91 Maine 250, 39 Atl. 1027.

[99] Egan v. Supreme Council, 32 App. Div. (N. Y.) 245, 52 N. Y. S. 978, affd. 161 N. Y. 650, 57 N. E. 1109.

[1] Fitzgerald v. Hartford &c. Ins. Co., 56 Conn. 116, 13 Atl. 673, 17 Atl. 411, 7 Am. St. 288; Martin v. Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. 620; Bushnell v. Bushnell, 92 Ind. 503; New York Life Ins. Co. v. Flack, 3 Md. 341, 56 Am. Dec. 742; Hewlett v. Home for Incurables, 74 Md. 350, 24 Atl. 324, 17 L. R. A. 447; Fitzgerald v. Rawlings, 114 Md. 470, 79 Atl. 915, 1 Ann. Cas. 1912a, 650, and note; Mutual Life Ins. Co. v. Allen, 138 Mass. 24, 52 Am. Rep. 245; Pingrey v. National Life Ins. Co., 144 Mass. 374, 11 N. E. 562;

signed may be enforced by or for the benefit of the assignee. And it has been held that a statute providing that where the beneficiaries are the wife and children of the insured, the insurance shall be paid to them free from his debts, does not prevent him from assigning or pledging the policy as security for a loan by the company.[2]

The parties may ordinarily, however, place such restrictions upon the right to transfer the policy as they choose. Where a policy required the consent of the company to an assignment and provided that with such consent a policy so assigned as security for the claim of a creditor, as beneficiary, should not exceed the amount of the actual bona fide indebtedness of the member to him existing at the time of the death of the insured, together with any payments made to the association upon the certificate or policy of insurance by such creditor, with interest thereon, and this certificate or policy of insurance "as to all amounts in excess thereof shall be null and void," it was held that the original beneficiary had parted with all his interest in the policy by the assignment.[3]

Falk v. Janes, 49 N. J. Eq. 484, 23 Atl. 813, revd. 50 N. J. Eq. 468, 26 Atl. 138, 35 Am. St. 783; Olmsted v. Keyes, 85 N. Y. 593; Steinback v. Diepenbrock, 158 N. Y. 24, 52 N. E. 662, 44 L. R. A. 417, 70 Am. St. 424; Eckel v. Renner, 41 Ohio St. 232; Clark v. Allen, 11 R. I. 439, 23 Am. Rep. 496; New York &c. Ins. Co. v. Armstrong, Admrx., 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. 877; Roller v. Moore's Admr., 86 Va. 512, 10 S. E. 241, 6 L. R. A. 136n; Bursinger v. Bank of Watertown, 67 Wis. 75, 30 N. W. 290, 58 Am. Rep. 848. See also Johnson v. Mutual Ben. Life Ins. Co., 157 N. Car. 106, 72 S. E. 847, and Hardy v. Ætna Life Ins. Co., 152 N. Car. 286, 67 S. E. 767 (holding that it may be assigned in good faith even to one having no insurable interest, and reviewing the authorities). To the same effect as these last cases are Dixon v. Nat. Life Ins. Co., 168 Mass. 48, 46 N. E. 430; Prudential Ins. Co. v. Liersch, 122 Mich. 436, 81 N. W. 258; Chamberlain v. Butler, 61 Nebr. 730, 86 N. W. 481, 54 L. R. A. 338, 87 Am. St. 478, and note; Steinbach v. Diepenbrock, 158 N. Y. 24, 52 N. E. 662, 44 L. R. A. 417, 70 Am. St. 424, and many other cases. But compare Metropolitan Life Ins. Co. v. Elison, 72 Kans. 199, 83 Pac. 410, 3 L. R. A. (N. S.) 934, and note, 15 Am. St. 189; Bendet v. Ellis, 111 Tenn. 277, 111 S. W. 795, 18 L. R. A. (N. S.) 114, 127 Am. St. 1000; and Russell v. Grigsby, 168 Fed. 577, 94 C. C. A. 61. The conflicting authorities on both sides, including many in addition to those here cited, are reviewed in the note in 3 L. R. A. (N. S.) 934 above referred to.

[2] Mutual Life Ins. Co. v. Twyman, 122 Ky. 513, 28 Ky. L. 1153, 92 S. W. 335, 121 Am. St. 471. Compare and see generally the cases cited in note 87 Am. St. 504, 505. The assignment of a policy issued by a foreign company is held to be governed by the law of the state where the policy is held and the assignment made, in Western L. & C. Co. v. Rupp, 147 Ky. 489, 144 S. W. 743.

[3] McQuillan v. Mutual &c. Assn., 112 Wis. 665, 87 N. W. 1069, 88 N. W. 925, 56 L. R. A. 233, 88 Am. St. 986, where the court said: "If a person sees fit to make an insurance

But it has been held that although a mutual benefit certificate provides that it shall not be assigned, yet if it is assigned to a creditor for a bona fide debt the assignment will be upheld to the extent of the debt.[3a]

§ 4363. **Notice to company.**—It is frequently provided that no assignment shall take effect until written notice is given to the company. This does not prohibit the assignment of the contract, but merely provides for notice. It is sometimes held to be merely directory and not to effect the legality of the transfer as between the insurer and the assignee of the policy. Certainly no one but the insurer can question the validity of the assignment where no notice is given.[4]

The clause does not, like that contained in many policies, provide that an assignment without the consent of the company shall be void. As said in a Minnesota case,[5] where the policy contained a somewhat similar provision, "the consent of the company to an assignment is not necessary. All that is required is that the assignment be in writing on the policy and a copy of it furnished to the company, within thirty days. This provision is not one which is intended to guard against increased risks, and does not go to, or infuse itself into, the essence of the contract. Its sole purpose is to protect the company against the danger of having to pay the policy twice, by requiring written evidence of any change of beneficiaries to be put into reliable

contract so that an assignment thereof to one of his creditors will have the effect of limiting all liability thereon to the amount due such creditor from him at the time of his death, there is no law to prevent it, and he and those who come after him must abide thereby. There can be no question but that an insurance company may, by contract, place such restraints upon the assignment of its insurance policies as it sees fit, not inconsistent with its own laws or some statute." And the court further said that the effect of the contract and the assignment "was to substitute a new contract for the policy as originally written, with like conditions except that the liability of the assurer was limited solely to the 'assignee, and to the amount due the assignee from M. at the time of his death, including payments by it to keep up the policy, and interest thereon, not exceeding in all the amount payable under the contract in the absence of the assignment."

[3a] Coleman v. Anderson, 98 Tex. 570, 86 S. W. 730. And see as to statute prohibiting assignment, Crocker v. Hogin, 103 Iowa 243, 72 N. W. 411. See also, to the effect that a restriction is not applicable after loss or maturity of policy, Briggs v. Earl, 139 Mass. 473, 1 N. E. 847.

[4] Embry's Admrs. v. Harris, 107 Ky. 61, 21 Ky. L. 714, 52 S. W. 958.

[5] Hogue v. Minnesota Packing &c. Co., 59 Minn. 39, 60 N. W. 812.

form and promptly furnished to the company. All that could, at the very most, be claimed as the effect of a noncompliance with this stipulation, is that the company might disregard the attempted assignment and pay the money to the original beneficiary; in other words, such attempted assignment would be merely voidable at the option of the company." The clause will not prevent the vesting of an equitable interest in the proceeds of the policy in an assignee who has an interest in the continuance of the life of the insured.[6]

In Tennessee the court said:[7] "The question, as to the necessity of the knowledge and assent of the underwriters, to the assignment of the policy, is very different with reference to fire policies from life and marine policies. The assent of the insurer to the assignment, in order to give it validity as against the office, in the case of a fire policy, is generally admitted; and notice of the assignment must therefore be given, or the assignee will not be entitled to demand the insurance money. The reason of this requirement in fire policies is obvious. In such cases, the personal character of the assured for integrity and prudence, is a most important consideration. In the language of the books, there is infused into the contract of fire insurance, something of the nature of a choice of persons. The insurer might be quite willing to underwrite a policy for one person, but not for another of different character and habits. The known reputation of the assured might be an ample guarantee that he would not secretly destroy his own property with a view to recover the insurance money, while that of the assignee might furnish no such assurance. But no such reason exists in the case of an insurance on the life of an individual, nor in the case of marine policies. And in the latter cases the assent of the insurer to the assignment of the policy, or notice of such assignment, is not indispen-

[6] Travelers' Ins. Co. v. Grant, 54 N. J. Eq. 208, 33 Atl. 1060. And it has been held that an insured who sells and assigns his policy for a valuable consideration is estopped from attacking the validity of the assignment on the ground that his assignee had no insurable interest in his life. Clark v. Equitable Life Assur. Soc., 143 Fed. 175.

[7] Mutual Protection Ins. Co. v. Hamilton, 5 Sneed (Tenn.) 269; and to the same effect are Robinson v. Cator, 78 Md. 72, 26 Atl. 959; Klinckhamer Brewing Co. v. Cassman, 21 Ohio Cir. Ct. 465, 12 Ohio C. D. 141; and Cook v. Black, 1 Hare 390. But see Hubbard v. Stapp, 32 Ill. App. 541.

sable, in order to entitle the assignee of the policy to recover the money from the insurer. * * * We are of the opinion therefore, that as between the insurer, and the assignee of a life policy, notice of the assignment is not required to complete the right of the latter, to receive the insurance money from the former."

There are decisions, however, to the effect that the company is entitled to the full benefit of this provision of the contract on the theory that it is intended to prevent speculative insurance.[8] Thus, it was said in Massachusetts that, "as the policy of the law accords with its purpose, the court will not regard with favor any rights sought to be acquired in contravention of the provision."[9] At the most, however, a failure to give the required notice, even if it invalidates an attempted assignment, does not avoid the policy,[10] and it is generally held that as between the assignor and assignee it is immaterial.[11] It has also been held that a notice given within a reasonable time after an assignment is sufficient, although the insured may have died in the meantime.[12]

The provision requiring the consent of the company, "in case of an assignment" of a benefit certificate, has been held not to apply to a change of beneficiaries.[13] And such a provision in a policy, which is payable to the executor or administrator of the insured, with the right to the company at its option to pay the benefit to any of a certain class of persons who should be equitably entitled thereto by reason of having incurred expenses for the benefit of the insured, does not prevent the assignment of a policy by the insured in the absence of its exercise of the option thus reserved.[14]

[8] Moise v. Mutual &c. Assn., 45 La. Ann. 736, 13 So. 170; Stevens v. Warren, 101 Mass. 564.

[9] Stevens v. Warren, 101 Mass. 564.

[10] Marcus v. St. Louis &c. Ins. Co., 68 N. Y. 625. Compare Moise v. Mut. &c. Assn., 45 La. Ann. 736, 13 So. 170.

[11] Fuller v. Kent, 13 App. Div. (N. Y.) 529, 43 N. Y. S. 649; Mutual Protection Ins. Co. v. Hamilton, 5 Sneed (Tenn.) 269. See also, Hogue v. Minnesota Packing &c. Co., 59 Minn. 39, 60 N. W. 812.

[12] New York Life Ins. Co. v. Flack, 3 Md. 341, 56 Am. Dec. 742. The requirement that notice shall be given the company and its consent obtained may, of course, be waived by the company. Anthony v. Massachusetts Ben. Assn., 158 Mass. 322, 33 N. E. 577.

[13] Carpenter v. Knapp, 101 Iowa 712, 70 N. W. 764, 38 L. R. A. 128. But see Yore v. Booth, 110 Cal. 238, 42 Pac. 808, 52 Am. St. 81.

[14] Prudential Ins. Co. v. Young, 14 Ind. App. 560, 43 N. E. 253, 56 Am. St. 319. See also, Robinson v. Hurst, 78 Md. 59, 26 Atl. 956, 20 L. R. A.

Under the New York statute, which authorizes a married woman to insure her husband's life for her sole use, a policy was held not assignable. "We determined," said the court, "that their peculiar character and purpose necessarily took from them the chief and most important characteristic of property in general."[15] But under a subsequent statute authorizing the assignment of such a policy with the written consent of the husband,[16] it was held that an assignment was valid where it appeared that the husband gave his oral consent and the assignment was for a consideration received by him for the purpose of enabling him to maintain his business and support a family.[17] But on appeal it was held that formal written consent of the husband is necessary.[18] Where a statute authorizes a married woman to sell and convey any of her personal property, she may sell and convey her right to recover upon a policy of life insurance in which she is the beneficiary.[19]

§ 4364. Manner of making assignment.—No special form of expression is necessary,[20] and, as the intention of the parties must govern, a transfer of the policy by delivery, with verbal directions as to the disposition of the proceeds, is a good assignment,[21] notwithstanding the fact that the policy requires the transfer to be in writing.[22] Even delivery of the policy in the strict

761, 44 Am. St. 266; St. John v. American Ins. Co., 13 N. Y. 31, 64 Am. Dec. 529. But assignment can not give an assignee rights where he belongs to a prohibited class. Kerr v. Crane, 212 Mass. 224, 98 N. E. 783.

[15] Eadie v. Slimon, 26 N. Y. 9, 82 Am. Dec. 395; Baron v. Brummer, 100 N. Y. 372, 3 N. E. 474; Dannhauser v. Wallenstein, 52 App. Div. (N. Y.) 312, 65 N. Y. S. 219. A contrary conclusion was reached under similar statutes in Maryland in Emerick v. Coakley, 35 Md. 188.

[16] See Dannhauser v. Wallenstein, 52 App. Div. (N. Y.) 312, 65 N. Y. S. 219, under laws 1879, ch. 248.

[17] Dannhauser v. Wallenstein, 28 Misc. (N. Y.) 690, 60 N. Y. S. 50.

[18] Dannhauser v. Wallenstein, 169 N. Y. 199, 62 N. E. 160.

[19] Supreme Assembly v. Campbell, 17 R. I. 402, 22 Atl. 307, 13 L. R. A. 601. But see as to prohibition against becoming security under many of the statutes, Union Cent. L. Ins. Co. v. Woods, 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205, and note in 87 Am. St. 503. And compare Brick v. Campbell, 122 N. Y. 337, 25 N. E. 493, 10 L. R. A. 259. See also, Mento v. Townsend, 68 Ark. 391, 59 S. W. 41.

[20] Southern Mut. Life Ins. Assn. v. Durdin, 132 Ga. 495, 64 S. W. 264, 131 Am. St. 210. See also, Metcalf v. Kincaid, 81 Iowa 433, 54 N. W. 867, 43 Am. St. 391.

[21] New York Life Ins. Co. v. Flack, 3 Md. 341, 56 Am. Dec. 742; Chapman v. McIlwrath, 77 Mo. 38, 46 Am. Rep. 1; Hewins v. Baker, 161 Mass. 320, 37 N. E. 441, and cases there cited.

[22] Hewins v. Baker, 161 Mass. 320, 37 N. E. 441.

sense is not always necessary,[23] as where a written assignment is executed and delivered to the assignee, and the policy is retained by the insured.[24] A life insurance policy is assignable by parol when accompanied by a delivery.[25] It has been held, however, that a letter from the insured to the insurer, requesting that the insurance be made payable, in case of his death, to his son, is not an assignment of the contract, as under the circumstances the insured retained dominion over it, and could cancel, or, with the consent of the company, modify the same.[26] So, it has been held that the execution by the insured of an assignment of a policy to his mother as a gift, he retaining possession of it and notifying her that he had made the assignment, and "would keep it for her," is not a complete delivery, and the insured retains the power to make another assignment of the policy.[27] But where the policy was made payable to the administrator or executor of the insured, and the insured immediately delivered it to a creditor, saying that it was an oversight that such creditor was not named as beneficiary, and the creditor held the policy until after the death of the insured, it was held that there was a valid assignment of the policy.[28] Even where a writing is required it is not necessary that any particular form of words be used.[29] The language must, however, be sufficient to show an intention to make the assignment; mere written directions as to the manner of the disposition of the fund have been held insufficient.[30]

[23] Burges v. New York Life Ins. Co. (Tex.), 53 S. W. 602. Mailing the policy is a sufficient delivery.

[24] Scott v. Dickson, 108 Pa. St. 6, 56 Am. Rep. 192. See also, Weaver v. Weaver, 182 Ill. 287, 55 N. E. 338, 74 Am. St. 173; Richardson v. White, 167 Mass. 58, 44 N. E. 1072; Hewins v. Baker, 161 Mass. 320, 37 N. E. 441; Janes v. Falk, 50 N. J. Eq. 468, 26 Atl. 138, 35 Am. St. 783. But compare, Palmer v. Merrill, 6 Cush. (Mass.) 282, 52 Am. Dec. 782; Spooner v. Hilbish, 92 Va. 333, 23 S. E. 751; Alvord v. Luckenbach, 106 Wis. 537, 82 N. W. 535.

[25] Hancock v. Fidelity Mut. Life Ins. Co. (Tenn.), 53 S. W. 181. See also, Rahders v. Peoples' Bank, 113 Minn. 496, 130 N. W. 16; Nixon v. Malone (Tex. Civ. App.), 95 S. W. 577.

[26] Alvord v. Luckenbach, 106 Wis. 537, 82 N. W. 535.

[27] Weaver v. Weaver, 182 Ill. 287, 55 N. E. 338, 74 Am. St. 173.

[28] Hancock v. Fidelity Mut. Life Ins. Co. (Tenn.), 53 S. W. 181.

[29] Swift v. Railway &c. Assn., 96 Ill. 309; Grogan v. United States Industrial Ins. Co., 90 Hun (N. Y.) 521, 71 N. Y. St. 707, 36 N. Y. S. 687.

[30] St. Clair County Benev. Soc. v. Fietsam, 97 Ill. 474.

§ 4365. Assignment of policy by assignee.—It has been held that the assignee of a policy held as collateral security for the debt of the insured cannot, in the absence of a provision therefor in the instrument of assignment, either sell or surrender up the policy to the company for its cash value until he has given the insured a reasonable time to redeem it.[31] But such an assignee has the right, under proper circumstances, to assign the policy to another party. Thus, one who holds a policy as collateral security for the payment of a note may assign the same to an indorsee of the note and confer on such assignee the right to hold the policy as collateral security for the note.[32] A policy of life insurance is not a negotiable instrument, and the assignee can get by assignment no better title nor greater interest than his assignor had to assign.[33]

§ 4366. Incontestable clause.—It is now generally provided that after two years or some other fixed time, the policy shall be incontestable, except, in most of the forms, for nonpayment of premiums. This provision is neither unreasonable nor contrary to public policy.[34] There is some controversy as to

[31] Manton v. Robinson, 19 R. I. 405, 34 Atl. 148.

[32] Corcoran v. Mutual L. Ins. Co., 183 Pa. 443, 39 Atl. 50. Where the insured assigned a policy to H. as security for a debt, and H. subsequently assigned it to a bank as security for money borrowed, it was held that the bank took the policy subject to the equities existing in favor of the insured, unless the conduct of the latter was such as to create an estoppel, and the fact that the assignment from the insured to H. was absolute in form would not create such an estoppel. It was held, however, that the laches of the insured and his practical abandonment of the policy for eleven years by neglecting to take any active measures to recover it from H., and neglecting during all that time to pay the premiums necessary to keep it from lapsing, would estop him from asserting any rights under the policy or attempting to avail himself of its benefits as against H. or his assignee, the bank, who had kept it alive by paying the premiums at its own expense.

[33] Morris v. Georgian Loan &c. Co., 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 506; Brown v. Equitable Life Assur. Soc., 75 Minn. 412, 78 N. W. 103, 79 N. W. 968; Locke v. Bowman (Mo. App.), 151 S. W. 468; Travelers' Ins. Co. v. Healey, 86 Hun (N. Y.) 524, 67 N. Y. St. 686, 33 N. Y. S. 911; Rousset v. Insurance Co., 1 Bin. (Pa.) 429.

[34] Royal Circle v. Achterrath, 204 Ill. 549, 68 N. E. 492, 63 L. R. A. 452, 98 Am. St. 224; Wright v. Mutual Ben. Assn., 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. 749; Clement v. New York L. Ins. Co., 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70 Am. St. 650. Incontestable clause is held not to apply to defense of lapse or forfeiture by nonpayment of premiums, nor to abandonment, in Haas v. Mut. Life Ins. Co., 90 Nebr. 808, 134 N. W. 937. And to the same effect as to its nonapplicability to nonpayment of premium is Thomp-

whether under it the insurer can raise the question of fraud after the expiration of the period. It is held by some courts that a provision making a policy absolutely incontestable from date on any ground is unlawful and invalid in so far as it relates to fraud in the procurement of the policy.[35] But the weight of authority is to the effect that such stipulation, especially if it is not to take effect at once but only after a certain length of time, is merely in the nature of a statute of limitations, and is valid even as against the defense of fraud.[36] A contract which is illegal as opposed to public policy, however, cannot be rendered enforcible by such a clause, and where the insured has no insurable interest, that defense, being founded on public policy, is open to the company.[37] Generally speaking, it is held that the clause controls all matters which would have the effect of defeating or destroying the contract of life insurance, such as those relating to the cause of death or the habits of the insured, although it may not control matters which affect the remedy merely.[38] And a policy containing this provision is not avoided although the insured commits

son v. Fidelity Mut. L. Ins. Co., 116 Tenn. 557, 92 S. W. 1098, 6 L. R. A. (N. S.) 1039. See also, Schmertz v. United States L. Ins. Co., 118 Fed. 250, 55 C. C. A. 104. And see as to right to take advantage of misrepresentations upon reinstatement after forfeiture for failure to pay premiums, Pacific Mut. Life Ins. Co. v. Galbraith, 115 Tenn. 471, 91 S. W. 204, 112 Am. St. 862.

[35] Welch v. Union &c. Ins. Co., 108 Iowa 224, 78 N. W. 853, 50 L. R. A. 774; Reagan v. Union &c. Ins. Co., 189 Mass. 555, 76 N. E. 217, 2 L. R. A. (N. S.) 821, 109 Am. St. 659. See also, Wheeton v. Hardisty, 8 El. & Bl. 232; Massachusetts Benefit Life Assn. v. Robinson, 104 Ga. 356, 30 S. E. 918, 42 L. R. A. 261.

[36] Clement v. New York L. Ins. Co., 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70 Am. St. 650. See Royal Circle v. Achterrath, 204 Ill. 549, 68 N. E. 492, 63 L. R. A. 452, 98 Am. St. 224; Wright v. Mut. &c. Assn., 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. 749; Union Cent. L. Ins. Co. v. Fox, 106 Tenn. 347, 61 S. W. 62, 82 Am. St. 885; Patterson v. Natural Premium &c. Ins. Co., 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. 899.

[37] Anctil v. Manufacturers' Life Ins. Co. (1899) App. Cas. 604; Bromley's Admr. v. Washington Life Ins. Co., 122 Ky. 402, 28 Ky. L. 1300, 92 S. W. 17, 5 L. R. A. (N. S.) 747, 121 Am. St. 467. But compare, Wright v. Mut. Ben. L. Assn., 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. 749. The question is not really as to whether a contract illegal as against public policy can be made incontestable, but rather as to whether the particular contract attempts to condone fraud and is or is not against public policy. Manufacturers' Life Ins. Co. v. Anctil, 28 Can. Sup. Ct. 103.

[38] Massachusetts Benefit Life Assn. v. Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261. See also, for strong cases in support of the first branch of proposition, that is to the effect that the incontestable clause applies even though the habits or health might otherwise have constituted a good defense, Mutual Reserve Fund Life Assn. v. Austin, 142 Fed. 398, 73 C. C. A. 498, 6 L. R. A. (N. S.) 1064; Grier v Mut. L. Ins. Co., 132 N. Car.

suicide after the expiration of the period, notwithstanding an agreement in the application that suicide is not one of the risks assumed under the policy.[39]

It applies where the company seeks to avoid liability by virtue of a clause to the effect that the policy shall be void "if the insured dies in consequence of his * * * own criminal action."[40] So, in a recent Wisconsin case, it was held that the incontestable clause covered misstatements or omissions of the insured respecting his health.[41] And in Texas it was held in a comparatively recent case that a clause which provided that if the terms of the policy were complied with, it should be incontestable after one year from its date, rendered the policy incontestable for false warranties after the expiration of one year, although its language was of uncertain and doubtful meaning.[42]

§ 4367. Special privileges.—Almost all of the policies now in use contain some provision in regard to special privileges, options, or the like. The special privileges thus provided for, of course, differ in each policy, and, therefore, require no special consideration at this time.

§ 4368. Provisions in the application.—The application upon which a policy of life insurance issues is by virtue of a clause contained in most policies incorporated into and made a part of the contract of insurance. Statements therein contained in answer to questions of the agent of the company and its medical examiner are generally, in express words, made warranties, and,

542, 44 S. E. 28. See also, Mutual L. Ins. Co. v. New, 125 La. 41, 51 So. 61, 27 L. R. A. (N. S.) 431, 136 Am. St. 326.

[39] Goodwin v. Provident Sav. Life Assur. Soc., 97 Iowa 226, 66 N. W. 157, 32 L. R. A. 473, 59 Am. St. 411; Mutual Reserve Fund Life Assn. v. Payne (Tex.), 32 S. W. 1063. See also, Mareck v. Mutual &c. Assn., 62 Minn. 39, 64 N. W. 68, 54 Am. St. 613; Simpson v. Life Ins. Co., 115 N. Car. 393, 20 S. E. 517; Patterson v. Natural Premium &c. Ins. Co., 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. 899.

[40] Sun L. Ins. Co. v. Taylor, 108 Ky. 408, 22 Ky. L. 37, 56 S. W. 668, 94 Am. St. 383.

[41] Patterson v. Natural Premium &c. Ins. Co., 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. 899. Citing Wright v. Mutual &c. Assn., 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. 749; Simpson v. Life Ins. Co., 115 N. Car. 393, 20 S. E. 517. See also, Goodwin v. Provident Sav. Life Assur. Soc., 97 Iowa 226, 66 N. W. 157, 32 L. R. A. 473, 59 Am. St. 411; Kline v. National Ben. Assn., 111 Ind. 462, 11 N. E. 620, 60 Am. Rep. 703.

[42] Franklin Ins. Co. v. Villeneuve, 25 Tex. Civ. App. 356, 60 S. W. 1014.

in the absence of a statute requiring a certain construction, they will usually be construed as warranties under the general rules already stated. The whole subject as to making the application part of the policy and the effect thereof has been so fully considered elsewhere that nothing more is required at this place. The form of application used by many companies contains also provisions that the policy applied for shall become and be null and void if, within two years, or some other specified time, the insured shall commit suicide while sane or insane; or within such period, and without the written consent of the company, shall reside in or travel to certain places or out of certain countries, or be personally engaged in blasting, mining, submarine operations, or in the making of explosives, or in the service of any railway train, or on a steam or sailing vessel, or in naval or army service in times of war, or the like. In some instances such provisions are contained in the body of the policy itself, but the effect is generally the same in either case.

§ 4369. **Suicide—Sane or insane.**—In order to avoid the controversy which has arisen over the meaning of the word "suicide," the insurance companies now generally protect themselves by providing that the policy shall be void if the insured die by suicide, while sane or insane.[43] In some states, however, this defense is forbidden unless it is made to appear that the insured contemplated suicide at the time he took out the policy;[44] and it is held in a recent case that under the North Dakota statute the defense of suicide cannot be set up when it occurs after the expiration of

[43] An examination of the policies and applications now in use shows that almost all the leading companies now insert the words "sane or insane."

[44] Rev. Stat. Mo. (1909), § 6945; Ætna Life Ins. Co. v. Florida, 69 Fed. 932, 16 C. C. A. 618, note 30 L. R. A. 87; Knights Templars' &c. Co. v. Jarman, 104 Fed. 638, 44 C. C. A. 93, affd. 187 U. S. 197, 47 L. ed. 139, 23 Sup. Ct. 108; Wallace v. Bankers' L. Assn., 80 Mo. App. 102. See also, Haynie v. Knights Templars' &c. Co., 139 Mo. 416, 41 S. W. 461. A mutual benefit certificate is a life policy within the meaning of such a statute. Head Camp Woodmen v. Sloss, 49 Colo. 177, 112 Pac. 49, 31 L. R. A. (N. S.) 831. And such statutes are constitutional. Knights Templars' &c. Co. v. Jarman, 187 U. S. 197, 47 L. ed. 139, 23 Sup. Ct. 108; Whitfield v. Ætna Life Ins. Co., 205 U. S. 489, 51 L. ed. 895, 27 Sup. Ct. 578. The Ohio statute providing that the company is estopped to set up certain defenses, after the lapse of three years (Rev. Stat., § 3626), does not estop the insurer from defending on the ground of suicide. Starck v. Union &c. Ins. Co., 134 Pa. St. 45, 19 Atl. 703, 7 L. R. A. 576, 19 Am. St. 674.

one year from the date of the policy, even though the company claims that the policy was issued at a later date than stated therein.[45]

The provision, however, is an exact and reasonable limitation upon the liability of the company, and under it the insurer is not liable, although the insured kills himself while in a condition which renders him wholly unconscious of the moral nature of the act.[46] This rule is recognized by the Supreme Court of the United States, which, in a leading case, said:[47] "For the purposes of this suit, it is enough to say, that the policy was rendered void, if the insured was conscious of the physical nature of his act,[48] and intended by it to cause his death, although, at the time, he was incapable of judging between right and wrong, and of understanding the moral consequences of what he was doing." So, it was held in Michigan that such a proviso "covers all conscious acts of the insured by which death by his own hand is compassed, whether he was at the time sane or insane. If the act was done for the purpose of self-destruction, it matters not that the insured had no conception of the wrong involved in its commission."[49] It is immaterial whether the act was deliberate or otherwise.[50]

[45] Harrington v. Mut. Life Ins. Co., 21 N. Dak. 447, 131 N. W. 246, 34 L. R. A. (N. S.) 373.

[46] Zimmerman v. Masonic Aid Assn., 75 Fed. 236; Kelley v. Mutual Life Ins. Co., 75 Fed. 637; Scarth v. Security &c. Soc., 75 Iowa 346, 39 N. W. 658; Hart v. Modern Woodmen, 60 Kans. 678, 57 Pac. 936, 72 Am. St. 380; Leman v. Manhattan Life Ins. Co., 46 La. Ann. 1189, 15 So. 388, 24 L. R. A. 589, 49 Am. St. 348; Scherar v. Prudential Ins. Co., 63 Nebr. 530, 88 N. W. 687, 56 L. R. A. 611; De Gogorza v. Knickerbocker &c. Ins. Co., 65 N. Y. 232; Spruill v. Northwestern &c. Ins. Co., 120 N. Car. 141, 27 S. E. 39; Tritshcler v. Keystone &c. Assn., 180 Pa. St. 205, 36 Atl. 734; Union Cent. Life Ins. Co. v. Fox, 106 Tenn. 347, 61 S. W. 62; Woiten v. American &c. Ins. Co. (Tex.), 51 S. W. 1105. For some limitations, see Mutual Ben. Life Ins. Co. v. Daviess' Exr., 87 Ky. 541, 10 Ky. L. 577, 9 S. W. 812; Sabin v. Senate of Nat. Union, 90 Mich. 177, 51 N. W. 202.

[47] Bigelow v. Berkshire Life Ins. Co., 93 U. S. 284, 23 L. ed. 918. See also, Connecticut &c. Ins. Co. v. Akens, 150 U. S. 468, 37 L. ed. 1148, 14 Sup. Ct. 155.

[48] There is considerable conflict as to whether even this much is required. See note to Cady v. Fidelity &c. Co. (Wis.), 113 N. W. 967, in 17 L. R. A. (N. S.) 260, reviewing authorities. Strong opinions to the effect that the clause applies to prevent a recovery even though the insured was incapable of forming any intention to take his life are found in Seitzinger v. Modern Woodmen, 204 Ill. 58, 68 N. E. 478, and Moore v. Northwestern Mut. Life Ins. Co., 192 Mass. 468, 78 N. E. 488, both citing numerous cases.

[49] Streeter v. Western Union &c. Soc., 65 Mich. 199, 31 N. W. 779, 8 Am. St. 882. See also, Sabin v. Senate of Nat. Union, 90 Mich. 177, 51 N. W. 202.

[50] Union Cent. L. Ins. Co. v. Hollowell, 14 Ind. App. 611, 43 N. E. 277.

It has also been held that the policy is void, although the insured acts under an insane impulse which overcomes his will power;[51] but there are decisions to the contrary,[52] and death from pure accident is not suicide.[53]

§ 4370. Where there is no provision as to the effect of suicide.—The Supreme Court of the United States has recently held that intentional self-destruction by the assured when sane is not a risk covered by a life insurance policy even when the policy does not except such a death; and it was further said that a contract of life insurance which expressly provided for payment if the insured, while sane, took his own life, would be against public policy, as it would have a tendency to tempt persons to commit suicide for the purpose of paying their debts or providing for those who are dependent upon them.[54] Before this decision, the weight of authority sustained the rule that where the contract contains no provision to the effect that suicide shall invalidate the contract, it is no defense to an action on the policy that the insured took his own life,[55] and many of the courts still stand by this doctrine, at least where the policy is not payable to the insured or his estate or personal representatives.[56] But a distinction is gen-

[51] Billings v. Accident Ins. Co., 64 Vt. 78, 24 Atl. 656, 17 L. R. A. 89n, 33 Am. St. 913. See also, Supreme Council R. A. v. Pels, 209 Ill. 33, 70 N. E. 697.

[52] Cady v. Fidelity &c. Co. (Wis.), 113 N. W. 967, 17 L. R. A. (N. S.) 260, and cases there cited in opinion and notes.

[53] Union Mut. L. Ins. Co. v. Payne, 105 Fed. 172, 45 C. C. A. 193; Knights Templars' &c. Co. v. Crayton, 110 Ill. App. 648, affd. in 209 Ill. 550, 70 N. E. 1066; Michigan Mutual Life Ins. Co. v. Naugle, 130 Ind. 79, 29 N. E. 393; Northwestern Mut. Ins. Co. v. Hazelett, 105 Ind. 212, 4 N. E. 582, 55 Am. Rep. 192; Mutual Ben. Life Ins. Co. v. Daviess' Exr., 87 Ky. 541, 10 Ky. L. 577, 9 S. W. 812; Spruill v. Northwestern Mut. L. Ins. Co., 120 N. Car. 141, 27 S. E. 39.

[54] Ritter v. Mutual L. Ins. Co., 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. 300. See Ritter v. Mut. L. Ins. Co., in 70 Fed. 954, 17 C. C. A. 537, 42 L. R. A. 583. See also, Supreme Commandery K. of G. R. v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332; Hartman v. Keystone Ins. Co., 21 Pa. St. 466; Plunkett v. Supreme Conclave I. O. of H., 105 Va. 643, 55 S. E. 9. The reasons for this view are also strongly presented in Shipman v. Protected Home Circle, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347. See note in 59 Am. Dec. 487.

[55] Seiler v. Economic L. Assn., 105 Iowa 87, 74 N. W. 941, 43 L. R. A. 537; Morton v. Supreme Council, 100 Mo. App. 76, 73 S. W. 259; Lange v. Royal Highlanders, 75 Nebr. 188, 110 N. W. 1110, 10 L. R. A. (N. S.) 666, 121 Am. St. 786; Campbell v. Supreme Conclave, 66 N. J. L. 274, 49 Atl. 550, 54 L. R. A. 576; Darrow v. Family Fund Soc., 116 N. Y. 537, 22 N. E. 1093, 6 L. R. A. 495, 15 Am. St. 430.

[56] Grand Legion of Illinois v. Beaty, 224 Ill. 346, 79 N. E. 565, 8 L. R. A. (N. S.) 1124, revg. 117 Ill. App. 657, and note reviewing the authorities

erally made between cases where the insured kills himself for the purpose of obtaining the money for the use of his own estate, and where the money is payable to a third person as beneficiary. Thus, it was said:[57] "In the law of insurance, suicide is not, as a rule, recognized as a ground of exemption from liability, or for forfeiture of a policy issued for the benefit of a third person." In Pennsylvania it was recently held that suicide by the insured under a policy payable to his wife does not, in the absence of any provision on the subject, avoid the policy as against the wife.[58] This rule prevails in Iowa[59] and Illinois,[60] although it is held that suicide will avoid a policy which is payable to the assured or his personal representatives. This distinction is recognized in most of the cases.[61] Hence, it has been held that a policy which contains no provision with reference to forfeiture if the insured commits suicide is void, where the insured deliberately kills himself in order to secure the money for the benefit of his estate.[62] And if the policy is taken out with the preconceived intention, then entertained by the insured, of taking his own life for the purpose of obtaining the insurance money, the contract is void by reason of such fraud, although it contains no provision with reference to the effect of suicide.[63]

§ 4371. **Suicide—Construction.**—Before the use of the clause referred to in a prior section there was much controversy and resulting confusion over the meaning of the words under consideration, as used without other descriptive words, and

on both sides; Supreme Conclave I. O. of H. v. Miles, 92 Md. 613, 48 Atl. 845, 84 Am. St. 528, and note.

[57] Kerr v. Minnesota Mut. Ben. Assn., 39 Minn. 174, 39 N. W. 312, 12 Am. St. 631. See Mills v. Rebstock, 29 Minn. 380, 13 N. W. 162; Fitch v. American &c. Ins. Co., 59 N. Y. 557, 11 Alb. Law J. 91, 17 Am. Rep. 372.

[58] Morris v. State &c. Assur. Co., 183 Pa. St. 563, 39 Atl. 52. Contra, Hopkins v. Northwestern Life Assur. Co., 94 Fed. 729.

[59] Parker v. Des Moines Life Assn., 108 Iowa 117, 78 N. W. 826.

[60] Supreme Lodge K. of P. v. Kutscher, 72 Ill. App. 462, revd. 179 Ill. 340, 53 N. E. 620, 70 Am. St. 115.

[61] Patterson v. Natural Premium &c. Ins. Co., 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. 899, and cases there cited. But see Morton v. Supreme Council, 100 Mo. App. 76, 73 S. W. 259; Campbell v. Supreme Conclave, 66 N. J. L. 274, 49 Atl. 550, 54 L. R. A. 576.

[62] Ritter v. Mutual L. Ins. Co., 70 Fed. 954, 17 C. C. A. 537, 42 L. R. A. 583, affd. 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. 300.

[63] Parker v. Des Moines Life Assn., 108 Iowa 117, 78 N. W. 826; Smith v. National Ben. Soc., 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616.

while the clause seems reasonably clear there is still some difference of opinion as to its meaning and effect in particular cases. Where the policy simply provides that suicide by the insured shall render it invalid, the weight of authority supports the rule established by the Supreme Court of the United States, in the well known Terry case.[64] The policy there under consideration required the interpretation of the phrase "died by his own hand." The court charged the jury that "if he was impelled by an insane impulse which his impaired capacity did not enable him to resist," or, if "his reasoning powers were overthrown and he had not power or capacity to exercise them upon the act he was about to do," the company is liable, and this was held to be correct.

In a subsequent case in the same court,[65] where the policy contained a provision to the effect that, "The self-destruction of the assured, in any form, except upon proof that the same is the direct result of disease or accident occurring without the voluntary act of the assured," it was held that the clause under consideration covered a case of the insured's death as the result of taking poison when his mind was so far deranged as to be unable to understand the moral character of his act, although he did understand its physical consequences.

Of course, accidental self-destruction is not suicide or self-destruction within the meaning of such provision in an insurance contract.[66] A provision in a policy that "self-destruction, sane or insane," is a risk not assumed by the company under the contract does not apply to death by accident.[67] So, the phrase, "die by his own hand or act, voluntary or otherwise," does not include the

[64] Life Ins. Co. v. Terry, 15 Wall. (U. S.) 580, 21 L. ed. 236. See also, Mutual Life Ins. Co. v. Leubrie, 71 Fed. 843, 18 C. C. A. 332. The words "die by his own hand," or "by his own act," mean suicide. Mutual Life Ins. Co. v. Wiswell, 56 Kans. 765, 44 Pac. 996, 35 L. R. A. 258.

[65] Connecticut &c. Ins. Co. v. Akens, 150 U. S. 468, 37 L. ed. 1148, 14 Sup. Ct. 155. See also, Life Ins. Co. v. Terry, 15 Wall. (U. S.) 580, 21 L. ed. 236; Bigelow v. Berkshire Life Ins. Co., 93 U. S. 284, 23 L. ed. 918; Charter Oak Life Ins. Co. v. Rodel, 95 U. S. 232, 24 L. ed. 433; Manhattan Life Ins. Co. v. Broughton, 109 U. S. 121, 27 L. ed. 878, 3 Sup. Ct. 99; Connecticut &c. Ins. Co. v. Lathrop, 111 U. S. 612, 28 L. ed. 536, 4 Sup. Ct. 533; Accident Ins. Co. of N. A. v. Crandal, 120 U. S. 527, 30 L. ed. 740, 7 Sup. Ct. 685.

[66] Pierce v. Travelers' &c. Ins. Co., 34 Wis. 389; Edwards v. Travelers' L. Ins. Co., 20 Fed. 661, affd. 122 U. S. 457, 30 L. ed. 1178, 7 Sup. Ct. 1249. See note to Breasted v. Farmers' Loan & Trust Co., 8 N. Y. 299, 59 Am. Dec. 482.

[67] Union Mut. L. Ins. Co. v. Payne, 105 Fed. 172, 45 C. C. A. 193.

innocent or accidental taking of an overdose of medicine.[68] Other decisions as to the meaning and effect of such provisions are found in the note referred to below.[69]

§ 4372. Presumption—Burden of proof.—The presumption is against suicide, and therefore, where there is a reasonable doubt whether death was due to suicide or accident, the presumption is in favor of accident.[70]

"It is a proposition of law supported by authority as well as reason that this and similar clauses in policies of insurance, conceding them to be valid, are not infracted by the accidental and mistaken taking of an overdose of medicine or poison or by the unintentional taking of his life by the insured.[71] * * * The principle or rule in cases of this character, is equally supported that suicide or intentional destruction by one's own hand is not presumed. The presumption is otherwise. A company interposing the defense of suicide, whether sane or insane, must overcome this presumption, and satisfy the jury or court trying the case by a preponderance of the evidence that the self-destruction was intentional."[72] The presumption against suicide is some-

[68] Northwestern Mut. Ins. Co. v. Hazelett, 105 Ind. 212, 4 N. E. 582, 55 Am. Rep. 192; Penfold v. Universal &c. Ins. Co., 85 N. Y. 317, 39 Am. Rep. 660; Burkhard v. Travellers' Ins. Co., 102 Pa. St. 262, 48 Am. Rep. 205; Bachmeyer v. Mutual Reserve Fund Life Assn., 82 Wis. 255, 52 S. W. 101. See also, Equitable &c. Soc. v. Patterson, 41 Ga. 338, 5 Am. Rep. 535.

[69] Note to Cady v. Fidelity &c. Co., (Wis.), 113 N. W. 967 in 17 L. R. A. (N. S.) 260. And see as to voluntary exposure to danger, Da Rin v. Casualty Co., 41 Mont. 175, 108 Pac. 649, 137 Am. St. 709.

[70] Union Mut. L. Ins. Co. v. Payne, 105 Fed. 172, 45 C. C. A. 193; Fidelity &c. Co. v. Freeman, 109 Fed. 847, 48 C. C. A. 692, 54 L. R. A. 680; Ingersoll v. Knights of Golden Rule, 47 Fed. 272; Travellers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18; Stephenson v. Bankers &c. Assn., 108 Iowa 637, 79 N. W. 459; Travellers' Ins. Co. v. McConkey, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. 1360; Connecticut &c. Ins. Co. v. Akens, 150 U. S. 468, 37 L. ed. 1148, 14 Sup. Ct. 155. See also, Travellers' Ins. Co. v. Nicklas, 88 Md. 470, 41 Atl. 906.

[71] Penfold v. Universal &c. Ins. Co., 85 N. Y. 317, 39 Am. Rep. 660; Walcott v. Metropolitan L. Ins. Co., 64 Vt. 221, 24 Atl. 992, 33 Am. St. 923; Phadenhauer v. Germania Life Ins. Co., 7 Heisk. (Tenn.) 567, 19 Am. Rep. 623.

[72] Brown v. Sun &c. Ins. Co. (Tenn.), 57 S. W. 415, 51 L. R. A. 252; citing Freeman v. Travellers' Ins. Co., 144 Mass. 572, 12 N. E. 372; Mallory v. Travellers' Ins. Co., 47 N. Y. 52, 7 Am. Rep. 410; Persons v. State, 90 Tenn. 291, 16 S. W. 726; Accident Ins. Co. of N. A. v. Bennett, 90 Tenn. 256, 16 S. W. 723, 25 Am. St. 685; Walcott v. Metropolitan L. Ins. Co., 64 Vt. 221, 24 Atl. 992, 33 Am. St. 923; Cronkhite v. Travelers' Ins. Co., 75 Wis. 116, 43 N. W. 731, 17 Am. St. 184. See also, to the effect that the burden is on the defendant, Supreme

times said, however, to exist only when the insured was sane.[73]

The rule that the burden rests upon the insurance company to establish such defense affirmatively is not changed by the fact that the proofs of death furnished by the plaintiff stated the cause of death as suicide.[74] But it is incumbent on the plaintiff to show that he was mistaken when he made the statement in the proofs.[75] So, in a case where it appeared that the death of the insured was caused by the taking of an overdose of morphine, the plaintiff prevailed because the defendant failed to prove by a preponderance of the evidence that the insured in taking the drug intended to end his own life.[76]

§ 4373. **Residence and occupation.**—The provisions referred to in a preceding section in regard to residence, occupation and travel are clear and specific. Where the policy prohibited residence south of a certain degree of latitude, but gave permission to pass "as a passenger by the usual routes of public conveyance to and from any port or place within the foregoing limits," it was held not to be invalidated by the fact that the insured was compelled by sickness to interrupt his journey while in a place in which travel was permitted but residence prohibited.[77] The provision with reference to residence has, however, been held waived by the reception and retention by the company of the premium after notice of a breach of the condition to an agent author-

Tent K. of M. v. Stensland, 206 Ill. 124, 68 N. E. 1098, 99 Am. St. 137; Supreme Lodge K. of P. v. Foster, 126 Ind. App. 333, 59 N. E. 877; Moody v. Amazon Ins. Co., 52 Ohio St. 12, 38 N. E. 1011, 26 L. R. A. 313, 49 Am. St. 699, and note in 84 Am. St. 540. See further, as to the presumption with reference to death by suicide, Mutual Life Ins. Co. v. Wiswell, 56 Kans. 765, 44 Pac. 996, 35 L. R. A. 258; Johns v. Northwestern Mut. Relief Assn., 90 Wis. 332, 63 N. W. 276, 41 L. R. A. 587. See also, Standard &c. Ins. Co. v. Thornton, 100 Fed. 582, 40 C. C. A. 564, 49 L. R. A. 116; Connecticut &c. Ins. Co. v. McWhirter, 73 Fed. 444, 19 C. C. A. 519.

[73] Mutual Ben. Life Ins. Co. v. Daviess' Exr., 87 Ky. 541, 10 Ky. L. 577, 9 S. W. 812. See language used in Connecticut &c. Ins. Co. v. Akens, 150 U. S. 468, 37 L. ed. 1148, 14 Sup. Ct. 155.

[74] Union Mut. L. Ins. Co. v. Payne, 105 Fed. 172, 45 C. C. A. 193; Leman v. Manhattan Life Ins. Co., 46 La. Ann. 1189, 15 So. 388, 24 L. R. A. 589, 49 Am. St. 348; Home Benefit Assn. v. Sargent, 142 U. S. 691, 35 L. ed. 1160, 12 Sup. Ct. 332.

[75] Dennis v. Union &c. Ins. Co., 84 Cal. 570, 24 Pac. 120; Keels v. Mutual Reserve Fund Life Assn., 29 Fed. 198.

[76] Brown v. Sun Life Ins. Co. (Tenn.), 57 S. W. 415. See also, Grand Legion of Select Knights v. Korneman, 10 Kans. App. 577, 63 Pac. 292.

[77] Converse v. Knights Templar &c. Co., 60 U. S. App. 288.

ized to receive, and who did receive and retain the premium.[78]

The policy also usually requires the applicant, in response to a question, to state his occupation—kind of business and position. It has been held that the statement with reference to occupation must be substantially true or the policy will be rendered void.[79] But a statement that the applicant is a soda-water maker, when he is in fact a soda-water seller, is not a breach of warranty.[80] And where the insured in his application stated that his occupation was that of a dry goods store-keeper, it was held that a failure to disclose that he was occasionally employed as a bevel-smoother of plate glass did not, in the absence of a fraudulent intent to mislead, invalidate the policy.[81] So, it his been held that a question requiring the applicant to state his "occupation or employment" refers to his occupation or employment at the time rather than his past trade.[82]

§ 4374. **Death in violation of law or at the hands of justice.** —Many insurance contracts provide that the insurer shall not be liable if the insured comes to his death at the hands of justice, or while engaged in the violation of law. The death of a woman which results from her voluntary submission to an illegal operation for abortion results from a violation of law within the meaning of this provision, and invalidates the policy.[83] So, the fact that the insured was shot by a police officer a few minutes after he had committed a robbery, and while he was attempting to escape, has been held to prevent a recovery on the policy, as the insured died in consequence of his own criminal action;[84] and

[78] Germania Life Ins. Co. v. Koehler, 168 Ill. 293, 48 N. E. 297, 61 Am. St. 108.

[79] Dwight v. Germania L. Ins. Co., 103 N. Y. 341, 8 N. E. 654, 57 Am. Rep. 729. See also, Forwood v. Prudential Ins. Co., 117 Md. 254, 83 Atl. 169; Kansas City L. Ins. Co. v. Blackstone (Tex. Civ. App.), 143 S. W. 702.

[80] Grattan v. Metropolitan Life Ins. Co., 80 N. Y. 281, 36 Am. Rep. 617; Kenyon v. Knights Templar &c. Assn., 122 N. Y. 247, 25 N. E. 299.

[81] Perrin v. Prudential Ins. Co., 30 Misc. (N. Y.) 508, 62 N. Y. S. 720. See also, Clemens v. Metropolitan L. Ins. Co., 20 Pa. Super. Ct. 567. See illustrations, §§ 4375, 4389. But compare United Brethren &c. Soc. v. White, 100 Pa. St. 12, 12 Wkly. Notes Cas. 147.

[82] Wright v. Vermont L. Ins. Co., 164 Mass. 302, 41 N. E. 303, 41 L. R. A. 303.

[83] Wells v. New England &c. Ins. Co., 191 Pa. St. 207, 43 Atl. 126, 53 L. R. A. 327, 71 Am. St. 763.

[84] Prudential Ins. Co. v. Haley, 91 Ill. App. 363, affd. 189 Ill. 317, 59 N. E. 545.

where the aggressor in an assault was killed it was held that there could be no recovery on his policy.[85] A by-law of an insurance company which provides that there can be no recovery should a member come to his death in consequence of a violation of a criminal law embraces any act of the insured which may be denominated a crime, although it is not a felony. But it was held that where the insured struck another with his hand, and the latter, throwing him down, inflicted injuries from which the insured died, such death was not in consequence of a violation of a criminal law within the contemplation of the parties.[86]

When suicide is not a crime under the laws of the state, a policy which contains a clause to the effect that it is to "be void if the member herein shall die in consequence of a duel or by the hands of justice, or in violation of or attempt to violate any criminal law of the United States, or of any state or country in which the member herein named may be," is not invalidated although the laws of the state make an attempt to commit suicide a crime. The court said:[87] "By the act of taking his own life he violated no criminal law, unless the attempt to do it may be distinguished from the act accomplished. An act is characterized by the purpose, when ascertained, of the party doing it, or by its result. If the act fails to accomplish its purpose, it constitutes an attempt, but if the result of it is the consummation of the purpose, the act is not commonly designated an attempt." If suicide, even though in a sense a crime, is not a violation of the criminal law, as there is no punishment provided for either an attempted or an accomplished suicide, it is not within such a provision.[88] Especially

[85] Payne v. Union Life Guards, 136 Mich. 416, 99 N. W. 376, 112 Am. St. 368.

[86] Brown v. Supreme Lodge K. of P., 83 Mo. App. 633. See also, Supreme Lodge K. of P. v. Bradley, 73 Ark. 274, 83 S. W. 1055, 67 L. R. A. 770, 108 Am. St. 38.

[87] Darrow v. Family Fund Soc., 116 N. Y. 537, 22 N. E. 1093, 6 L. R. A. 495, 15 Am. St. 430; Meacham v. New York &c. Assn., 120 N. Y. 237, 24 N. E. 283. See also, § 4396. So the killing of an adulterer by the husband has been held not within the condition of a policy relieving the company if death is caused at the hands of justice or in violation of or attempt to violate any criminal law. Supreme Lodge v. Crenshaw, 129 Ga. 195, 58 S. E. 628, 13 L. R. A. (N. S.) 258n, 121 Am. St. 216. See note to Conboy v. Railway Officials & Employés Assn., 17 Ind. App. 62, 60 Am. St. 154.

[88] Kerr v. Minnesota Mut. Ben. Assn., 39 Minn. 174, 39 N. W. 312, 12 Am. St. 631; Patterson v. Natural Premium &c. Ins. Co., 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. 899.

should this be held where the company has stricken out the usual suicide clause.[89] So, a suicide committed by an alleged fugitive from justice to avoid arrest and trial for a crime is not the proximate result of the alleged crime, and hence is not within the proper meaning of the provision that "if the assured shall die in, or in consequence of, the violation of any criminal law of any country, state or territory in which the assured may be," the policy shall be void.[90]

Even though a policy contains no provision for forfeiture in the event of the execution of the insured for a crime, there can be no recovery when the insured is executed.[91] In the oft-cited Fauntleroy case,[92] Lord Lyndhurst held that a policy assuming to insure against such a risk would be void as against public policy. This rule applies where it is alleged that the conviction was erroneous and the insured in fact innocent, as it would be equally against public policy to allow insurance against the miscarriage of justice. "A contract of life insurance, written to insure against a capital conviction in the established courts of competent jurisdiction in the event that such conviction is unjust and unwarranted by the evidence, is void, as being against public policy."[93]

§ 4375. **Habits.**—The general rules as to representations and warranties have been considered elsewhere. Attention is here called, however, to some particular rulings and decisions. A false statement to the effect that the applicant does not drink spirituous liquors has been held to avoid the policy;[94] and it was so held in a Kentucky case although he did not use liquor excessively or intemperately, and notwithstanding a statute which provided that all statements in the application should be deemed representa-

[89] Patterson v. Natural Premium &c. Ins. Co., 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. 899.

[90] Kerr v. Minnesota Mut. Ben. Assn., 39 Minn. 174, 39 N. W. 312, 12 Am. St. 631.

[91] Collins v. Metropolitan L. Ins. Co., 232 Ill. 37, 83 N. E. 542, 122 Am. St. 54.

[92] Amicable Society v. Bolland, 4 Bligh (N. S.) 194.

[93] Burt v. Union Cent. Life Ins. Co., 105 Fed. 419, 44 C. C. A. 548, affd. 187 U. S. 362, 47 L. ed. 216, 23 Sup. Ct. 139; Northwestern Mut. Life Ins. Co. v. McCue, 223 U. S. 234, 32 Sup. Ct. 220.

[94] Malicki v. Chicago &c. Soc., 119 Mich. 151, 77 N. W. 690. See also, Mutual Life Ins. Co. v. Thomson, 94 Ky. 253, 14 Ky. L. 800, 22 S. W. 87; Mutual Life Ins. Co. v. Gividen, 13 Ky. L. (abstract) 970.

tions and not warranties.[95] A statement that the applicant is of temperate habits, however, does not mean that he is a total abstainer,[96] and the Supreme Court of the United States has held that a man may be of temperate habits although he has once had delirium tremens.[97] Where the applicant stated that he had never used narcotics, it was held that the company could not defeat liability by showing a use of narcotics which did not amount to a custom or habit.[98] But where the applicant stated that he had always been temperate, and that the last time he had consulted a physician was about a year before for influenza, and he died of influenza four months after the policy was issued, and it appeared that before the application was made he had been frequently drunk and had consulted a physician within four months for vomiting and nausea caused by drunkenness, it was held that there was a breach of a material warranty, and there could be no recovery on the policy.[99]

In another case an applicant for insurance stated that he had never been intemperate in the use of intoxicating liquors, and in construing the statement the court said:[1] "An occasional excess in the use of intoxicating liquor does not, it is true, constitute a habit, or make a man intemperate, within the meaning of this policy; but if the habit has been formed and is indulged in, of drinking to excess and becoming intoxicated, whether daily and continuously, or periodically, with sober intervals of greater or less length, a person addicted to such a habit cannot be said to be of temperate habits, within the meaning of this policy. * * * This habit may manifest itself in practice by daily or periodical intoxication or drunkenness. Within the purview of these questions it must have existed at some previous time, or at

[95] Union Cent. L. Ins. Co. v. Lee, 20 Ky. L. 839, 47 S. W. 614.

[96] Van Valkenburgh v. American &c. Ins. Co., 70 N. Y. 605.

[97] Knickerbocker Life Ins. Co. v. Foley, 105 U. S. 350, 26 L. ed. 1055, disapproving Thomson v. Weems, L. R. 9 App. Cas. 671, where it was said that "temperate in habits" is a phrase to be interpreted, and though not to be taken in a Pythagorean sense as total abstinence, yet seems to import abstemiousness, or at least moderation.

[98] National Fraternity v. Karnes, 24 Tex. Civ. App. 607, 60 S. W. 576. See also, Franklin L. Ins. Co. v. Galligan, 71 Ark. 295, 73 S. W. 102, 100 Am. St. 73.

[99] Mengel v. Northwestern &c. Ins. Co., 176 Pa. St. 280, 35 Atl. 197.

[1] Union &c. Ins. Co. v. Reif, 36 Ohio St. 596, 38 Am. Rep. 613.

the date of the application, but it is not essential to its existence that it should be continuously practiced, or that the insured should be daily and habitually under the influence of liquor. Where the general habits of a man are either abstemious or temperate, an occasional indulgence to excess does not make him a man of intemperate habits. But if the habit is formed of drinking to excess, and the appetite for liquor is indulged to intoxication, either constantly or periodically, no one will claim that his habits are temperate, though he may be duly sober for longer or shorter periods in the intervals between the times of his debauches." The time covered by such questions and provisions depends largely upon the phraseology of the particular question or provision and answer.[2]

§ 4376. **Health and freedom from disease.**—A statement that the applicant is in "good health" means that he is free from disease or ailments which affect the general healthfulness of his system, and not from mere indisposition, which does not tend to undermine or weaken his constitution.[3] The applicant is not required to know and state with absolute certainty his physical condition or predisposition to different diseases, and it is sufficient that he in good faith discloses fully all that he knows about his past and present health.[4] Hence, a statement that a person is in good health, made in an application for reinstatement of a lapsed policy, does not mean that his health is absolutely perfect; but means that it was practically the same as it was when the policy was issued.[5] Sound health means freedom from disease

[2] Des Moines Life Assn. v. Owen, 16 Colo. 60, 63 Pac. 781; Bacon v. New England Order of Protection, 123 Fed. 152; John Hancock Mut. Life Ins. Co. v. Daly, 65 Ind. 6. As to whether a by-law of a fraternal insurance order applies or can be made to apply to a certificate already issued and invalidate it where the member has already become intemperate or the like, see Grand Lodge A. O. U. W. v. Haddock, 72 Kans. 35, 82 Pac. 583, 1 L. R. A. (N. S.) 1064, and note; Taylor v. Modern Woodmen, 72 Kans. 443, 83 Pac. 1099, 5 L. R. A. (N. S.) 283, and note.

[3] Plumb v. Penn &c. Ins. Co., 108 Mich. 94, 65 N. W. 611.

[4] Endowment Rank Knights of Pythias v. Cogbill, 99 Tenn. 28, 41 S. W. 340; Moulor v. American Life Ins. Co., 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. 466. See also, Reppond v. National Life Ins. Co., 100 Tex. 519, 101 S. W. 786, 11 L. R. A. (N. S.) 981, and note.

[5] Massachusetts Benefit Life Assn. v. Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261; Brown v. Metropolitan Life Ins. Co., 65 Mich. 306, 32 N. W. 610, 8 Am. St. 894.

or ailment which affects the general soundness or healthfulness of the system seriously, and the word "serious" is not generally used to describe a necessarily dangerous condition, but rather a grave, important or weighty trouble,[6] or a likely permanent or material impairment of health.[7]

A temporary indisposition such as an ordinary cold is not an illness within the meaning of that word as used in an application for a policy.[8] A man who has a cold, on account of which he is in bed, may be in good health within the meaning of such a clause, and this is not affected by the fact that he was taken with pneumonia and died a few days after the premium was paid.[9] Where the applicant, in answer to a question whether he had ever had any "illness, local disease, injury, mental or nervous disease or infirmity, or ever had any disease, weakness of the head, throat, heart, lungs, stomach, kidneys, bladder or any disease or infirmity whatever," answered "No," it was held not untrue, although a year before he had been treated by a physician while insensible from the influence of chloroform, presumably taken with suicidal intent.[10] A failure of the applicant to state, in reply to a question as to when and for what diseases he has consulted a physician, that he had taken the Keeley cure for alcoholism is not a misrepresentation, as drunkenness is not a disease within the meaning of this inquiry.[11]

A statement in the application that the applicant since childhood had not had the disease or disorder of spitting of blood is material, and invalidates the policy where it appears that within a year prior to the application he had a hemorrhage, in regard to which he consulted a physician.[12] So, where the applicant

[6] Metropolitan Life Ins. Co. v. Howle, 62 Ohio St. 204, 56 N. E. 908.

[7] Caruthers v. Kansas Mutual Life Ins. Co., 108 Fed. 487; Eminent Household v. Prater, 24 Okla. 214, 103 Pac. 558, 23 L. R. A. (N. S.) 917; Drakeford v. Supreme Conclave, 61 S. Car. 338, 39 S. E. 523.

[8] Billings v. Metropolitan Life Ins. Co., 70 Vt. 477, 41 Atl. 516.

[9] Barnes v. Fidelity Mut. Life Assn., 191 Pa. St. 618, 43 Atl. 341, 45 L. R. A. 264. See also, Cole v. Mutual Life Ins. Co., 129 La. 704, 56 So. 645.

[10] Mutual Reserve Fund Life Assn. v. Farmer, 65 Ark. 581, 47 S. W. 850.

[11] Supreme Lodge K. of P. v. Taylor (Ala.), 24 So. 247.

[12] Smith v. Northwestern &c. Ins. Co., 196 Pa. St. 314, 46 Atl. 426. See also, Mutual Benefit Life Ins. Co. v. Miller, 39 Ind. 475; Smith v. Ætna Ins. Co., 49 N. Y. 211; Foote v. Ætna Life Ins. Co., 61 N. Y. 571; Eminent Household v. Prater, 24 Okla. 214, 103 Pac. 558, 23 L. R. A. (N. S.) 917. But compare Peterson v. Des Moines Life Assn., 115 Iowa 668, 87 N. W. 397; Rupert v. Supreme

stated that he had never had kidney disease and had not been attended by a physician within two years, and proofs of death were made by a physician, wherein it was stated that he had attended the assured for acute kidney disease and that he had died of Bright's disease, and the proofs were by the contract made evidence against the insured, it was held that the falsity of the answers was established, and that there could be no recovery.[13] And, where the applicant stated that he had been in good health, with the exception of having had yellow fever seven or eight years before, and that he had no physician and had never been an inmate of any infirmary or hospital, and that he had never had any illness or ailment of any kind, it was held that there could be no recovery where it appeared that prior to the application the applicant was subject to fits, that he had been an inmate of two different hospitals, and had suffered from a severe gunshot wound.[14] So, where the applicant stated that he had never had any serious illness, and it appeared that two months before he made the application he had a severe attack of typhoid fever, the policy was held invalid, although there was opinion evidence to the effect that "for life insurance purposes" typhoid fever is not a dangerous disease.[15]

It is difficult to give any precise definition of the word "health." As said in New York: "The word 'health,' as ordinarily used, is a relative term. It has reference to the condition of the body. Thus it is frequently characterized as perfect, as good, as indifferent and as bad. The epithet 'good' is comparative. It does not require absolute perfection. When, therefore, one is described as being in good health, that does not necessarily nor ordinarily mean that he is absolutely free from all and every ill which 'flesh is heir to.' If the phrase should be so interpreted as to require entire exemption from physical ills, the number to whom it would be strictly applicable would be very inconsiderable. In applying terms somewhat indefinite, reference should be had

Court U. O. F., 94 Minn. 293, 102 N. W. 715; Singleton v. St. Louis Mutual Ins. Co., 66 Mo. 63, 27 Am. Rep. 321.

[13] Trudden v. Metropolitan Life Ins. Co., 50 App. Div. (N. Y.) 473, 64 N. Y. S. 183, revd. 69 App. Div. (N. Y.) 392, 74 N. Y. S. 1083.

[14] Petitpain v. Mutual &c. Assn., 52 La. Ann. 503, 27 So. 113.

[15] Meyers v. Woodmen of the World, 193 Pa. St. 470, 44 Atl. 563.

to the business to which they relate. * * * It is not usually deemed an objection that one has some slight physical disturbance of which in all human probability he will soon be relieved, although it might possibly lead to a fatal disease. A slight difficulty, such as the sting of a bee, the puncture of a thorn, a boil or a common cold has sometimes induced complaints which have shortened human life; but this result is so unfrequent and improbable that the mere possibility is disregarded in the business of life insurance."[16]

A person may be in good health although he has a touch of dyspepsia.[17] A disorder or congestion of the liver is not necessarily a disease of the liver.[18] Questions of this character should usually be left for the jury to determine.[19]

It has been held that a policy is invalid where it appears that it was issued while the insured was dangerously ill from appendicitis, and the premium was paid by his private secretary, who intentionally concealed the fact of such illness from the officers of the company and stated that the insured was away and had left funds with which to pay the premium.[20] So, as elsewhere shown, there are many instances in which false answers as to health and the like, at least when warranties as they generally are, have been held to avoid the policy even though not made with any intention to deceive.[21]

§ 4377. Bodily injuries.—Where the applicant stated: "I have never been * * * physically injured," the court said: "The reasonable interpretation of the clause is that the decedent was at the time free from serious physical injury, and that any in-

[16] Peacock v. New York Life Ins. Co., 14 N. Y. Super. Ct. 338, affd. 20 N. Y. 293. See also, Smith v. Travelers' Ins. Co., 76 Misc. (N. Y.) 441, 135 N. Y. S. 18.

[17] Morrison v. Wisconsin &c. Ins. Co., 59 Wis. 162, 18 N. W. 13.

[18] Cushman v. United States Life Ins. Co., 70 N. Y. 72.

[19] Mutual Ben. Life Ins. Co. v. Daviess' Exr., 87 Ky. 541, 10 Ky. L. 577, 9 S. W. 812. See Illinois Masons' Benev. Soc. v. Winthrop, 85 Ill. 537; Hockaday v. Jones, 8 Okla. 156, 56 Pac. 1054.

[20] Equitable Life Assur. Soc. v. McElroy, 83 Fed. 631, 28 C. C. A. 365. See also, Fraser v. Ætna Life Ins. Co., 114 Wis. 510, 90 N. W. 476.

[21] Note to Fidelity Mutual Life Assn. v. Jeffords, 107 Fed. 402, 53 L. R. A. 193; National Annuity Assn. v. McCall (Ark.), 146 S. W. 125; Supreme Lodge v. Payne, 101 Tex. 449, 108 S. W. 1160, 15 L. R. A. (N. S.) 1277 and note. The authorities on both sides are reviewed in the notes referred to. See also, Haapa v. Metropolitan Life Ins. Co., 150 Mich. 467, 114 N. W. 380, 121 Am. St. 627, and note.

juries which he may have suffered in the course of his previous life had disappeared and left no trace behind that would render him an unfit subject for accident insurance; that he was as to such accidents, and their results, free from bodily ailments."[22]

Where the applicant falsely stated that there was nothing in his physical condition tending to shorten life which was not in the application, while as a matter of fact his shoulder was in a serious condition as a result of a gunshot wound and an operation, which had not been disclosed, the company was held not estopped from relying on this false statement by the fact that the applicant called the agent's attention to the arm and showed his use thereof.[23]

Where the applicant was asked, "Have you ever had any difficulty with your head and brain?" and answered, "No," it was held that the question called for a functional or organic derangement, and did not require the disclosure of the fact that he had been subject to periodic headaches.[24]

§ 4378. **Medical attendance.**—A false statement with reference to having consulted a medical attendant invalidates the policy.[25] And it is said that if the insured has been attended by a physician within the prescribed time it is his duty to state the fact to the company, as it is entitled to know for what cause he had medical advice, and the name and address of the physician consulted in order that it may make further inquiries from him with reference to the physical condition of the applicant.[26] A statement with reference to having consulted a physician is material to the risk within the meaning of a statute which provides that the falsity of a statement in the application for life insurance shall be no defense to an action on the policy unless it is material to the risk.[27]

[22] Standard L. &c. Ins. Co. v. Martin, 133 Ind. 376, 33 N. E. 105.

[23] National Fraternity v. Karnes, 24 Tex. Civ. App. 607, 60 S. W. 576.

[24] Higbie v. Guardian Mut. Life Ins. Co., 53 N. Y. 603.

[25] Mudge v. Supreme Court I. O., 149 Mich. 467, 112 N. W. 1130, 14 L. R. A. (N. S.) 279n, 119 Am. St. 686; Phillips v. New York &c. Ins. Co., 56 Hun (N. Y.) 649, 31 N. Y. St. 636, 9 N. Y. S. 836.

[26] United Brethren &c. Soc. v. O'Hara, 120 Pa. St. 256, 13 Atl. 932. See also, Mutual Life Ins. Co. v. Arhelger, 4 Ariz. 271, 36 Pac. 895; Metropolitan Life Ins. Co. v. Brubaker, 78 Kans. 146, 96 Pac. 62, 18 L. R. A. (N. S.) 362, and note, 130 Am. St. 356. But compare Keatley v. Grand Fraternity, 198 Fed. 264.

[27] Fidelity &c. Assn. v. McDaniel, 25 Ind. App. 608, 57 N. E. 645.

The question refers, however, to a consultation about some substantial injury or ailment, and not concerning a slight and temporary indisposition.[28] Thus, consulting a physician for a cold is not a breach of the condition that the insured has not been under the care of a physician for two years.[29] So, calling at a physician's office for medicine to relieve a temporary indisposition, or calling at the house of a physician for the same purpose, is not a breach of a warranty that the applicant has not consulted a physician since childhood except for the measles.[30] But, "if the insured went to a physician for the purpose of getting his aid, advice, or assistance as a physician, in a difficulty under which he was then suffering, or supposed himself to be suffering, and the physician, hearing what the insured had to say, as a physician, and for the purpose of relief, or cure, or aid, or assistance, gave to the insured medicine, then it may be said that such a physician prescribed for him."[31]

An applicant was asked, "How long since you have consulted a physician?" and answered, "Five years." It appeared that he had consulted a physician the previous year, and it was held insufficient to establish the falsity of the answer, as the question was ambiguous.[32]

§ 4379. **Family relationship.**—The insurance company is entitled to have correct answers given to questions with reference to the family relationships of the applicant, and a false statement

[28] Hubbard v. Mutual Reserve Fund Life Assn., 100 Fed. 719, 40 C. C. A. 665. See also, Modern Woodmen v. Miles (Ind.), 97 N. E. 1009; Cole v. Mutual Life Ins. Co., 129 La. 704, 56 So. 645; Woodward v. Iowa Life Ins. Co., 104 Tenn. 49, 56 S. W. 1020; Modern Woodman v. Lawson, 110 Va. 81, 65 S. E. 509, 135 Am. St. 927.

[29] Metropolitan Life Ins. Co. v. Larson, 85 Ill. App. 143. See also, Blumenthal v. Berkshire Life Ins. Co., 134 Mich. 216, 96 N. W. 17, 104 Am. St. 604.

[30] Billings v. Metropolitan Life Ins. Co., 70 Vt. 477, 41 Atl. 516. See also, Mutual Reserve Life Ins. Co. v. Dobler, 137 Fed. 550, 70 C. C. A. 134; Brown v. Metropolitan Life Ins. Co., 65 Mich. 306, 32 N. W. 610, 8 Am. St. 894; Mutual Reserve Fund Assn. v. Agletree, 77 Miss. 7, 25 So. 869; Harris v. Knights & Ladies of Honor, 129 Mo. App. 163, 108 S. W. 130.

[31] Cobb v. Covenant &c. Assn., 153 Mass. 176, 26 N. E. 230, 10 L. R. A. 666, 25 Am. St. 619. See also, Metropolitan Life Ins. Co. v. Brubaker, 78 Kans. 146, 96 Pac. 62, 18 L. R. A. (N. S.) 362n, 130 Am. St. 356; Flippen v. State Life Ins. Co., 30 Tex. Civ. App. 362, 70 S. W. 787.

[32] Stewart v. Equitable &c. Assn., 110 Iowa 528, 81 N. W. 782. Compare also Owen v. Metropolitan Life Ins. Co., 74 N. J. L. 770, 67 Atl. 25, 122 Am. St. 413; Keatley v. Grand Fraternity, 198 Fed. 264. But see Crosse v. Supreme Lodge, 254 Ill. 80, 98 N. E. 261.

with reference thereto may invalidate the policy. Thus, it has been held that a false statement that the applicant is a widower,[33] or that he is a single man,[34] will render the policy void, although a statement that the person named as beneficiary is a cousin of the applicant was held immaterial.[35] The applicant is often asked as to the cause of the death of deceased members of his family, and as the cause of death is often a mere matter of opinion, about which even physicians may differ, an untrue statement with reference to the same will not invalidate the policy when made in good faith.[36] So, a statement by the applicant to a medical examiner of the insurance company that he had no dead brother was construed to be a representation which would not invalidate the policy in the absence of fraud or intentional misstatement, although the application signed by him stated that the answers were warranted to be true.[37]

§ 4380. **Other insurance.**—As elsewhere shown, a false answer in response to a question as to other insurance will generally invalidate a policy.[38] The question most likely to arise in reference to other insurance in connection with life insurance contracts is whether it includes certificates in mutual benefit associations. As to this the authorities are conflicting. In some states it has been held that such associations are insurance companies, and their contracts are properly termed policies, and hence constitute other insurance.[39] In others such associations are not

[33] United Brethren &c. Soc. v. White, 100 Pa. St. 12, 12 Wkly. Notes Cas. 147.

[34] Jeffries v. Economical Mut. Life Ins. Co., 22 Wall. (U. S.) 47, 22 L. ed. 833.

[35] Britton v. Supreme Council, 46 N. J. Eq. 102, 18 Atl. 675, 19 Am. St. 376. Such a statement in a mutual benefit certificate has been held to be merely a direction or nomination of the person to whom the insurance should be paid and not a warranty or false representation. Cunat v. Supreme Tribe, 249 Ill. 448, 94 N. E. 925, 34 L. R. A. (N. S.) 1192; Minnesota Mutual Life Ins. Co. v. Link, 230 Ill. 273, 82 N. E. 637.

[36] Supreme Lodge of Knights of Honor v. Dickson, 102 Tenn. 255, 52 S. W. 862. But compare Kansas City L. Ins. Co. v. Blackstone (Tex. Civ. App.), 143 S. W. 702.

[37] Globe Mut. Life Ins. Assn. v. Wagner, 188 Ill. 313, 58 N. E. 970, 52 L. R. A. 649, 80 Am. St. 169.

[38] Clapp v. Massachusetts Ben. Assn., 146 Mass. 519, 16 N. E. 433; Bruce v. Connecticut Mutual Life Ins. Co., 74 Minn. 310, 77 N. W. 210. See also, Wyss-Thalman v. Maryland Casualty Co., 193 Fed. 55, 113 C. C. A. 383.

[39] Presbyterian Mut. Assur. Fund v. Allen, 106 Ind. 593, 7 N. E. 317; State v. Nichols, 78 Iowa 747, 41 N. W. 4; Sherman v. Commonwealth, 82 Ky. 102, 5 Ky. L. 874; Commonwealth v. Wetherbee, 105 Mass. 149; Pemniston v. Union Cent. Life Ins.

treated as insurance companies, but belong to a recognized class of organizations known as benevolent associations,[40] and the weight of authority seems to support the proposition that the benefit certificate of such an association is not other insurance within the meaning of a question as to whether the applicant for life insurance in a regular company has any other insurance.[41]

§ 4381. **Rejection of former application.**—Insurance companies often ask whether the applicant has previously applied for insurance in any other company and been rejected, and a question sometimes arises, similar to that first considered in the last preceding section, with regard to which there is a like conflict among the decisions.[42] In one case a party signed an application for life insurance, and after the medical examination was substantially completed refused to comply with certain physical tests which were required. The company thereupon rejected his application and notified him of the fact by mail. Subsequently he applied to another company for insurance, and, in answer to a question, stated that he had not formally made a proposal or application to any company, agent, or association, on which a policy had not been issued. It was held that this answer was

Co., 6 Ohio Dec. 830, 8 Am. Law Rec. 361; Co-operative Fire Ins. Order of Knoxville v. Lewis, 12 Lea (Tenn.) 136.

[40] Theobald v. Supreme Lodge &c., 59 Mo. 87; Masonic Mutual Assn. v. Jones, 154 Pa. St. 107, 26 Atl. 255; Commonwealth v. Equitable Ben. Assn., 137 Pa. St. 412, 18 Atl. 1112; Lithgow v. Supreme Tent of Knights of Maccabees, 165 Pa. St. 292, 30 Atl. 830.

[41] Mutual Reserve Life Ins. Co. v. Dobler, 137 Fed. 550, 70 C. C. A. 134 (does not include accident insurance); Penn Mut. Life Ins. Co. v. Mechanics' Sav. &c. Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33; Mutual Life Ins. Co. v. Ford (Tex. Civ. App.), 130 S. W. 769; Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304, 33 L. ed. 341, 10 Sup. Ct. 87.

[42] To the effect that rejection by a fraternal or other mutual benefit association is not included, see Lyon v. United Moderns, 148 Cal. 470, 83 Pac. 804, 4 L. R. A. (N. S.) 247, 113 Am. St. 291; Peterson v. Manhattan Life Ins. Co., 115 Ill. App. 421, revd. 244 Ill. 329, 91 N. E. 466, 18 Am. & Eng. Ann. Cas. 96; Newton v. Southwestern Mutual Life Assn., 116 Iowa 311, 90 N. W. 73; White v. National Life Ins. Co., 11 Ohio Dec. 857, 30 Wkly. L. Bul. 237; Equitable Life Ins. Co. v. Hazelwood, 75 Tex. 338, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. 893. See Fidelity Mutual Life Ins. Assn. v. Miller, 92 Fed. 63, 34 C. C. A. 211. Contra, Bruce v. Connecticut Mutual Life Ins. Co., 74 Minn. 310, 77 N. W. 210 (here, however, the question used the words "company" or "association"); Alden v. Supreme Tent, 178 N. Y. 535, 71 N. E. 104; Kemp v. Good Templars' &c., 64 Hun (N. Y.) 637, 46 N. Y. St. 429, 19 N. Y. S. 435, affd. 135 N. Y. 658, 32 N. E. 648; Meyer-Burns v. Penna. Mut. Life Ins. Co., 189 Pa. St. 579, 42 Atl. 297. And compare Masonic L. Assn.

substantially and technically false and avoided the policy.[43] In another case a person applied to an agent of an insurance company for insurance upon his life, filled up and signed an application which the agent was authorized to reduce to writing. The agent and the applicant then went to the office of the medical examiner, but, not finding him in, no examination was made. The agent subsequently went to the medical examiner alone with the application, which had been delivered to him, and was advised by the examiner that, having attended the applicant professionally, he was aware that the applicant was not insurable, and that it was useless to examine him. The application, which had been reduced to writing by the agent, was thereupon destroyed. It was held that these facts established conclusively that an application for insurance had been made within the purview of a question propounded by another company to the same person subsequently applying for insurance, as to whether an application for insurance had ever been made by him to any other company.[44] So, where the applicant was asked the question, "Has any examining physician for life-insurance company or order declined to recommend your application?" and answered, "No," it was held that the false statement invalidated the policy.[45]

It is generally held that a question as to whether the applicant carries other insurance or has been rejected relates to insurance of the same character and does not ordinarily include an entirely different kind of insurance or company.[46] Thus, it has been held not to include mere accident insurance where the application is for life insurance, and not to include life insurance where the application is to an accident insurance company or fraternal order for mere accident insurance.[47]

v. Robinson, 149 Ky. 80, 147 S. W. 882; Cundiff v. Royal Neighbors, 162 Mo. App. 117, 144 S. W. 128.

[43] Security &c. Ins. Co. v. Webb, 106 Fed. 808, 45 C. C. A. 648, 55 L. R. A. 122.

[44] Edington v. Ætna Life Ins. Co., 77 N. Y. 564, 100 N. Y. 536, 3 N. E. 315.

[45] Finch v. Modern Woodmen, 113 Mich. 646, 71 N. W. 1104.

[46] As to whether a paid-up policy is included where the question is as to the insurance carried, see Dimick v. Metropolitan Life Ins. Co., 69 N. J. L. 384, 55 Atl. 291, 62 L. R. A. 774.

[47] Montreal Coal & Towing Co. v. Metropolitan Life Ins. Co., 24 C. S. (Rap. Jud. Quebec) 399, affd. in 35 Can. S. C. 266; Mutual Reserve Life Ins. Co. v. Dobler, 137 Fed. 550, 70 C. C. A. 134; Wright v. Fraternities Health & Acc. Assn., 107 Maine, 418, 78 Atl. 475, 32 L. R. A. (N. S.) 461n; Dineen v. General Acc. Ins. Co., 126 App. Div. (N. Y.) 167, 110 N. Y. S.

§ 4382. **Proof of death.**—Life insurance policies also usually contain a provision that proof of death must be furnished within some specified time, and in some of the policies it is stated that "due" or "satisfactory" proof must be furnished while in a few others more or less specific provisions are found not only as to the time and place of furnishing the proof but also as to the manner. This whole subject, however, has been so fully treated in considering proof of loss in a preceding chapter that little is required to be added here. "Due" or "satisfactory" proof is such as the law will pronounce reasonable and satisfactory, and the insurer is not the arbitrary or despotic judge thereof.[48] So, all that is required in general is reasonable proof under the circumstances, and where there are no eye-witnesses, or the literal performance of a provision as to proof becomes impossible, or the like, different or less definite proof of death or the cause of death may be sufficient than might otherwise be required according to the terms of the particular policy.[49] And a provision as to the time or manner of making proof may be waived by the insurer either expressly or impliedly as in other cases.[50] The entire subject,—including the sufficiency of proof of death, the manner of making it, by whom it should be made, the time within which it must be furnished, and waiver—is elaborately treated in the case and note referred to below.[51]

344. But see McCollum v. Mutual Life Ins. Co., 55 Hun (N. Y.) 103, 28 N. Y. St. 272, 8 N. Y. S. 249, affd. in 124 N. Y. 642, 27 N. E. 412.

[48] Noyes v. Commercial Travelers &c. Assn., 190 Mass. 171, 76 N. E. 665; Buffalo Loan &c. Co. v. Knights Templar &c. Assn., 126 N. Y. 450, 27 N. E. 942, 22 Am. St. 839; Charter Oak Life Ins. Co. v. Rodel, 95 U. S. 232, 24 L. ed. 433.

[49] Preferred Acc. Assn. v. Fielding, 35 Colo. 19, 83 Pac. 1013, 9 Am. & Eng. Ann. Cas. 916; Preferred Acc. Ins. Co. v. Barker, 93 Fed. 158, 35 C. C. A. 250; Metropolitan Casualty Ins. Co. v. McAuley, 134 Ga. 165, 67 S. E. 393; O'Neill v. Massachusetts Benefit Assn., 63 Hun (N. Y.) 292, 43 N. Y. St. 761, 18 N. Y. S. 22; Potter v. Union Cent. Life Ins. Co., 195 Pa. St. 557, 46 Atl. 111.

[50] National Life Maturity Ins. Co. v. Whitacre, 15 Ind. App. 506, 43, N. E. 905; Pray v. Life Indemnity &c. Co., 104 Iowa 114, 73 N. W. 485; Fillmore v. Great Camp of Knights of Maccabees, 109 Mich. 13, 66 N. W. 675; Robinson v. Northwestern Nat. Ins. Co., 92 Minn. 379, 100 N. W. 226; Seely v. Manhattan Life Ins. Co., 72 N. H. 49, 55 Atl. 425, and many other cases cited in the note next referred to below.

[51] Da Rin v. Casualty Co., 41 Mont. 175, 108 Pac. 649, 27 L. R. A. (N. S.) 1164n, 137 Am. St. 709, and note.

CHAPTER CXXX.

ACCIDENT INSURANCE.

§ 4385. Definition of accident—Proximate cause.
4386. Construction of policy—External, violent or accidental.
4387. Risks of travel.
4388. Inhaling gas—Poison.
4389. Occupation or employment.
4390. External signs.
4391. Excepted risks—Effect of negligence.
4392. Voluntary exposure to unnecessary dangers.
4393. Knowledge — Distinction between voluntary act and voluntary exposure.
§ 4394. Bodily infirmity or disease.
4395. Injuries intentionally inflicted by others.
4396. Injuries received while engaged in violation of law.
4397. Injuries received while intoxicated.
4398. General provisions — Amount of recovery—Disability.
4399. Sick benefits.
4400. Construction—Effect of existing judicial decisions.

§ 4385. **Definition of accident—Proximate cause.**—"Accidental" means happening by chance; unexpectedly taking place; not according to the usual course of things, or not as expected.[1] It includes an unusual or unexpected result which attends the performance of a usual act.[2] Thus, within the definition of an accident are included the following:—A rupture of a blood vessel while exercising with indian clubs;[3] an unintentional taking of poison;[4] a sprain caused by lifting a heavy weight;[5] an injury

[1] Richards v. Travelers' Ins. Co., 89 Cal. 170, 26 Pac. 762, 23 Am. St. 455; Lovelace v. Travelers' Protect. Assn., 126 Mo. 104, 28 S. W. 877, 30 L. R. A. 209, 47 Am. St. 638; Paul v. Travelers' Ins. Co., 112 N. Y. 472, 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. 758, and note; North American Life & Accident Ins. Co. v. Burroughs, 69 Pa. St. 43, 8 Am. Rep. 212; United States Mut. Acc. Assn. v. Barry, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. 775. See also, Hey v. Guarantors' Liability Indem. Co., 181 Pa. St. 220, 37 Atl. 402, 59 Am. St. 644. A snowstorm is not an "accident". Fenwick v. Schmalz, L. R. 3 C. P. 313. Injuries received in a fight in which the insured engaged without fault on his part are "accidental". Supreme Council v. Garrigus, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298.

[2] Western Commercial Travelers' Assn. v. Smith, 85 Fed. 401, 29 C. C. A. 223, 40 L. R. A. 653; Providence Life Ins. Co. v. Martin, 32 Md. 310. See also, 3 Elliott Ev., §§ 2399, 2400.

[3] McCarthy v. Travelers' Ins. Co., 8 Biss. (U. S.) 362, Fed. Cas. No. 8682.

[4] Healey v. Mutual Acc. Assn., 133 Ill. 556, 25 N. E. 52, 9 L. R. A. 371, 23 Am. St. 637; Mutual &c. Acc. Assn. v. Tuggle, 39 Ill. App. 509, revd. 138 Ill. 428, 28 N. E. 1066. See also, Dezell v. Fidelity & Casualty Co., 176 Mo. 253, 75 S. W. 1102.

[5] Martin v. Travelers' Ins. Co., 1

resulting from jumping from the platform of a train under circumstances that would justify a person in assuming that no harm would result;[6] suicide while insane;[7] death by hanging at the hands of a mob;[8] injuries from an assault which the insured was not expecting and did nothing to induce;[9] injuries intentionally inflicted by another;[10] and injuries received while asleep.[11]

The accident must be the proximate cause of the injury or there can be no recovery.[12] But it may be the proximate cause of death even though death results from blood poisoning caused by the accident or in connection with medical treatment necessitated by the accident.[13]

§ 4386. **Construction of policy—External, violent or accidental injuries.**—A policy insuring against death or accident caused by "external, violent and accidental means" includes, in

F. & F. 505. Policies sometimes exempt the company from liability when the injury is caused by voluntary over-exertion. For construction of this provision, see Rustin v. Standard &c. Ins. Co., 58 Nebr. 792, 79 N. W. 712, 46 L. R. A. 253, 76 Am. St. 136. See also, Metropolitan Acc. Assn. v. Bristol, 69 Ill. App. 492; Reynolds v. Equitable Acc. Assn, 49 Hun (N. Y.) 605, 59 Hun (N. Y.) 13, 1 N. Y. S. 738, 17 N. Y. St. 337, affd. 121 N. Y. 649, 24 N. E. 1091.

[6] United States Mut. Acc. Assn. v. Barry, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. 755. See also, Smith v. Ætna L. Ins. Co., 115 Iowa 217, 88 N. W. 368, 56 L. R. A. 271, 91 Am. St. 153. But see Southard v. Railway &c. Assur. Co., 34 Conn. 574, Fed. Cas. No. 13182.

[7] Mutual &c. Ins. Co. v. Daviess' Exr., 87 Ky. 541, 100 Ky. L. 577, 9 S. W. 812; Blackstone v. Standard Life & Acc. Ins. Co., 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486. See also, Tuttle v. Iowa State &c. Assn., 132 Iowa 652, 104 N. W. 1131, 7 L. R. A. (N. S.) 223, and note; Accident Ins. Co. v. Crandal, 120 U. S. 527, 30 L. ed. 740, 7 Sup. Ct. 685.

[8] Fidelity & Casualty Co. v. Johnson, 72 Miss. 333, 17 So. 2, 30 L. R. A. 206.

[9] Phelan v. Travelers' Ins. Co., 38 Mo. App. 640.

[10] See § 4395.

[11] Ætna L. Ins. Co. v. Fitzgerald, 165 Ind. 317, 75 N. E. 262, 1 L. R. A. (N. S.) 422, 112 Am. St. 232. See also, Travelers Ins. Co. v. Ayres, 217 Ill. 390, 75 N. E. 506, 2 L. R. A. (N. S.) 168n.

[12] Freeman v. Mercantile &c. Assn., 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753, and note on Proximate Cause of Death within the Meaning of a Life Insurance Policy. See also, Manufacturers' Acc. Indem. Co. v. Dorgan, 58 Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620; Western Commercial Travelers' Assn. v. Smith, 85 Fed. 401, 29 C. C. A. 223, 40 L. R. A. 653; Martin v. Manufacturers' &c. Co., 151 N. Y. 94, 45 N. E. 377. As to when it is for the jury, see Continental Casualty Co. v. Lloyd, 165 Ind. 52, 73 N. E. 824; Standard Acc. &c. Co. v. Wood (Md.), 82 Atl. 702.

[13] Gardner v. United Surety Co., 110 Minn. 291, 125 N. W. 264, 26 L. R. A. (N. S.) 1004, and note; Cary v. Preferred Acc. Ins. Co., 127 Wis. 67, 106 N. W. 1055, 5 L. R. A. (N. S.) 926, 115 Am. St. 997, and note. See also, Travelers Ins. Co. v. Murray, 16 Colo. 296, 26 Pac. 774, 25 Am. St. 267; Delaney v. Modern Acc. Club, 121 Iowa 528, 97 N. W. 91, 63 L. R. A. 603. The question usually occurs, however, in connection with some exception in the policy and is hereinafter considered..

a proper case, death or bodily injury accidentally caused by a substance taken internally.[14] Such a policy covers death by stumbling and falling against a locomotive engine;[15] a fall due to a temporary and unexpected physical disorder;[16] an accidental strain causing death;[17] a blow struck by another person;[18] death due to excitement and strain caused by attempting to hold and control a frightened and runaway team;[19] death caused by accidental drowning;[20] death caused by drowning while attempting to rescue the crew of a wrecked ship, where it appeared that there was a bruise over the left temple;[21] a rupture caused by jumping from a train;[22] choking to death while attempting to swallow a piece of beefsteak;[23] injury caused by the sting of an insect;[24] hanging at the hands of a mob;[25] death by inhaling gas

[14] Miller v. Fidelity &c. Co., 97 Fed. 836; Fidelity & Casualty Co. v. Lowenstein, 97 Fed. 17, 38 C. C. A. 29, 46 L. R. A. 450; Healey v. Mutual Acc. Assn., 133 Ill. 556, 25 N. E. 52, 9 L. R. A. 371, 23 Am. St. 637; Jenkins v. Hawkeye Commercial Men's Assn., 147 Iowa 113, 124 N. W. 199, 30 L. R. A. (N. S.) 1181, and note; Gardner v. United Surety Co., 110 Minn. 291, 125 N. W. 264, 26 L. R. A. (N. S.) 1004n; Bayless v. Travelers' Ins. Co., 14 Blatchf. (U. S.) 143, Fed. Cas. No. 1138, revd. 113 U. S. 316, 28 L. ed. 989, 5 Sup. Ct. 494.

[15] Equitable Acc. Ins. Co. v. Osborn, 90 Ala. 201, 9 So. 869, 13 L. R. A. 267. See also, Continental Casualty Co. v. Lloyd, 165 Ind. 52, 73 N. E. 824.

[16] Meyer v. Fidelity &c. Co., 96 Iowa 378, 65 N. W. 328, 59 Am. St. 374. But compare Shanberg v. Fidelity &c. Co., 143 Fed. 651; Carr v. Pacific Mut. L. Ins. Co. of California, 100 Mo. App. 602, 75 S. W. 180 (under exception in policy).

[17] North American Life & Accident Ins. Co. v. Burroughs, 69 Pa. St. 43, 8 Am. Rep. 212. But compare Stanton v. Travelers' Ins. Co., 83 Conn. 708, 78 Atl. 317, 34 L. R. A. (N. S.) 445n.

[18] Richards v. Travelers' Ins. Co., 89 Cal. 170, 26 Pac. 762, 23 Am. St. 455.

[19] McGlinchey v. Fidelity &c. Co., 80 Maine 251, 14 Atl. 13, 6 Am. St. 190.

[20] Trew v. Railway &c. Assur. Co., 6 Hurl. & N. 839; Manufacturers' &c. Indem. Co. v. Dorgan, 58 Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620; Mallory v. Travelers' Ins. Co., 47 N. Y. 52, 7 Am. Rep. 410; Tucker v. Mutual Ben. Life Co., 121 N. Y. 718, 24 N. E. 1102; De Van v. Commercial &c. Assn., 92 Hun (N. Y.) 256, 72 N. Y. St. 304, 36 N. Y. S. 931, affd. 157 N. Y. 690, 51 N. E. 1090; United States Mut. Acc. Assn. v. Hubbell, 56 Ohio St. 516, 47 N. E. 544, 40 L. R. A. 453.

[21] Tucker v. Mutual Ben. Life Co., 121 N. Y. 718, 24 N. E. 1102.

[22] Travelers' Ins. Co. v. Murray, 16 Colo. 296, 26 Pac. 774, 25 Am. St. 267. But compare Ætna L. Ins. Co. v. Dorney, 68 Ohio St. 151, 67 N. E. 254.

[23] American Acc. Co. v. Reigart, 94 Ky. 547, 15 Ky. L. 469, 23 S. W. 191, 21 L. R. A. 651, 42 Am. St. 374.

[24] Omberg v. United States &c. Assn., 101 Ky. 303, 19 Ky. L. 462, 40 S. W. 909, 72 Am. St. 413.

[25] Fidelity & Casualty Co. v. Johnson, 72 Miss. 333, 17 So. 2, 30 L. R. A. 206.

while working in a well,[26] or while asleep,[27] periostitis of the metacarpal bones caused by placing the hands during sleep between the head and the edge of the bed rail;[28] blood poisoning, caused by an abrasion of the skin of a toe by a new shoe;[29] and lockjaw produced by a gunshot accidentally inflicted upon the insured by himself.[30] But a rupture caused by the insured jumping from a train, where he acted for his own convenience, and not under any necessity, was held not within the conditions of an accident policy insuring against injury caused by "violent or accidental means."[31] So, sunstroke contracted in the course of the ordinary duties of an architect has been held to be a disease, and not an accident caused by "external, violent or accidental" means.[32] But where a policy provided that if "any injury causing disability or death entitling the insured to claim benefits under the provisions of this policy be caused, or contributed to * * * by sunstroke or freezing while not in the line of his duty as a railroad employé * * * then, in such case, the limit of the association's liability shall be one-fourth of the sum otherwise payable," it was held that under this limitation a sunstroke received while in the line of his employment was covered by the policy,[33] and under a somewhat similar provision it was held that disability caused by heat of a furnace might be considered as within the meaning of "sunstroke" for which a recovery could be had.[34]

[26] Paul v. Travelers' Ins. Co., 112 N. Y. 472, 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. 758; Pickett v. Pacific &c. Ins. Co., 144 Pa. St. 79, 22 Atl. 871, 13 L. R. A. 661, 27 Am. St. 618.

[27] Travelers' Ins. Co. v. Ayres, 217 Ill. 390, 75 N. E. 506, 2 L. R. A. (N. S.) 168, and note; Paul v. Travelers' Ins. Co., 112 N. Y. 472, 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. 758.

[28] Ætna L. Ins. Co. v. Fitzgerald, 165 Ind. 317, 75 N. E. 262, 1 L. R. A. (N. S.) 422, 112 Am. St. 232.

[29] Western Commercial Travelers' Assn. v. Smith, 85 Fed. 401, 29 C. C. A. 223, 40 L. R. A. 653. See generally as to blood poisoning, Cary v. Preferred Acc. Ins. Co., 127 Wis. 67, 106 N. W. 1055, 5 L. R. A. (N. S.) 926, 115 Am. St. 997, and note.

[30] Travelers' Ins. Co. v. Melick, 65 Fed. 178, 12 C. C. A. 544, 27 L. R. A. 629.

[31] Southard v. Railway &c. Assur. Co., 34 Conn. 574, Fed. Cas. No. 13182.

[32] Dozier v. Fidelity & Casualty Co. of New York, 46 Fed. 446, 13 L. R. A. 114. See also, Bryant v. Continental Casualty Co. (Tex. Civ. App.), 145 S. W. 636.

[33] Railway &c. Assn. v. Johnson, 109 Ky. 261, 22 Ky. L. 759, 58 S. W. 694, 52 L. R. A. 401, 95 Am. St. 370. See also, Schumacher v. Great Eastern Casualty &c. Co., 197 N. Y. 58, 90 N. E. 353, 27 L. R. A. (N. S.) 480n.

[34] Continental Casualty Co. v. Johnson (Kans.), 85 Pac. 545, 6 L. R. A. (N. S.) 609.

§ 4387. **Risks of travel.**—Policies sometimes insure against accidents while "actually traveling in a public conveyance," and while complying with the rules and regulations of the carrier. Such a policy covers an accident which occurs while the insured is getting on or off a train, either at an intermediate station, where he left the car temporarily, or at his destination.[35] A party accepting a policy which plainly limits the risk to that of a common carrier's public conveyances cannot recover for injuries received while caring for and selling horses which he was taking to market, although the agent of the company instructed him that the policy would cover such risks.[36] But the company is presumed to issue its policy with a knowledge of the ordinary customs of the business in which the insured is engaged. Hence, a cattle dealer who receives a policy which permits him to care for his cattle in transit on trains may show that at the time of the injury he was engaged in doing what was customary among cattle dealers.[37] It has also been held that a party who is insured against "accident while traveling by public or private conveyances, provided for the transportation of travelers," can recover for an injury sustained while going on foot from a steamboat landing to the railway station for the purpose of continuing his journey.[38] But, on the other hand, it has been held that a person who had left the landing place of a steamer and was injured while walking home, a distance of about eight miles, was not traveling by a "public or private conveyance" at the time of the injury;[39] and where the policy covered only injuries "received within the United States (not including its parts beyond the seas), Mexico, and Canada," it was held that there was no liability for injury and death of the insured while in the canal zone on the Isthmus of Panama.[40]

§ 4388. **Inhaling gas—Poison.**—The question as to whether the act of the insured was voluntary and intelligent is

[35] Tooley v. Railway &c. Assur. Co., 3 Biss. (U. S.) 399, Fed. Cas. No. 14098.

[36] Fidelity & Casualty Co. v. Teter, 136 Ind. 672, 36 N. E. 283.

[37] Pacific &c. Ins. Co. v. Snowden, 58 Fed. 342, 7 C. C. A. 264.

[38] Northrup v. Railway Pass. &c. Co., 43 N. Y. 516, 3 Am. Rep. 724.

[39] Ripley v. Insurance Co., 16 Wall. (U. S.) 336, 21 L. ed. 469.

[40] Currie v. Continental Casualty Co., 147 Iowa 281, 126 N. W. 164, 140 Am. St. 300..

often decisive of the question of liability of the insurer. Thus, it is generally held that under a policy which contains a provision that the liability of the company shall not extend to any death or disability which may have been caused "by the taking of poison, contact with poisonous substances, or inhaling of gas, or by any surgical operation or medical treatment," the company is not liable for death caused by a voluntary and intelligent act on the part of the insured, as distinguished from one which was unconscious and in that sense involuntary, but is liable under such a policy where the insured was asphyxiated by illuminating gas which he unconsciously, involuntarily and accidentally inhaled while asleep in his room at a hotel;[41] and the company was also held liable for death from the accidental inhalation of gas while asleep where the exemption was from liability for death resulting wholly or partly, directly or indirectly, from any gas or vapor.[42]

Death caused by the poisonous sting of an insect is not within a clause exempting the company from liability for injuries caused by "poison in any form," or "by contact with poisonous substances."[43] But death resulting from the shock caused by swallowing aqua ammonia has been held to result from taking poison within an exemption from liability for death resulting from poison, notwithstanding it was given by a druggist.[44] Under a policy insuring against "the effects of injuries to the body caused by external, violent, and accidental means," but excepting liability for death caused by poison, the insurer is liable when death is

[41] Fidelity &c. Co. v. Waterman, 59 Ill. App. 297, affd. 161 Ill. 632, 44 N. E. 283, 32 L. R. A. 654; Paul v. Travelers' Ins. Co., 112 N. Y. 472, 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. 758; Bacon v. United States Mut. Acc. Assn., 123 N. Y. 304, 25 N. E. 399, 9 L. R. A. 617, 20 Am. St. 748; Menneiley v. Employers' &c. Assur. Corp., 148 N. Y. 596, 43 N. E. 54, 31 L. R. A. 686, 51 Am. St. 716; Pickett v. Pacific Ins. Co., 144 Pa. St. 79, 22 Atl. 871, 13 L. R. A. 661, 27 Am. St. 618. See also, Fidelity & Casualty Co. v. Lowenstein, 97 Fed. 17, 38 C. C. A. 29, 46 L. R. A. 450. Contra on the general proposition, see McGlother v. Provident &c. Acc. Co., 89 Fed. 685, 32 C. C. A. 318; Preferred Acc. Ins. Co. v. Robinson, 45 Fla. 525, 33 So. 1005, 61 L. R. A. 145; Early v. Standard &c. Ins. Co., 113 Mich. 58, 71 N. W. 500, 67 Am. St. 445.

[42] Travelers' Ins. Co. v. Ayres, 217 Ill. 390, 75 N. E. 506, 2 L. R. A. (N. S.) 168n.

[43] Omberg v. United States &c. Assn., 101 Ky. 303, 19 Ky. L. 462, 40 S. W. 909, 72 Am. St. 413.

[44] Early v. Standard L. & Acc. Ins. Co., 113 Mich. 58, 71 N. W. 500. But see authorities cited in notes 43, 45 and 46.

caused by poison accidentally taken by the insured.[45] And where the policy contained a statement that it should not be held to extend to a poison "in any way taken, administered, absorbed, or inhaled," it was held that the words "in any way" related to the mode or manner in which the poison was taken, and not to the motive of the insured in taking it.[46]

In a recent case in Wisconsin,[47] the policy in suit excepted "injuries, fatal or otherwise, resulting wholly or in part from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled;" and the insured having died from blood poisoning resulting from the treatment of a wound caused by extracting a tooth, it was held that the insurer was not liable. But it seems somewhat difficult to distinguish this case from a later decision of the same court, as well as some of the decisions of other courts.[48]

§ 4389. Occupation or employment.—All occupations are not subject to the same risks, and some are so hazardous as to render it impossible, or almost impossible for the parties engaged in them to procure accident insurance. The insurance companies classify the various occupations and arrange their premium rates in accordance with the hazard involved. Where the contract provides that if the insured is injured in any occupation rated by the company as more hazardous than that given by the insured

[45] Travelers' Ins. Co. v. Dunlap, 160 Ill. 642, 43 N. E. 765, 52 Am. St. 355; Metropolitan Acc. Assn. v. Froiland, 161 Ill. 30, 43 N. E. 766, 52 Am. St. 359; Pollock v. United States &c. Assn., 102 Pa. St. 230, 48 Am. Rep. 204.

[46] Metropolitan Acc. Assn. v. Froiland, 161 Ill. 30, 43 N. E. 766, 52 Am. St. 359, citing Travelers' Ins. Co. v. Dunlap, 160 Ill. 642, 43 N. E. 765, 52 Am. St. 355. And see Healey v. Mutual Acc. Assn., 133 Ill. 556, 25 N. E. 52, 9 L. R. A. 371, 23 Am. St. 637.

[47] Kasten v. Interstate Casualty Co., 99 Wis. 73, 74 N. W. 534, 40 L. R. A. 651; Westmoreland v. Preferred &c. Ins. Co., 75 Fed. 244 (when the insured died from the effects of chloroform); Early v. Standard L. & Acc. Ins. Co., 113 Mich. 58, 71 N. W. 500, 67 Am. St. 445. See also, Herdic v. Maryland Casualty Co., 149 Fed. 198, 79 C. C. A. 156; Preferred Acc. Ins. Co. v. Robinson, 45 Fla. 525, 33 So. 1005, 61 L. R. A. 145; Flint v. Travelers' Ins. Co. (Tex. Civ. App.), 43 S. W. 1079.

[48] Cary v. Preferred Acc. Ins. Co., 127 Wis. 67, 106 N. W. 1055, 5 L. R. A. (N. S.) 926, 115 Am. St. 997. See also, Fitton v. Accidental Death Ins. Co., 17 C. B. (N. S.) 122; Central Acc. Ins. Co. v. Rembe, 220 Ill. 151, 77 N. E. 123, 5 L. R. A. (N. S.) 933, 110 Am. Rep. 235; Jones v. Pennsylvania Casualty Co., 140 N. Car. 262, 52 S. E. 578, 5 L. R. A. (N. S.) 932, 111 Am. St. 843. See as to medical treatment the note in 26 L. R. A. (N. S.) 1004.

as his occupation, the insurance shall only be what the premium paid would purchase at the rate fixed by the tables for the increased hazard, it has been held that the jury must determine whether there has been any increase in the risk.[49]

Where the insured gave his occupation as that of a blacksmith employed by a railroad company, and it appeared that he also acted as a switchman and car-coupler, which occupation was classed as a more hazardous one, he was allowed to recover the amount the premium paid would have secured in the more hazardous occupation.[50]

A mere occasional act not strictly within the scope of the stated occupation is not engaging in another occupation. Such provisions refer to classes of occupations and not to particular acts. Thus, one who is insured as a merchant may hunt for pleasure without being held to have engaged in the occupation of a hunter.[51] So, a person insured as a mining expert does not become an engineer or fireman by casually riding on an engine.[52] A farmer may drive piles in the construction of a private bridge without engaging in the occupation of a piledriver.[53] A banker does not change his employment to that of a sawyer by operating a saw to cut some pieces of lumber while he is in a sawmill for the purpose of getting some boards to make a table to use in his bank.[54]

But it seems that operating a buzz-saw for his own amusement is not within the permissible pleasures of one who states his occupation to be that of "retired gentleman."[55]

[49] Eggenberger v. Guarantee Mut. Acc. Assn., 41 Fed. 172; Standard Life & Acc. Ins. Co. v. Martin, 133 Ind. 376, 33 N. E. 105.

[50] Standard L. &c. Ins. Co. v. Taylor, 12 Tex. Civ. App. 386, 34 S. W. 781.

[51] Union Mut. Acc. Assn. v. Frohard, 134 Ill. 228, 25 N. E. 642, 10 L. R. A. 383, 23 Am. St. 664; Star Accident Co. v. Sibley 57 Ill. App. 315; Kentucky Life & Accident Ins. Co. v. Franklin, 102 Ky. 512, 19 Ky. L. 1573, 43 S. W. 709.

[52] Berliner v. Travelers' Ins. Co., 121 Cal. 458, 53 Pac. 918, 41 L. R. A. 467.

[53] National Accident Society v. Taylor, 42 Ill. App. 97.

[54] Hess v. Preferred Masonic Mut. Acc. Assn., 112 Mich. 196, 70 N. W. 460, 40 L. R. A. 444. A teacher who, while out of employment, causes two dwelling houses to be erected does not become a "builder." Stone v. United States Casualty Co., 34 N. J. L. 371. See also, Grattan v. Metropolitan Life Ins. Co., 80 N. Y. 281, 36 Am. Rep. 617; Dwight v. Germania L. Ins. Co., 103 N. Y. 341, 8 N. E. 654, 57 Am. Rep. 729; North American Life & Accident Ins. Co. v. Burroughs, 69 Pa. St. 43, 8 Am. Rep. 212.

[55] Knapp v. Preferred Mut. Acc.

§ 4390. **External signs.**—A provision to the effect that there shall be no liability for injuries which produce no external and visible signs does not apply to the injuries which result in death.[56] Under such a provision the insured was allowed to recover for injury caused by a strain which produced no external result until some time after the accident.[57] A nosebleed has been held an external and visible sign of injury.[58] Where artificial respiration practiced upon a dead body brought forth illuminating gas, it was treated as an external or visible mark of an accident.[59] So, where water ran from the mouth of a dead body, which was taken from a river, it was held that there were external and visible signs of drowning.[60] And it may be stated generally that bruises, lacerations, broken limbs, or the like, are not the only things included under "external signs."[61]

§ 4391. **Excepted risks—Effect of negligence.**—Unless excepted by the terms of the policy, the insured is entitled to recover in a proper case even where the accident was caused by his own negligence.[62] But policies ordinarily provide that the company shall not be liable unless the insured exercises due care for his personal protection. Under such a provision he is bound to exercise that degree of care which an ordinarily prudent man would

Assn., 53 Hun (N. Y.) 84, 24 N. Y. St. 882, 6 N. Y. S. 57.

[56] Eggenberger v. Guarantee Mut. Acc. Assn., 41 Fed. 172; McGlinchey v. Fidelity &c. Co., 80 Maine 251, 14 Atl. 13, 6 Am. St. 190. See also, Pickett v. Pacific &c. Ins. Co., 144 Pa. St. 79, 22 Atl. 871, 13 L. R. A. 661, 27 Am. St. 618; United States Mut. Acc. Assn. v. Newman, 84 Va. 52, 3 S. E. 805.

[57] Pennington v. Pacific &c. Ins. Co., 85 Iowa 468, 52 N. W. 482, 39 Am. St. 306.

[58] Whitehouse v. Travelers' Ins. Co., Fed. Cas. No. 17566, 7 Ins. L. J. 23.

[59] Menneiley v. Employers' &c. Assur. Corp., 148 N. Y. 596, 43 N. E. 54, 31 L. R. A. 686, 51 Am. St. 716.

[60] Wehle v. United States &c. Assn., 63 N. Y. St. 464, 31 N. Y. S. 865.

[61] Freeman v. Mercantile &c. Assn., 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753, and note; Thayer v. Standard &c. Ins. Co., 68 N. H. 577, 41 Atl. 182; North American Life & Accident Ins. Co. v. Burroughs, 69 Pa. St. 43, 8 Am. Rep. 212; United States Mut. Acc. Assn. v. Barry, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. 755. See 3 Elliott Ev., § 2412.

[62] Wilson v. Northwestern &c. Assn., 53 Min. 470, 55 N. W. 626; Schneider v. Provident L. Ins. Co., 24 Wis. 28, 1 Am. Rep. 157. See also, Commercial Travelers Mut. Acc. Assn. v. Springsteen, 23 Ind. App. 657, 55 N. E. 973; Payne v. Fraternal Acc. Assn., 119 Iowa 342, 39 N. W. 361; Providence Life Ins. Co. v. Martin, 32 Md. 310; Keene v. New England Mut. Acc. Assn., 161 Mass. 149, 36 N. E. 891; Union Casualty Co. v. Harroll, 98 Tenn. 591, 40 S. W. 1080, 60 Am. St. 873; Fidelity & Casualty Co. v. Chambers, 93 Va. 138, 24 S. E. 896, 40 L. R. A. 432; Diddle v. Continental Casualty Co., 65 W. Va. 170, 63 S. E. 962,

use under the same circumstances;[63] and the question is generally for the jury.[64]

In one case, however, the insured was not allowed to recover where the policy contained such a provision, and it appeared that he was thrown from the platform of a passenger coach, where he was standing in violation of a known rule of the carrier,[65] and in another a recovery was denied where a passenger "inadvertently" put his arm out of a car window and his hand was injured by coming in contact with a post.[66]

§ 4392. **Voluntary exposure to unnecessary dangers.**—Accident policies commonly exempt the insurer from liability for death or injury caused by voluntary exposure to unnecessary danger, or hazards, or perilous adventure. This has been said to mean wanton or grossly imprudent exposure.[66a] At all events it means intentional, conscious exposure to danger; as where a person acts so recklessly and carelessly as to show an utter disregard of known danger, or does an act in the face of a risk and danger so obvious that a prudent man, exercising reasonable foresight, would not have done it.[67] It means danger or risk recog-

22 L. R. A. (N. S.) 779n; Beard v. Indemnity Ins. Co., 65 W. Va. 283, 64 S. E. 119.

[63] Kentucky Life & Accident Ins. Co. v. Franklin, 102 Ky. 512, 19 Ky. L. 1573, 43 S. W. 709; Tuttle v. Travelers' Ins. Co., 134 Mass. 175, 45 Am. Rep. 316; Stone v. United States Casualty Co., 34 N. J. L. 371; Ducan v. Preferred &c. Assn., 59 N. Y. Super. Ct. 145, 36 N. Y. St. 928, 13 N. Y. S. 620, affd. 129 N. Y. 622, 29 N. E. 1029.

[64] Stone v. United States Casualty Co., 34 N. J. L. 371; Pacific Mut. L. Ins. Co. v. Adams, 27 Okla. 496, 112 Pac. 1026.

[65] Bon v. Railway Pass. Assur. Co., 56 Iowa 664, 10 N. W. 225, 41 Am. Rep. 127. But compare Smith v. Ætna L. Ins. Co., 115 Iowa 217, 88 N. W. 368, 56 L. R. A. 271, 91 Am. St. 153; Champlin v. Railway Pass. Assur. Co., 6 Lans. (N. Y.) 71.

[66] Morel v. Mississippi &c. L. Ins. Co., 4 Bush (Ky.) 535. So where the insured ventured on a lake in a canoe after being warned of the danger, Morse v. Commercial Travelers' &c. Acc. Assn., 212 Mass. 140, 98 N. E. 599, 40 L. R. A. (N. S.) 145.

[66a] Manufacturers' &c. Indem. Co. v. Dorgan, 58 Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620. In an English case it was said: "Two classes of accidents are excluded from the risks insured against, viz.: (1) Accidents which arise from exposure by the insured to risk of injury, which risk is obvious to him at the time he exposes himself to it; (2) accidents which arise from an exposure by the insured to risk of injury, which risk would be obvious to him at the time, if he were paying reasonable attention to what he was doing." Cornish v. Accident Ins. Co., L. R. 23 Q. B. D. 453 (insured was killed while attempting to cross a railway track).

[67] Manufacturers' &c. Indem. Co. v. Dorgan, 58 Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620; Johnson v. London Guarantee & Accident Co., 115 Mich. 86, 72 N. W. 1115, 40 L. R. A. 440, 69 Am. St. 549; DeLoy v. Travelers' Ins. Co., 171 Pa. St. 1, 32 Atl. 1108, 50 Am. St. 787.

nized, but consciously and intentionally assumed.[68] A policy containing such a provision does not relieve the company from liability for injury resulting from a voluntary exposure to a danger which was contemplated by the contract.[69] A party who goes out in a boat on a dark night to fish, without a knowledge of the existence of snags which are dangerous to his boat, does not expose himself to unnecessary danger within the meaning of such provision.[70] Nor does a person voluntarily expose himself to danger by riding in a bicycle race and overexerting himself;[71] nor by cleaning a gun, without the knowledge that it was defective and loaded;[72] nor by visiting a house of ill fame and getting shot immediately after leaving the place;[73] nor, generally, by doing what a man of ordinary prudence would do under the same circumstances;[74] as by climbing a bank with a loaded gun in his hand, while hunting.[75] But wanton and recklessly taking a risk where danger is obvious, even though not fully appreciated, is generally considered within this exception and it has been held that there can be no recovery under such a policy for an accident occasioned by jumping from a moving train after it has passed the station;[76] or by attempting to cross through a freight train

[68] Travelers' Ins. Co. v. Randolph, 78 Fed. 754, 24 C. C. A. 305; Ashenfelter v. Employers' Liability &c. Assur. Corp., 87 Fed. 682, 31 C. C. A. 193; Keene v. New England &c. Assn., 161 Mass. 149, 36 N. E. 891. See also, Correll v. Nat. Acc. Assn., 139 Iowa 36, 116 N. W. 1046, 130 Am. St. 294; Hunt v. United States Acc. Assn., 146 Mich. 521, 109 N. W. 1042, 7 L. R. A. (N. S.) 938, 117 Am. St. 655, 10 Am. & Eng. Ann. Cas. 449; Whalen v. Peerless Casualty Co., 75 N. H. 297, 73 Atl. 642, 139 Am. St. 695, and note, where many other authorities are cited to the same effect.

[69] Wilson v. Northwestern &c. Assn., 53 Minn. 470, 55 N. W. 626.

[70] Collins v. Bankers' Acc. Ins. Co., 96 Iowa 216, 64 N. W. 778, 59 Am. St. 367. But see Morse v. Commercial Travelers' &c. Acc. Assn., 212 Mass. 140, 98 N. E. 599, 40 L. R. A. (N. S.) 145.

[71] Keeffe v. National Acc. Soc., 4 App. Div. (N. Y.) 392, 38 N. Y. S. 854. But compare Smith v. Ætna L. Ins. Co., 185 Mass. 74, 69 N. E. 1059, 64 L. R. A. 117, 102 Am. St. 326.

[72] Miller v. American &c. Ins. Co., 92 Tenn. 167, 21 S. W. 39, 20 L. R. A. 765. But compare Sargent v. Central Acc. Ins. Co., 112 Wis. 29, 87 N. W. 796, 88 Am. St. 946.

[73] Jones v. United States Mut. Acc. Assn., 92 Iowa 652, 61 N. W. 485.

[74] Shevlin v. American &c. Assn., 94 Wis. 180, 68 N. W. 866, 36 L. R. A. 52.

[75] Cornwell v. Fraternal Acc. Assn., 6 N. Dak. 201, 69 N. W. 191, 40 L. R. A. 437, 66 Am. St. 601. Additional illustration will be found in the elaborate note in 139 Am. St. 707, et seq.

[76] Smith v. Preferred &c. Assn., 104 Mich. 634, 62 N. W. 990. As to whether boarding or alighting from a moving train is voluntary exposure to unnecessary danger depends largely upon the particular circumstances. See Garcelon v. Commercial Travelers' Eastern Accident Assn., 195

standing across the highway;[77] or by attempting to lower himself from a window to avoid police officers who were at the door.[78] A person who, with packages in his hands, attempts to cross over a trestle which he knows is dangerous, while there are other ways of travel open to him, voluntarily exposes himself to unnecessary danger.[79] But it cannot be said, as a matter of law, that a person voluntarily exposes himself to unnecessary danger by crossing a railroad trestle bridge, where there is a plank walk and a fence railing on one side.[80] Whether standing on the platform of a moving train which is going at a rapid speed is a voluntary exposure to a known danger, is usually a question for the jury.[81] Whether, under all the circumstances, going on a railroad track or bridge is a voluntary exposure to unnecessary danger, is likewise a question of fact which should be submitted to the jury.[82]

Force must be given to the word "unnecessary" as qualifying "danger,"[83] as said in a case in which it was held that an attempt of a traveling man to get on a train which is already in motion is not, as a matter of law, a voluntary exposure to an unnecessary danger.[84] "For one to leap into a turbulent stream, rush into a burning building, or to do any other hazardous thing

Mass. 531, 81 N. E. 201, 10 L. R. A. (N. S.) 961; Rebman v. General Acc. Ins. Co., 217 Pa. St. 518, 66 Atl. 859, 10 L. R. A. (N. S.) 957, and note, where a number of cases will be found in which this was held within the exception and others in which it was held not to be.

[77] Bean v. Employers' Liability Assur. Corp., 50 Mo. App. 459. One who attempted to cross the track between the cars of a freight train, when he saw the men in the places where they would be if the train was about to start, voluntarily exposed himself to unnecessary danger. Willard v. Masonic &c. Assn., 169 Mass. 288, 47 N. E. 1006, 61 Am. St. 285.

[78] Shaffer v. Travelers' Ins. Co. (Ill.), 22 N. E. 589.

[79] Travelers' Ins. Co. v. Jones, 80 Ga. 541, 7 S. E. 83, 12 Am. St. 270.

[80] Follis v. United States &c. Assn., 94 Iowa 435, 62 N. W. 807, 28 L. R. A. 78, 58 Am. St. 408.

[81] Travelers' Ins. Co. v. Randolph, 78 Fed. 754, 24 C. C. A. 305. See Standard Life & Acc. Ins. Co. v. Thornton, 100 Fed. 582, 40 C. C. A. 564, 49 L. R. A. 116.

[82] Keene v. New England Mut. Acc. Assn., 161 Mass. 149, 36 N. E. 891. See also, Travelers' &c. Assn. v. Stone 50 Ill. App. 222; Tuttle v. Travelers' Ins. Co., 134 Mass. 175, 45 Am. Rep. 316; Freeman v. Travelers' Ins. Co., 144 Mass. 572, 12 N. E. 372. See generally the elaborate note in 139 Am. St. 707 et seq., and notes in 22 L. R. A. (N. S.) 779, and 27 L. R. A. (N. S.) 164.

[83] As when the insured attempts to rescue a person in danger, Da Rin v. Casualty Co. of America, 41 Mont. 175, 108 Pac. 649, 27 L. R. A. (N. S.) 1164n, 137 Am. St. 709n; Tucker v. Mutual &c. Co., 50 Hun (N. Y.) 50, 23 N. Y. St. 957, 4 N. Y. S. 505, affd. in 121 N. Y. 718, 24 N. E. 1102.

[84] Fidelity & Casualty Co. v. Sittig, 181 Ill. 111, 54 N. E. 903, 48 L. R. A. 359. But it would seem a voluntary exposure to unnecessary danger if under all the circumstances an ordinarily prudent man would

to save human life, would be a voluntary exposure to danger but not to unnecessary danger. So, too, many emergencies in the lives of men occur where the most urgent necessity requires their presence at some particular place at some particular time, and where to miss a train would involve serious consequences. In such a case the voluntary exposure to danger might not be unnecessary. * * * The presence of a physician or surgeon at some critical period in the illness or injury of a human being might be necessary to save life, and it might be necessary for him to expose himself to danger to reach his patient or in some other respect to perform his professional duty. The necessity implied in the provision of the policy does not mean only that which is unavoidable and inevitable, but also any object or purpose which men of moral responsibility and prudence would regard as of such serious importance in the performance of duty as to demand or justify the incurring of risk of danger to accomplish it."

§ 4393. Knowledge—Distinction between voluntary act and voluntary exposure.—As already intimated, knowledge of the danger is usually important, and an act may be voluntary and the exposure to danger at the same time involuntary.[85] Where the insured, while asleep and unconscious, walked off the platform of a car and was killed, it was held not a case of "self-infliction, design, or voluntary exposure,"[86] and so one who lay down to sleep by the boilers of a steamboat and was injured by steam from a safety valve was held not to have voluntarily exposed himself to unnecessary danger, though warned not to sleep there, unless he was conscious of the danger of steam escaping from the valve.[87]

not have made the attempt. Travelers Protective Assn. v. Small, 115 Ga. 455, 41 S. E. 628; Rebman v. Gen. Acc. &c. Co., 127 Pa. St. 518, 66 Atl. 859, 10 L. R. A. (N. S.) 957, note in 139 Am. St. 704. See also, as to going on track and about cars, Whalen v. Peerless Casualty Co., 75 N. H. 297, 73 Atl. 642, 139 Am. St. 695n; Wilcox v. Central Acc. Ins. Co., 234 Pa. 58, 82 Atl. 1093. And as to "roadbed," see note in 8 L. R. A. (N. S.) 970.

[85] Equitable &c. Ins. Co. v. Osborn, 90 Ala. 201, 9 So. 869, 13 L. R. A. 267; Conboy v. Railway Officials & Employés Acc. Assn., 17 Ind. App. 62, 46 N. E. 363, 60 Am. St. 154; Collins v. Bankers Acc. Ins. Co., 96 Iowa 216, 64 N. W. 778, 59 Am. St. 367; Burkhard v. Travelers' Ins. Co., 102 Pa. St. 262, 48 Am. Rep. 205; note in 139 Am. St. 699. See also, Union Casualty &c. Co. v. Harroll, 98 Tenn. 591, 40 S. W. 1080, 60 Am. St. 873.

[86] Scheiderer v. Travelers' Ins. Co., 58 Wis. 13, 16 N. W. 47, 46 Am. Rep. 618.

[87] Travelers Ins. Co. v. Clark, 109

§ 4394. **Bodily infirmity or disease.**—Accident policies frequently provide that the insurer shall not be liable for injuries resulting from bodily infirmity or disease, and these terms have received judicial construction. In one such case there was evidence that the insured died from a fall while having a fit or vertigo, and it was claimed that his death was due to disease or bodily infirmity, and the court held that the terms "disease" and "bodily infirmity" had practically the same meaning and referred to some disorder of a somewhat settled or permanent character rather than a mere and temporary disorder.[88] So, in another case the court said: "In a broad, generic sense, any temporary trouble by reason of which a man loses consciousness is a disease. It is a condition of the body not normal, and produced by the imperfect working of some function, but as the imperfect working is not permanent, and the body returns at once, or in a short period of time, to its normal condition, it does not rise to the dignity of a disease. A fainting spell produced by indigestion or a lack of proper food for a number of hours, or from any other cause which would not indicate disease in the body, but would show a mere temporary disturbance or enfeeblement, would not come within the meaning of the words 'disease and bodily infirmity,' as used in this policy."[89] So, of course death from the bite of a dog is death from accident and not from disease, and where the use of the hand is thus interfered with, though the injury at first appeared slight, followed by increasing pain and death in two weeks, the insured should be considered as "immediately disabled."[90] It seems to be established that sunstroke is a disease, and not an accident.[91] Death caused by a malignant pustule re-

Ky. 350, 22 Ky. L. 902, 59 S. W. 7, 95 Am. St. 374.

[88] Meyer v. Fidelity &c. Co., 96 Iowa 378, 65 N. W. 328, 59 Am. St. 374.

[89] Manufacturers' &c. Indem. Co. v. Dorgan, 58 Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620. See also, Pudritzky v. Supreme Lodge K. of H., 76 Mich. 428, 43 N. W. 373; Mutual &c. Ins. Co. v. Daviess' Exr., 87 Ky. 541, 10 Ky. L. 577, 9 S. W. 812. And compare Northwestern Mut. Ins. Co. v. Heimann, 93 Ind. 24; Cushman v. United States Ins. Co., 70 N. Y. 72.

[90] Farner v. Mass. Mut. Acc. Assn., 219 Pa. St. 71, 67 Atl. 927, 123 Am. St. 621.

[91] Sinclair v. Maritime &c. Assur. Co., 3 El. & El. 478; Dozier v. Fidelity & Casualty Co. of New York, 46 Fed. 446, 13 L. R. A. 114. See also, Continental Casualty Co. v. Johnson, 74 Kans. 129, 85 Pac. 545, 6 L. R. A. (N. S.) 609 (holding that it may be insured against and includes a condition produced by heat no matter whether solar or artificial); ante § 4386, n. 2.

sulting from contact of the body with putrid animal matter has also been held to be death by disease, and not accident.[92]

The question of proximate cause often arises in such cases,[93] and where the disease is already in the system and there is also an accident it is sometimes difficult to determine just what effect should be given to the provisions of the policy. Much depends upon the wording of the particular policy in question. It may, however, be stated as a general rule that where the risk is limited to injury or death caused wholly by accident or resulting therefrom independently of all other causes, and the insurer is expressly exempted from liability for disability or death "resulting wholly or in part, directly or indirectly," from disease or bodily infirmity, there can be no recovery if existing disease was an active cause of the disability or death whether by aggravating the accident or by being aggravated by it;[94] but the mere presence of disease will not necessarily exempt the insurer, especially if the insured would have died from the accident anyway.[95]

§ 4395. Injuries intentionally inflicted by others.—A policy which insures against accidents covers an injury intentionally inflicted upon the insured by a third person, unless such risk is expressly excepted.[96] "While our preconceived notion of the

[92] Bacon v. United States Mut. Acc. Assn., 123 N. Y. 304, 25 N. E. 399, 9 L. R. A. 617, 20 Am. St. 748. See also, generally, Knights & Ladies of Columbia Ins. Order v. Shoaf, 166 Ind. 367, 77 N. E. 738. As to disease caused by accident, see Freeman v. Mercantile & Acc. Assn., 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753.

[93] See White v. Standard Life &c. Ins. Co., 95 Minn. 77, 103 N. W. 753, 5 Am. & Eng. Ann. Cas. 83; Fetter v. Fidelity &c. Co., 174 Mo. 256, 73 S. W. 592, 61 L. R. A. 459, 97 Am. St. 560, and notes; also, notes in 5 L. R. A. (N. S.) 926, 78 L. R. A. (N. S.) 1014, and 26 L. R. A. (N. S.) 1004.

[94] Stanton v. Travelers Ins. Co., 83 Conn. 708, 78 Atl. 317, 34 L. R. A. (N. S.) 445, and note; National Masonic Acc. Assn. v. Shryock, 73 Fed. 774, 20 C. C. A. 3; Illinois Commercial Men's Assn. v. Parks, 199 Fed. 794, 103 C. C. A. 286.

[95] Modern Woodman &c. v. Shryock, 54 Nebr. 250, 74 N. W. 607, 39 L. R. A. 826. See also, Carr v. Pac. Mut. Life Ins. Co. of California, 100 Mo. App. 602, 75 S. W. 180, and annotated cases referred to in last two preceding notes.

[96] Supreme Council O. of C. F. v. Garrigus, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298; Hutchcraft's Exr. v. Travelers' Ins. Co., 87 Ky. 300, 10 Ky. L. 260, 8 S. W. 570, 12 Am. St. 484; American Acc. Co. v. Carson, 99 Ky. 441, 36 S. W. 169, 18 Ky. L. 308, 34 L. R. A. 301, 59 Am. St. 473; Fidelity & Casualty Co. v. Johnson, 72 Miss. 333, 17 So. 2, 30 L. R. A. 206; Lovelace v. Travelers' Prot. Assn. of America, 126 Mo. 104, 28 S. W. 877, 30 L. R. A. 209, 47 Am. St. 638; Collins v. Fidelity &c. Co., 63 Mo. App. 253; Travellers' Ins. Co. v. McConkey, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. 1360. See also, Union Casualty Co. v. Harroll, 98 Tenn.

term 'accident' would hardly lead us to speak of the intentional killing of a person as an 'accidental' killing, yet no doubt can now remain, in view of the precedents established by all the courts that the word 'intentional' refers alone to the person inflicting the injury, and if as to the person injured the injury was unforeseen, unexpected, not brought about through his agency designedly, or was without his foresight or was a casualty or mishap not intended to befall him, then the occurrence was accidental, and the injury one inflicted by accidental means within the meaning of such policies."[97] It is customary, however, to insert a provision exempting the company from liabilty for injuries intentionally inflicted upon the insured by others. The exemption is limited to such injuries as are intentional; hence the insurer is liable where the injury was inflicted by an insane person who was incapable of forming an intent.[98]

Where the policy provided that there could be no recovery for injuries caused by fighting, it was held that there could be no recovery, although the insured was not the aggressor.[99] There is no liability under an exemption from liability for injuries intentionally inflicted where the insured was intentionally shot and killed by another person;[1] as, where the insured was waylaid and shot by robbers;[2] although, in the absence of such a limiting

591, 40 S. W. 1080, 60 Am. St. 873; note in 13 L. R. A. (N. S.) 262 et seq.

[97] American Acc. Co. v. Carson, 99 Ky. 441, 18 Ky. L. 308, 36 S. W. 169, 34 L. R. A. 301, 59 Am. St. 473. See Button v. American Mut. Acc. Assn., 92 Wis. 83, 65 N. W. 861, 53 Am. St. 900.

[98] Corley v. Travelers' &c. Assn., 105 Fed. 854, 46 C. C. A. 278; Berger v. Pacific Mut. Life Ins. Co., 88 Fed. 241. See also, Richards v. Travelers' Ins. Co., 89 Cal. 170, 26 Pac. 762, 23 Am. St. 455; Utter v. Travelers' Ins. Co., 65 Mich. 545, 32 N. W. 812, 8 Am. St. 913.

[99] United States Mut. Acc. Assn. v. Millard, 43 Ill. App. 148. See also, Gaines v. Fidelity & Casualty Co., 111 App. Div. (N. Y.) 386, 97 N. Y. S. 836, affd. 188 N. Y. 411, 81 N. E. 169. It is immaterial whether the person by whom the insured was killed was sane or insane, if the insured voluntarily engaged in the fight. Gresham v. Equitable Acc. Ins. Co., 87 Ga. 497, 13 S. E. 752, 13 L. R. A. 838, 27 Am. St. 263. See Accident Ins. Co. v. Bennet, 90 Tenn. 256, 16 S. W. 723, 25 Am. St. 685.

[1] Fischer v. Travelers' Ins. Co., 77 Cal. 246, 19 Pac. 425, 1 L. R. A. 572; Travelers' Ins. Co. v. McCarthy, 15 Colo. 351, 25 Pac. 713, 11 L. R. A. 297, 22 Am. St. 410; Jones v. United States Mut. Acc. Assn., 92 Iowa 652, 61 N. W. 485; Washington v. Union &c. Co., 115 Mo. App. 627, 91 S. W. 988; Travelers Protective Assn. v. Weil, 40 Tex. Civ. App. 629, 91 S. W. 886.

[2] Hutchcraft's Exr. v. Travelers' Ins. Co., 87 Ky. 300, 10 Ky. L. 260, 8 S. W. 570, 12 Am. St. 484; Railway &c. Acc. Assn. v. Drummond, 56 Nebr. 235, 76 N. W. 562. A recovery was denied because, while the killing was accidental within the meaning of these words, "external, violent and

clause, death by such means would be considered an accident.[3] Where the policy provided that $4,000 shall be paid "in case of death by accident," and that in case of death "from natural causes," the insured should be entitled to $100, the beneficiary was allowed to recover for injuries received by the insured in a fight in which he voluntarily engaged.[4]

Under this exception the insurer is not liable where the insured is murdered.[5] The insurer is not liable where the insured is killed for the purpose of getting the insurance money, under a policy which provides that "this insurance does not cover * * * death * * * resulting wholly or partly, directly or indirectly, from * * * intentional injuries inflicted by the insured or any other person," and which further provides that this clause does not exclude claims for personal injuries received by the insured while defending herself or her family, or her property, from assaults of burglars, robbers, thieves or pickpockets.[6] So, there is no liability where the injuries are inflicted upon an officer by a person who is resisting arrest, although such injuries are within the meaning of the words, "external, violent and accidental means."[7] In such cases the general liability is limited by the express provision.

§ 4396. Injuries received while engaged in violation of law. —A provision is usually found to the effect that no claim shall be made when an injury or death occurs while the insured is engaged in, or in consequence of, any unlawful act. Under such provision the mere fact that the insured is violating some criminal statute

accidental," as used on the face of the policy, yet certain conditions or provisos protected the company against loss where the death or injury was caused by intentional injuries inflicted by the insured or any other person. American Acc. Co. v. Carson (Ky.), 30 S. W. 879.

[3] Ripley v. Railway Passengers' Assur. Co., 16 Wall. (U. S.) 336, 21 L. ed. 469.

[4] Lovelace v. Travelers' Prot. Assn. of America, 126 Mo. 104, 28 S. W. 877, 30 L. R. A. 209, 47 Am. St. 638.

[5] Brown v. United States Casualty Co., 38 Fed. 38; Travelers' Prot. Assn. v. Langholz, 86 Fed. 60, 29 C. C. A. 628; Railway Officials &c. Assn. v. McCabe, 61 Ill. App. 565; Phelan v. Travelers' Ins. Co., 38 Mo. App. 640; Johnson v. Travelers' Ins. Co., 15 Tex. Civ. App. 314, 39 S. W. 972; Travelers Ins. Co. v. McConkey, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. 1360; Butero v. Travelers' Acc. Ins. Co., 96 Wis. 536, 71 N. W. 811.

[6] Ging v. Travelers' Ins. Co., 74 Minn. 505, 77 N. W. 291.

[7] American Acc. Co. v. Carson, 99 Ky. 441, 18 Ky. L. 308, 36 S. W. 169, 34 L. R. A. 301, 59 Am. St. 473.

does not absolve the company from liability unless it appears that the death was in some manner caused by such violation of law. As said in a case in Indiana,[8] "A known violation of a positive law * * * avoids the policy, if the natural and reasonable consequences of the violation are to increase the risk; a violation of law * * * does not avoid the policy, if the natural and reasonable consequences of the act do not increase the risk."

In one case, applying the rule that it must be made to appear that the injury was the natural result of a violation of law, it was held that the fact that the insured was killed by being shot soon after he had left a house of ill fame, while carrying a concealed weapon, did not prevent a recovery on the policy, and the court said:[9] "It is not enough to defeat liability to show that the assured violated the conditions of the policy in these respects, but it must also be shown that such violation had a causative connection with the injury. The shooting was not, in a legal sense, caused by, or the result of, the assured's visit to the bawdy-house—reprehensible as that act may have been—nor of his carrying concealed weapons in violation of law. In other words, it does not appear that there was any such connection between the unlawful acts and the injury as would justify the contention that the former caused the latter. If the injury was caused or produced by something else than the assured's violation of the law, then the latter cannot be said to have such a legal relation to the former as to be a defense to the action upon the policy. If the acts were in themselves unlawful, as they were, and the shooting might reasonably have been expected to have resulted from them, then a causative connection between the unlawful acts and the injury may be said to have been established."[10]

[8] Conboy v. Railway Officials & Employés Acc. Assn., 17 Ind. App. 62, 43 N. E. 1017; National Ben. Assn. v. Bowman, 110 Ind. 355, 11 N. E. 316; Supreme Lodge K. of P. v. Beck, 181 U. S. 49, 45 L. ed. 741, 21 Sup. Ct. 532. See also, Eaton v. Atlas &c. Ins. Co., 89 Maine 570, 36 Atl. 1048; Cornwell v. Fraternal &c. Assn., 6 N. Dak. 201, 69 N. W. 191, 40 L. R. A. 437, 66 Am. St. 601; Supreme Lodge K. of P. v. Beck, 181 U. S. 49, 45 L. ed. 741, 21 Sup. Ct. 532.

[9] Jones v. United States Mut. Acc. Assn., 92 Iowa 652, 61 N. W. 485. See also, for other cases of injury in personal encounter, Supreme Lodge K. of P. v. Bradley, 73 Ark. 274, 83 S. W. 1055, 67 L. R. A. 770, 108 Am. St. 38, and notes in 13 L. R. A. (N. S.) 262, et seq.

[10] Griffin v. Western Mut. Benev. Assn., 20 Nebr. 620, 31 N. W. 122,

Where the insured was shot by an officer who was attempting to arrest him as a deserter, the death did not result from the unlawful act of the insured, as the insured was not acting unlawfully at the time of the killing.[11] So, where the insured was injured while at the house of a friend, a few hours after he had been hunting on Sunday, in violation of law, it was held that he could recover on the policy.[12] But in another case where the accident happened while the insured was returning from a hunting expedition, and a statute made both hunting and traveling on Sunday a crime, the insured was not allowed to recover.[13]

It has been held that a person, who was shot by one upon whom he had made a violent assault, died in consequence of a violation of law.[14] So, a woman who voluntarily submits to an operation for abortion is engaged in a violation of law, and there can be no recovery upon a policy for death resulting therefrom.[15]

There is some difference of opinion as to whether the law which is being violated must be a criminal statute. It was held in Massachusetts that to invalidate the policy there must be a violation of some criminal statute.[16] A contrary view was expressed in New York;[17] and in Indiana the court said:[18] "In our

57 Am. Rep. 848; Bradley v. Mutual Ben. Life Ins. Co., 45 N. Y. 422, 6 Am. Rep. 115; Murray v. New York &c. Ins. Co., 96 N. Y. 614, 48 Am. Rep. 658; Accident Ins. Co. v. Bennett, 90 Tenn. 256, 16 S. W. 723, 25 Am. St. 685 (where the insured was killed while living with a mistress in violation of law). And see Supreme Lodge K. P. v. Crenshaw, 129 Ga. 195, 58 S. E. 628, 13 L. R. A. (N. S.) 258n, 121 Am. St. 216.

[11] Utter v. Travelers' Ins. Co., 65 Mich. 545, 32 N. W. 812, 8 Am. St. 913. See also, Griffin v. Western Mut. Benev. Assn., 20 Nebr. 620, 31 N. W. 122, 57 Am. Rep. 848; Goetzmann v. Connecticut Mutual Life Ins. Co., 3 Hun (N. Y.) 515, 5 Thomp. & C. (N. Y.) 572.

[12] Prader v. National &c. Assn., 95 Iowa 149, 63 N. W. 601.

[13] Duran v. Standard Life & Acc. Ins. Co., 63 Vt. 437, 22 Atl. 530, 13 L. R. A. 637, 25 Am. St. 773.

[14] Murray v. New York L. Ins. Co., 96 N. Y. 614, 48 Am. Rep. 658. See also, Woodruff Ins. Cas. 301; Bloom v. Franklin Life Ins. Co., 97 Ind. 478, 49 Am. Rep. 469. See note in 13 L. R. A. (N. S.) 262, making the determination of the question as to whether the death is within the exception turn on the distinction as to whether the homicide is justifiable or not.

[15] Hatch v. Mutual Life Ins. Co., 120 Mass. 550, 21 Am. Rep. 541. As to suicide being a violation of this provision, see § 4374.

[16] Cluff v. Mutual &c. Ins. Co., 13 Allen (Mass.) 308. See also, Harper's Admr. v. Phœnix Ins. Co., 19 Mo. 506; Accident Ins. Co. v. Bennett, 90 Tenn. 356, 16 S. W. 723, 25 Am. St. 685.

[17] Bradley v. Mutual Ben. Life Ins. Co., 3 Lans. (N. Y.) 341, revd. 45 N. Y. 422, 6 Am. Rep. 115. But see Lehman v. Great Eastern Casualty & Indem. Co., 7 App. Div. (N. Y.) 424, 39 N. Y. S. 912, affd. 158 N. Y. 689, 53 N. E. 1127.

[18] Bloom v. Franklin Life Ins. Co., 97 Ind. 478, 49 Am. Rep. 469.

opinion the law is this: A known violation of a positive law, whether the law is a civil or a criminal one, avoids the policy if the natural and reasonable consequences of the violation are to increase the risk; a violation of law, whether the law is a civil or a criminal one, does not avoid the policy if the natural and reasonable consequence of the act does not increase the risk."

§ 4397. Injuries received while intoxicated.—Where a contract provides that there shall be no recovery for injuries which are received while the insured is intoxicated, the insurance company is not liable, although the intoxication did not contribute to the injury.[19]

§ 4398. General provisions—Amount of recovery—Disability.—The contract is commonly for the payment of a specified sum for certain injuries, such as the loss of a hand,[20] foot,[21] or eye,[22] and the payment of a certain sum in case of total disability.[23] As said in a Minnesota case:[24] "The principal contest is as to the construction of the part of the policy * * * and particularly the term, 'wholly disabled.' Accident insurance being of comparatively recent origin, the policies do not seem to have acquired any settled form, and the decisions construing them

[19] Standard Life & Acc. Ins. Co. v. Jones, 94 Ala. 434, 10 So. 530; Shader v. Railway &c. Assur. Co., 66 N. Y. 441, 23 Am. Rep. 65, Woodruff Ins. Cas. 297. See Jones v. United States Mut. Acc. Assn., 92 Iowa 652, 61 N. W. 485.

[20] Hutchinson v. Supreme Tent of Knights of Maccabees, 68 Hun (N. Y.) 355, 52 N. Y. St. 199, 22 N. Y. S. 801; Lord v. American &c. Assn., 89 Wis. 19, 61 N. W. 293, 26 L. R. A. 741, 46 Am. St. 815. Loss of fingers has been held not a total disability. Supreme Tent v. King, 79 Ill. App. 145. See also, Stoner v. Yeomen of America, 160 Ill. App. 432. But compare Theorell v. Supreme Court, 115 Ill. App. 313; Cook v. Benefit League of Minn., 76 Minn. 382, 79 N. W. 320. See generally, Anderson v. Ætna Life Ins. Co., 75 N. H. 375, 74 Atl. 1051, 28 L. R. A. (N. S.) 730, and note.

[21] Stevers v. People's &c. Ins. Assn., 150 Pa. St. 132, 24 Atl. 662, 16 L. R. A. 446; Sheanon v. Pacific &c. Ins. Co., 83 Wis. 507, 53 N. W. 878.

[22] Moge v. Societe de Bienfaisance St. Jean Baptiste, 167 Mass. 298, 45 N. E. 749, 39 L. R. A. 736; Humphreys v. National Ben. Assn., 139 Pa. St. 214, 20 Atl. 1047, 11 L. R. A. 564. Loss of one eye was held not to authorize a recovery where the policy provides for whole indemnity in case of total permanent disability, and one-half the amount for "loss of the sight of both eyes." Phillipy v. Homesteaders, 140 Iowa 562, 118 N. W. 880.

[23] It has been held that there is no liability for death under a policy insuring against permanent disability. Hill v. Travelers' Ins. Co., 146 Iowa 133, 124 N. W. 898, 28 L. R. A. (N. S.) 742, and note.

[24] Lobdill v. Laboring Men's &c. Assn., 69 Minn. 14, 71 N. W. 696, 38 L. R. A. 537, 65 Am. St. 542. The court continued as follows: "As is

are comparatively few, and do not seem to have agreed on any very definite meaning to be given to the term 'total disability.'[25] * * * The cases which have placed a construction upon the term 'total disability' might seem to be divided into two classes, viz., those which construe it liberally in favor of the insured,[26] and those which construe it strictly against him.[27] * * * Any apparent conflict in the decisions may, however, be mostly reconciled in view of differences in the language of the policies, and of the different occupations under which the parties were insured."

Of course if the insured is so injured that he cannot do any-

said in Wolcott v. United Life &c. Assn., 55 Hun (N. Y.) 98, 'total disability must, from the necessity of the case, be a relative matter, and must depend largely upon the occupation and employment in which the party insured is engaged.' One who labors with his hands might be so disabled by a severe injury to one hand as not to be able to labor at all at his usual occupation; whereas a merchant or professional man might, by the same injury, be only disabled from transacting some kinds of business pertaining to his occupation. * * * There are a few propositions applicable to the construction of the policy under consideration, which, under the evidence, are decisive of this case. The first is that total disability does not mean absolute physical inability on the part of the insured to transact any kind of business pertaining to his occupation. It is sufficient if his injuries were of such a character that common care and prudence required him to desist from the transaction of any such business so long as it was reasonably necessary to effectuate a cure. This was a duty which he owed to the insurer as well as to himself. Young v. Travelers' Ins. Co., 80 Maine 244. The second is that under the particular terms of this policy, to wit, 'from the transaction of any and every kind of business pertaining to the occupation above stated' (merchant), inability to perform some kinds of business pertaining to that occupation would not constitute total disability within the meaning of the policy. * * * But, fourth, the mere fact that he might be able, with due regard to his health, to occasionally perform some single and trivial act connected with some kind of business pertaining to his occupation as a merchant would not render his disability partial instead of total, provided he was unable substantially or to some material extent to transact any kind of business pertaining to such occupation. To illustrate this proposition by reference to the evidence in this case, it appears, as we shall assume, that on one or two occasions where the plaintiff went into his store, when down-town for other purposes, he handed out some small article to a customer, and took the change for it. This would not necessarily prove that he was able to attend to the business of waiting on customers, and that he was not 'wholly disabled' within the meaning of the policy. * * * The frequency and nature of these acts would be for the consideration of the jury in determining whether he was totally disabled, but would ordinarily be by no means conclusive on that question."

[25] See cases cited in Bacon Ben. Soc., § 501; Niblack Vol. Soc., § 401. See 4 Harvard Review 180.

[26] Hooper v. Accidental &c. Ins. Co., 5 Hurl. & N. 557; Young v. Travelers' Ins. Co., 80 Maine 244, 13 Atl. 896.

[27] Lyon v. Railway Passenger Assur. Co., 46 Iowa 631; Saveland v. Fidelity & Cas. Co., 67 Wis. 174, 30 N. W. 237, 58 Am. Rep. 863.

thing it is a case of total disability. But the decisions go much further and it is generally held that if the insured is so injured that he cannot perform such work as he was engaged in at the time, or similar or remunerative work, it is a case of total disability even though he may be able to do some slight act.[28] So, the fact that a man whose business was that of making loans on personal security goes to his office for a short time every day, without doing any work or business there, does not show that he was not totally disabled from prosecuting any and every kind of business pertaining to his occupation.[29] But where he is still able to attend to some extent to his usual business, much depends upon the provisions of the particular policy, the nature of the occupation or business and the extent to which he can attend to it.[30]

§ 4399. Sick benefits.—In accident and health policies issued by fraternal associations and the like provision is often made also for the payment of "sick benefits" for a specified time or under certain circumstances, and questions have frequently arisen as to the construction and effect of such provisions. Many of the cases cited in the notes to the last preceding section consider

[28] United States Casualty Co. v. Hanson, 20 Colo. App. 393, 79 Pac. 176; Mutual Benefit Assn. v. Nancarrow, 18 Colo. App. 274, 71 Pac. 423; Grand Lodge v. Orrell, 206 Ill. 208, 69 N. E. 68; Wall v. Continental Casualty Co., 111 Mo. App. 504, 86 S. W. 491; Keith v. Chicago, B. & Q. R. Co., 82 Nebr. 12, 116 N. W. 957, 23 L. R. A. (N. S.) 352, and note, 130 Am. St. 655. See also, Industrial Mut. Indemnity Co. v. Hawkins, 94 Ark. 417, 127 S. W. 457, 29 L. R. A. (N. S.) 635n; Beach v. Supreme Tent Knights of Maccabees, 177 N. Y. 100, 69 N. E. 281.

[29] Turner v. Fidelity & Cas. Co., 112 Mich. 425, 70 N. W. 898, 38 L. R. A. 529, 67 Am. St. 428. See also, Order of United Commercial Travelers v. Barnes, 72 Kans. 293, 80 Pac. 1020, 82 Pac. 1099; Hoffman v. Michigan Home & Hospital Assn., 128 Mich. 323, 87 N. W. 265, 54 L. R. A. 746; Thayer v. Standard Life &c. Co. 68 N. H. 577, 41 Atl. 182. But compare Shirts v. Phœnix &c. Assn., 135 Mich. 439, 97 N. W. 966.

[30] For cases allowing a recovery under the circumstances, see Pacific Mut. Life Ins. Co. v. Branham, 34 Ind. App. 243, 70 N. E. 174; Commercial Travelers Mut. Acc. Assn. v. Springsteen, 23 Ind. App. 657, 55 N. E. 973. See also, Switchmen Union v. Colehouse, 131 Ill. App. 349, affd. in 227 Ill. 561, 81 N. E. 696; Monahan v. Supreme Lodge O. of Col. K., 88 Minn. 224, 92 N. W. 972; James v. United States Casualty Co., 113 Mo. App. 622, 88 S. W. 125. For cases in which no recovery was permitted, see Ætna Life Ins. Co. v. Lasseter, 153 Ala. 630, 45 So. 166, 15 L. R. A. (N. S.) 252; Smith v. Supreme Lodge, 62 Kans. 75, 61 Pac. 416; Coad v. Travelers' Ins. Co., 61 Nebr. 563, 85 N. W. 558; Fidelity &c. Co. v. Getzendanner, 93 Tex. 487, 22 Tex. Civ. App. 76, 23 Tex. Civ. App. 135, 53 S. W. 838, 55 S. W. 179, affd. 93 Tex. 587, 56 S. W. 326.

this subject. But another phase of it is presented under provision for such benefits where "confined to the house, or continuously confined to the house," or the like. There is some conflict among the authorities, but such a provision is not usually so literally and strictly construed as to prevent recovery where the insured merely goes out of the house occasionally to get fresh air or see his physician, or the like.[31]

§ 4400. Construction—Effect of existing judicial decisions. —In an action on a policy containing a provision which had, prior to its issuance, been given a uniform judicial construction by the courts of last resort of several states, it will be presumed that such construction was adopted by the parties and the policy issued with that understanding. Thus, where a policy contained a provision that the insurance should cover "injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed or inhaled," and prior to its issuance another policy issued by the same company had been construed so as not to exempt the company from liability for the death or injury of the insured resulting from the unconscious and involuntary inhaling of illuminating gas while asleep, it was held by the Circuit Court of Appeals that the same construction would be adopted in an action on the latter policy.[32]

[31] Breil v. Claus Groth Plattdutschen Vereen, 84 Nebr. 155, 120 N. W. 905, 23 L. R. A. (N. S.) 359, and note reviewing the authorities.

[32] Fidelity & Casualty Co. v. Lowenstein, 97 Fed. 17, 38 C. C. A. 29, 46 L. R. A. 450, and cases there cited.

CHAPTER CXXXI.

EMPLOYERS' LIABILITY, CASUALTY, GUARANTY AND TITLE INSURANCE.

§ 4405. Employers' liability insurance—In general.
4406. Legal liability—Costs.
4407. Injuries while engaged in designated business.
4408. Violation of statute by insured.
4409. When liability accrues.
4410. Effect of judgment against insured.
4411. Notice of injury or claim.
4412. Fidelity insurance—In general.
4413. Notice of loss or dishonesty.
4414. Time and duties or acts covered.
§ 4415. Manner of proof of default.
4416. Constructive notice.
4417. Supervision of employé.
4418. Warranties and misrepresentations.
4419. Credit insurance—In general.
4420. Construction of policy—Amount of recovery.
4421. Identity of the insured—Partnership.
4422. Title insurance—Generally—Insurance of titles—Construction.
4423. Insurance of titles—Construction.

§ 4405. Employers' liability insurance—In general.—A kind or form of insurance that has become common with employers of late is that generally known as employers' liability insurance. In the most common form, the insurance company, for a certain premium, agrees, subject to specific exceptions, restrictions and conditions, to protect the employer against liability or loss resulting from actions brought against him by his employés to recover damages for personal injuries caused by the negligence of the employer or his representatives. As between master and servant, a contract exempting the master from liability for the results of his negligence is void as against public policy; but by the overwhelming weight of authority, a contract with a third person by which such third person agrees to indemnify the master is valid.[1]

[1] American Cas. Ins. Co.'s Case, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97; Boston & A. R. Co. v. Mercantile Trust & Deposit Co., 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97; Trenton Pass R. Co. v. Guarantors' &c. Indem. Co., 60 N. J. L. 246, 37 Atl. 609, 44 L. R. A. 213; Kansas City &c. R. Co. v. Southern Ry. News Co., 151 Mo. 373, 52 S. W. 205, 45 L. R.

Liability or indemnity insurance of a somewhat similar nature is also written by some companies covering a wider or slightly different field, and casualty insurance, not strictly accident insurance, is also written in other cases as well as in cases of employers. In a recent case a policy insuring an employer "against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death accidentally suffered * * * by any employé" was under consideration and it was held that this covered liability of the assured to a hostler whom the assured had negligently set to the work of caring for horses afflicted with glanders which the hostler caught from them in doing such work.[2]

§ 4406. **Legal liability—Costs.**—The insurer frequently takes charge of the defense and pays the costs, but just when and to what extent it is liable therefor would seem to depend largely upon the terms of the particular policy or contract. The general rule where the undertaking is merely to indemnify the assured against "legal liability," or against "common law or statutory liability" for injuries is that he cannot recover his expenses in successfully defending an action on a groundless claim.[3] So, where the insurer undertook to indemnify the assured against loss or liability imposed by law for damages on account of bodily

A. 380, 74 Am. St. 545. As to the right of the injured employé to maintain an action upon the policy of insurance or reach the proceeds, see Embler v. Hartford &c. Ins. Co., 158 N. Y. 431, 53 N. E. 212, 44 L. R. A. 512; Allen v. Ætna Life Ins. Co., 145 Fed. 881, 76 C. C. A. 265, 7 L. R. A. (N. S.) 958, and note. See also, note in 11 L. R. A. (N. S.) 194, and Cayard v. Robinson, 123 Tenn. 382, 131 S. W. 864, 30 L. R. A. (N. S.) 1224, and note. That such policies sometimes provide for the apportionment of the loss between the insured and the insurer, see Rumford Falls Paper Co. v. Fidelity &c. Co., 92 Maine 574, 43 Atl. 503. That this is also true of credit insurance contracts, see Jaeckel v. American Indem. Co., 34 App. Div. (N. Y.) 565, 54 N. Y. S. 505, affd. 164 N. Y. 598, 59 N. E. 1124.

[2] Hood v. Maryland Casualty Co., 206 Mass. 223, 92 N. E. 329, 30 L. R. A. (N. S.) 1192n, 138 Am. St. 379. The policy was headed "Manufacturers' Employers' Liability Policy." See also, Higgins v. Campbell, L. R. (1904) 1 K. B. 328, 337; Brintons v. Turvey, L. R. (1905) App. Cas. 230.

[3] Nesson v. United States Casualty Co., 201 Mass. 71, 87 N. E. 191, 131 Am. St. 390; Cornell v. Travelers Ins. Co., 175 N. Y. 239, 67 N. E. 578. See also, Munson v. Standard &c. Co., 156 Fed. 44, 84 C. C. A. 210. But in a proper case under most policies the insurer is liable for costs or expenses of defense in addition to the amount named in the policy. New Amsterdam Casualty Co. v. Cumberland &c. Co., 152 Fed. 961, 82 C. C. A. 315, 12 L. R. A. (N. S.) 478, and note.

injury accidentally suffered by any person not employed by him, and to defend any suit on a claim for damages on account of an accident covered by the policy, it was held that the insurer was not liable for costs and counsel fees and the amount paid in compromise of a suit brought by a boy who was injured while trespassing upon the property of the assured under circumstances absolving the assured from liability therefor.[4] But the amount expended by the assured in compromising may be recovered in a proper case.[5]

§ 4407. Injuries while engaged in designated business.— The provision usually found with reference to the business is liberally construed for the purpose of securing to the insured the protection for which he has paid. But where a policy insured an ice company against claims for damages on the part of its employés "in all operations connected with the business of ice-dealers," it was held that, taking into consideration the statements contained in the application, this language covered only employés in the operating department, and that a person injured while engaged in constructing an ice house was not one of such employés.[6]

A policy was issued under which the liability was restricted to injuries to employés while engaged in occupations connected with the business of iron and steel works; that is, in the operating department as distinguished from a business like that of constructing necessary buildings. An employé was injured, while at work in the operating department, by the fall of a girder which was being raised to its position by an independent crew engaged in this work. The court said:[7] "The general language of the contract,

[4] Henderson Lighting &c. Co. v. Maryland Casualty Co., 153 N. Car. 275, 69 S. E. 234, 30 L. R. A. (N. S.) 1105n.

[5] Southern R. News Co. v. Fidelity &c. Co., 26 Ky. L. 1217, 83 S. W. 620; St. Louis Dressed Beef &c. Co. v. Maryland Casualty Co., 201 U. S. 173, 50 L. ed. 712, 26 Sup. Ct. 400.

[6] People's Ice Co. v. Employers' &c. Assur. Corp., 161 Mass. 122, 36 N. E. 754.

[7] Hoven v. Employers' &c. Assur. Corp., 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388. In reference to People's Ice Co. v. Employers' &c. Assur. Corp., 161 Mass. 122, 36 N. E. 754, the court said: "We are not prepared to say but there was reasonable ground to hold that the policy, taken in connection with the application, and the language of the schedule, 'all operations connected with the business of ice dealers,' covered only persons engaged in the actual operations of cutting, handling, storing, and delivering ice, and not those engaged in the construction of store-

'All operations connected with the business of iron and steel works,' is not restricted by anything in the conditions indorsed on the policy or any paper referred to or made a part of it. * * * The court should give the general language the assurer saw fit to use, under the circumstances, a broad and liberal construction in favor of the objects for which the policy was taken out, and by so doing the conclusion is easily reached that it covers the operation of constructing a building for the use of the assured in its business, as one of the operations connected with such business." So, where a policy was issued upon an application which stated that it was "understood that in the conduct of a portion of their business the assured employed a railroad, owned by themselves, and used only for their own lumbering purposes," and the insurance was against liability to persons who should "sustain accidental bodily injuries under circumstances which shall impose upon the insured a common-law or statutory liability therefor," and two commercial travelers while being carried over the railroad by special arrangement on a locomotive for compensation were injured and recovered damages from the company therefor, it was held that the injuries might be deemed, under the circumstances of the case, to have occurred within the scope of the company's lumbering operations and that the insurer was liable.[8]

But it has been held that a policy indemnifying for damages on account of injuries to persons not employés, resulting from "accident to or caused by the cars, horses, plants, ways, works, machinery or appurtenances used in the business of the insured and described in the application," does not cover injuries caused by the use of omnibus sleighs, as the risk would be different.[9]

houses; nevertheless we should hesitate to adopt such construction if the precise question were before us."

[8] Travelers' Ins. Co. v. Wild River Lumber Co., 83 Fed. 977, 28 C. C. A. 127. Other cases, also, allowing a recovery on a somewhat liberal construction are Cashman v. London &c. Co., 187 Mass. 188, 72 N. E. 957; Andrus v. Maryland Casualty Co., 91 Minn. 358, 99 N. W. 200; Fuller Bros. Toll Lumber & Box Co. v. Fidelity & Casualty Co., 94 Mo. App. 490, 68 S. W. 222; Travelers' Ins. Co. v. Bright, 24 Ohio C. C. 441; Fidelity &c. Co. v. Lone Oak Cotton Co., 35 Tex. Civ. App. 260, 80 S. W. 541. See also, Fidelity &c. Co. v. Phœnix Mfg. Co., 100 Fed. 604, 40 C. C. A. 614. But compare Home &c. Guano Co. v. Ocean Acc. &c. Co., 176 Fed. 600; Wollman v. Fidelity &c. Co., 87 Mo. App. 677; East Carolina R. Co. v. Maryland Casualty Co., 145 N. Car. 114, 58 S. E. 906.

[9] Phillipsburg Horse Car Co. v. Fidelity &c. Co., 160 Pa. St. 350, 28 Atl. 823.

§ 4408. Violation of statute by insured.—It is sometimes provided that there shall be no liability for injuries to employés caused by the neglect of the insured to obey statutes and ordinances designed for the protection of such employés. Where the policy insured against liability for injuries accidentally sustained by employés, except a child illegally employed, it was held that the company was not liable for damages which were recovered from the insured for injuries sustained through its negligence by a child under twelve years of age, employed in violation of law. The insured claimed that under this contract the insurance company was exempted from liability only where the injuries were proximately caused by the illegality of the employment, but the court said:[10] "We can entertain no doubt that the meaning of this clause in question which was intended by the parties, and which should be given to it by the courts, is the popular meaning as distinguished from the purely technical legal meaning. So construed, all difficulties disappear. The clause becomes a substantial limitation, as undoubtedly intended by the parties; and it encourages no violation of law, but, rather, discourages it." And a similar decision was rendered in a recent case by a federal court where a child was injured.[11] So, where a miner was injured by a wilful failure of the assured to maintain a passageway as required by statute it was held that there could be no recovery.[12]

On the other hand, in a recent New York case, the application upon which the policy was issued contained an agreement on the part of the insured, a cement company, "to conduct all business and maintain all premises to which the proposed insurance may apply, in strict compliance with all statutes, ordinances and by-laws provided for the safety of persons." One of the employés of the insured was injured while attempting to oil a shafting in certain machinery, and subsequently brought an action against the cement company and secured judgment, which the cement company paid and demanded from the insurance company. The

[10] Goodwillie v. London Guarantee &c. Co., 108 Wis. 207, 84 N. W. 164.

[11] Frank Unneweher Co. v. Standard Life &c. Ins. Co., 176 Fed. 16, 99 C. C. A. 490.

[12] Chicago-Coulterville Coal Co. v. Fidelity & Casualty Co., 130 Fed. 957.

insurance company claimed that the insured had forfeited his right to indemnity because it had failed to maintain its premises in compliance with the Factory Act, which required such machinery to be properly guarded, but the court took to the view that the legislature could not have intended that every piece of machinery in a large building should be covered or guarded, but only that those parts of the machinery which were dangerous to servants whose duty required them to work in its immediate vicinity should be properly guarded so as to minimize, as far as practicable, the dangers attending their labors, and this appearing to have been done, a recovery was allowed against the insurance company.[13] In other cases the same view was taken as in the first three cases cited in the notes to this section as to there being no right of recovery where the statute was violated, but a recovery was allowed on the ground of estoppel because the insurer, instead of denying liability, had voluntarily assumed control and undertaken the defense of the action against the assured.[14]

§ 4409. **When liability accrues.**—Whether the insured can maintain an action against the insurer without having paid the claim of an employé depends, of course, upon the language of the policy. If the insurance is against damages actually suffered by the assured, it would seem to be necessary for the insured to pay the judgment or claim against it before proceeding against the insurance company.[15] But where the policy by its terms protects the insured against liability for damages for injuries suffered by his employés, it is not necessary that the liability be discharged before bringing an action.[16]

[13] Glens Falls &c. Co. v. Travelers' Ins. Co., 162 N. Y. 399, 56 N. E. 897. Compare Butler Bros. v. American Fidelity Co. (Minn.), 139 N. W. 355.

[14] Tozer v. Ocean Acc. &c. Co., 94 Minn. 478, 103 N. W. 509; Royle Min. Co. v. Fidelity &c. Co., 126 Mo. App. 104, 103 S. W. 1098.

[15] As to time liability accrues and whether final judgment against the assured by the employé must be shown, see and compare Fidelity &c. Co. v. Fordyce, 64 Ark. 174, 41 S. W. 420, and American Employers' Liability Ins. Co. v. Fordyce, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. 305, with Ross v. American Employers' Liability Ins. Co., 56 N. J. Eq. 41, 38 Atl. 22.

[16] Hoven v. Employers' &c. Assur. Corp., 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388. See generally and compare Finley v. United States Casualty Co., 113 Tenn. 592, 83 S. W. 2; Cayard v. Robertson, 123 Tenn. 382, 131 S. W. 864, 30 L. R. A. (N. S.) 1224. See also, Allen v.

An employers' liability policy provided (1) that it insured against all liability on account of fatal or nonfatal injuries suffered by an employé; (2) that the company, at its own expense, would take upon it the settlement of any loss, and the control of any legal proceedings taken against the insured to enforce a claim for injuries to an insured employé; (3) that the insured should not settle for any injury without the consent of the insurance company; (4) that no action should lie against the insurance company after the period in which action might be brought by the employé against the insured, unless at such period there was a suit pending for such purpose, in which case the action might be brought in respect to a claim involved in such suit against the company within thirty days after a judgment was rendered in such suit, and not later. It was held that this policy was not one merely of indemnity against any act of an employé, but that in case of accident to him whereby he had a cause of action against the insured, the insurance company would assume and pay the liability, and also, that an employé having, while so employed, sustained injury and recovered a judgment therefor against the insured, the insurance company was liable therefor in an action against it without the employer having first paid the judgment.[17]

§ 4410. **Effect of judgment against insured.**—In a rather peculiar case in New York an action had been brought by an employé against his employer for damages for personal injuries alleged to have been caused by the negligence of the employer, and the defense was undertaken by the insurance company, but a short time before the time set for trial it withdrew from the defense and permitted judgment to go by default on the theory that the evidence showed that the employer had neglected to comply with the provisions of the statute for the protection of his employés, and therefore the insurance company was not, under

Gilman-McNeil &c. Co., 137 Fed. 136, affd. 145 Fed. 881, 76 C. C. A. 265, 7 L. R. A. (N. S.) 958, criticizing Sanders v. Frankford &c. Co., 72 N. H. 485, 57 Atl. 655, 101 Am. St. 688.

[17] Anoka Lumber Co. v. Fidelity & Casualty Co., 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689. Compare also, Campbell v. Maryland Casualty Co. (Ind. App.), 97 N. E. 1026; West Riverside Coal Co. v. Maryland Casualty Co. (Iowa), 135 N. W. 414.

the terms of its policy, liable for the loss. Afterward, in an action against the insurance company by the employer, it was claimed that the question of negligence of the employer in failing to comply with the statutory provisions was res adjudicata, but the court said:[18] "We do not think that the adjudication in that action is binding upon the plaintiff in this action, for the reason that, under the contract of insurance, the insurance company had agreed to defend the action, and had conducted such defense down to the eve of the trial and then withdrew, leaving the cement company no reasonable opportunity to prepare its own defense to the action. Had the insurance company continued its defense it might have shown upon the trial that the cement company was free from negligence in the matter, and thus avoided a judgment against that company; but having withdrawn from the defense of that action improperly and permitted judgment to go against the cement company by default, it is now estopped from claiming that the adjudication thus obtained precludes the plaintiff from insisting upon the indemnity which the defendant had contracted to render."

§ 4411. Notice of injury or claim.—Although, as elsewhere seen, a provision to the effect that notice shall immediately be given to the company of the occurrence of an accident is not to be given an unduly strict construction, yet it is usually considered a condition precedent to liability, even where the policy contains no forfeiture clause. Thus, where an employé made no claim for damages until nine months after the accident, a notice given at that time was held to be too late.[19] But in Minnesota, under a policy which contained a clause to the effect that, "The insured, upon the occurrence of an accident, and upon notice of any claim on account of an accident, shall give immediate notice in writing of such accident or claim, with the fullest in-

[18] Glens Falls &c. Co. v. Travelers' Ins. Co., 162 N. Y. 399, 56 N. E. 897. Compare Myton v. Fidelity &c. Co., 117 Mo. App. 442, 92 S. W. 1149. And see generally, as to when the insurer is or is not estopped when it participates in the defense, Sargent Mfg. Co. v. Travelers' Ins. Co., 165 Mich. 87, 130 N. W. 211, and note, 34 L. R. A. (N. S.) 491n.

[19] Underwood Veneer Co. v. London Guar. &c. Co., 100 Wis. 378, 75 N. W. 996, quoting Kentzler v. American &c. Acc. Assn., 88 Wis. 589, 60 N. W. 1002, 43 Am. St. 934. See further, as to the construction

formation available, to the company, at its office in New York City, or to the agent, if any, who shall have countersigned this policy," it was held that the insured need not give notice to the insurance company until notice that a claim had been made.[20]

§ 4412. Fidelity insurance—In general.—Contracts by which a party is insured against loss[21] by the fraud or dishonesty of his employés are, in substance and effect, contracts of insurance and not of suretyship;[22] and, in the main at least, the general principles applicable to other classes of insurance are applicable here as well.[23] The more liberal rules of construction applicable to contracts of insurance generally are therefore followed rather than the rules peculiar to contracts of suretyship.[24]

§ 4413. Notice of loss or dishonesty.—Fidelity policies usually provide that the insured shall promptly notify the company of any fraud or dishonesty on the part of the employé.[25] It has been held that a condition in the bond of fidelity insurance, which requires that a claim thereunder shall be made as soon as practicable after the discovery of the loss, and within six months

of the provision requiring notice, Grand Rapids &c. Co. v. Fidelity &c. Co., 111 Mich. 148, 69 N. W. 249.

[20] Anoka Lumber Co. v. Fidelity & Casualty Co., 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689.

[21] As to what are "losses," see Rice v. National &c. Ins. Co., 164 Mass. 285, 41 N. E. 276.

[22] Supreme Council v. Fidelity &c. Co., 63 Fed. 48, 11 C. C. A. 96; Mechanics' Sav. Bank & Trust Co. v. Guarantee Co., 68 Fed. 459, affd. 80 Fed. 766, 26 C. C. A. 146. The principal questions which have arisen out of credit insurance have been those of construction. As an illustration, see the cases of Smith v. National &c. Ins. Co., 65 Minn. 283, 68 N. W. 28, 33 L. R. A. 511, and Shakmen v. United States &c. Co., 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. 920.

[23] People v. Rose, 174 Ill. 310, 51 N. E. 246, 44 L. R. A. 124. See also, People v. Fidelity &c. Co., 153 Ill. 25, 38 N. E. 752, 26 L. R. A. 295; Claflin v. United States &c. Co., 165 Mass. 501, 43 N. E. 293, 52 Am. St. 528. For the general principles of insurance governing contracts of this character, see Mechanics' Sav. Bank & T. Co. v. Guarantee Co., 66 Fed. 459, affd. in 80 Fed. 766, 26 C. C. A. 146 (but see for further history of the case 183 U. S. 402, 22 Sup. Ct. 124); Supreme Council v. Fidelity & Cas. Co., 63 Fed. 48, 11 C. C. A. 96.

[24] See Guarantee Co. v. Mechanics' Sav. Bank &c., 80 Fed. 766, 26 C. C. A. 146, revd. 173 U. S. 582, 43 L. ed. 818, 19 Sup. Ct. 551, and cases there cited. American Bonding & Trust Co. v. Burke, 36 Colo. 49, 85 Pac. 692; Lesher v. United States Fidelity &c. Co., 239 Ill. 502, 88 N. E. 208; Brandrup v. Empire State Surety Co., 111 Minn. 376, 127 N. W. 424; Bank of Tarboro v. Fidelity &c. Co., 126 N. Car. 320, 35 S. E. 588, 83 Am. St. 682; Wise v. Wise, 60 S. Car. 426, 38 S. E. 794; Remington v. Fidelity &c. Co., 27 Wash. 429, 67 Pac. 989. But see Guarantee Co. v. Mechanics' Sav. Bank, 183 U. S. 402, 46 L. ed. 253, 22 Sup. Ct. 124.

[25] California Sav. Bank v. Ameri-

after the expiration of the bond, must be complied with or there can be no recovery; and the fact that the insurance company has actual knowledge of the loss does not excuse noncompliance with such a condition.[26] But under such a provision it is not necessary to give notice of a mere suspicion. Thus, where a bond was given to protect a bank from the dishonesty of its cashier, it was held that notice need be given only after the bank had knowledge of such facts as would justify a charge of fraud or dishonesty against the cashier.[27] It has been held, however, that failure of the bank to notify the company, upon the officers of the bank being told that the teller was speculating, will defeat a recovery for his defalcation after the information was received by such officers, where the contract provided that immediate notice should be given on "becoming aware" of the employé being engaged in speculation or gambling.[28]

The notice must be given within a reasonable time. And this is all that seems to be required under a provision for "immediate" notice.[29] Where a bond provided that notice should be given the

can Surety Co., 87 Fed 118; Guarantee Co. v. Mechanics' Sav. Bank &c., 183 U. S. 402, 46 L. ed. 253, 22 Sup. Ct. 124. In Phillips v. Foxhall, L. R. 7 Q. B. 666, it was said: "We think that in the case of a continuing guaranty for the honesty of a servant, if the master discovers that the servant has been guilty of acts of dishonesty in the course of the service to which the guaranty relates, and if, instead of dismissing the servant, as he may do at once and without notice, he chooses to continue in his employment a dishonest servant, without the knowledge and consent of the surety, express or implied, he cannot afterward have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service." To the same effect, see Lancashire Ins. Co. v. Callahan, 68 Minn. 277, 71 N. W. 261, 64 Am. St. 475. Contra, see Phœnix Ins. Co. v. Finley, 59 Iowa 591, 13 N. W. 738.

[26] California Sav. Bank v. American Surety Co., 87 Fed. 118; Missouri &c. Trust Co. v. German Nat. Bank, 77 Fed. 117, 23 C. C. A. 65 (where a guarantee company, after it knew of the fact that an employé was a defaulter, took security from him without notifying the insured that it disclaimed liability, it was held proper to submit to the jury the question as to whether the guarantee company waived the defense that the employé in his application for the bond had understated his indebtedness to the bank); Michigan Sav. &c. Assn. v. Missouri &c. Trust Co., 73 Mo. App. 161.

[27] Bank of Tarboro v. Fidelity &c. Co., 126 N. Car. 320, 35 S. E. 588, 83 Am. St. 682; American Surety Co. v. Pauly, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. 552.

[28] Guarantee Co. v. Mechanics' &c. Co., 183 U. S. 402, 46 L. ed. 253, 22 Sup. Ct. 124.

[29] See Perpetual Bldg. &c. Assn. v. United States Fidelity &c. Co., 118 Iowa 729, 92 N. W. 686; Remington v. Fidelity &c. Co., 27 Wash. 429, 67 Pac. 989; National Surety Co. v. Western Pac. R. Co., 200 Fed. 675. It may be waived. See case first

company of any act of the cashier of a bank which might involve loss for which the insurance company might be responsible, "as soon as practicable after the occurrence of such acts shall have come to the knowledge of the employer," and the bank suspended payment and passed into the hands of a receiver, and afterward notified the surety company of the discovery of dishonest acts of the cashier, and made proofs of loss as required, it was held to be a question for the jury as to whether notice had been given with reasonable promptness.[30]

§ 4414. **Time and duties or acts covered.**—Such contracts are expressly limited with reference to the time and manner of employment, but it is not always easy to determine just what is covered and just what constitutes a change of employment or duties.[31] The cashier of a national bank remains in the "service of the bank" after the bank is in the hands of a bank examiner who is investigating its affairs, and until the appointment and qualification of a receiver.[32] In the same case in the lower court it was held that the cashier was in the service of the bank while he was in the employ of the receiver, who was winding up the affairs of the bank.[33] So, where a bank was insured against loss through the fraud or dishonesty of an employé in connection with his duties as teller, "or the duties to which, in the employer's service, he may be subsequently appointed or assigned by the employer," the contract was held to cover his misconduct while acting as assistant cashier.[34] And to the same effect are other cases.[35] But the contract is not ordinarily retroactive,[36] and a

cited; also Globe Savings & Loan Co. v. Employers' Liability &c. Co., 13 Manitoba 531.

[30] American Surety Co. v. Pauly, 72 Fed. 470, 18 C. C. A. 644, affd. 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. 552.

[31] See generally, City Trust &c. Co. v. Lee, 204 Ill. 69, 68 N. E. 485; American Bonding & Trust Co. v. Milwaukee Harvester Co., 91 Md. 733, 48 Atl. 72; Sun Life Ins. Co. v. United States Fidelity &c. Co., 130 N. Car. 129, 40 S. E. 975. See also, United States Fidelity &c. Co. v. Des Moines Nat. Bank, 145 Fed. 273, 74 C. C. A. 553; Fidelity &c. Co. v. Bank of Timmonsville, 139 Fed. 101, 71 C. C. A. 299.

[32] American Surety Co. v. Pauly, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. 552.

[33] American Surety Co. v. Pauly, 72 Fed. 470, 18 C. C. A. 644, affd. 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. 552.

[34] Fidelity &c. Co. v. Gate City Nat. Bank, 97 Ga. 634, 25 S. E. 392, 33 L. R. A. 821, 54 Am. St. 440.

[35] Champion Ice &c. Co. v. American Bond &c. Co., 115 Ky. 863, 25 Ky. L. 239, 75 S. W. 197, 103 Am. St. 356.

[36] Florida Cent. R. Co. v. Ameri-

renewal contract is usually held not to operate as a continuing contract.[37]

Where a bond, given to secure a bank against loss by reason of fraud or dishonesty of an employé, provided that a claim thereunder should embrace only acts and defaults committed during its currency, and within twelve months next before the discovery of the act or default, it was held that it did not cover a default committed more than twelve months prior to the discovery, which would have been discovered within the year had not such discovery been prevented by the act of the employé in falsifying the books during the year preceding the discovery.[38] And where the liability of the insurer was limited to such losses as should occur during the continuance of the contract and should be discovered "during said continuance and within six months after the death, dismissal, or retirement" of the employé, it was held that at the expiration of the year for which indemnity was given, the liability of the company ceased as to an undiscovered loss caused by an employé who still remained in the same position, notwithstanding he afterward died and the loss was discovered within six months thereafter.[39]

§ 4415. Manner of proof of default.—It is often provided that certain facts and statements shall be taken as proof of a default by the employé, and the amount of such default. Where this is so the production of such evidence makes a prima facie case against the insurer.[40] Where a policy insuring against actual loss by theft or dishonesty of an employé provided the means of determining the extent and amount of the shortage, and that, when thus ascertained, it should be accepted as evidence that it

can Surety Co., 99 Fed. 674, 41 C. C. A. 45; Dorsey v. Fidelity & Casualty Co., 98 Ga. 456, 25 S. E. 521; Sinclair v. National Surety Co., 132 Iowa 549, 107 N. W. 184. But see Hall v. U. S. Fidelity &c. Co., 77 Minn. 24, 79 N. W. 590, and Ætna Life Ins. Co. v. American Surety Co., 34 Fed. 291.

[37] Proctor Coal Co. v. United States Fidelity Co., 124 Fed. 424; De Jernette v. Fidelity & Casualty Co., 98 Ky. 558, 17 Ky. L. 1088, 33 S. W. 828. But see First Nat. Bank v. Fidelity &c. Co., 110 Tenn. 10, 75 S. W. 1076, 100 Am. St. 765.

[38] Fidelity &c. Co. v. Consolidated Nat. Bank, 71 Fed. 116, 17 C. C. A. 641, revg. 67 Fed. 874.

[39] Florida Cent. R. Co. v. American Surety Co., 99 Fed. 674, 41 C. C. A. 45.

[40] American Surety Co. v. Pauly, 72 Fed. 484, 18 C. C. A. 657, affd. 170 U. S. 160, 42 L. ed. 987, 18 Sup. Ct. 563.

was caused by fraud or dishonesty, and not by any of the various other causes enumerated as exceptions, it was held that a shortage so ascertained was prima facie evidence of its existence, and that it was caused by the employé's fraud or dishonesty, thus casting the burden upon the insurer to rebut the prima facie case by sufficient evidence. It was held, however, that it was not bound to do this by affirmative evidence showing a particular one of the causes enumerated as exceptions, but might do it by negative evidence showing that it was not caused by fraud or dishonesty of the employé, and hence must have been produced by one or more of the excepted causes. It was also held, in an action brought by the insurance company against the employé to recover money alleged to have been paid to his employer on the bond, that, the contract of guaranty having been executed at defendant's request, the obligation to indemnify plaintiff was coextensive with the obligation of the latter to indemnify the employer, and any provisions in the contract between the insurer and the employer as to the proofs of liability were equally binding on the defendant in favor of the plaintiff.[41]

Under a bond to "make good * * * such pecuniary loss, if any, as may be sustained by the employer by reason of fraud or dishonesty of the employé in connection with the duties referred to, amounting to embezzlement or larceny, which was committed and discovered during the continuance of said term or any renewal thereof,"—it has been held that entries, receipts and reports made by an employé, the treasurer of a benevolent association, during the life of the bond in the ordinary course of his duty, charging himself with certain items, are not conclusive against the insurance company as to the time such items were received.[42]

[41] Fidelity &c. Co. v. Eickhoff, 63 Minn. 170, 65 N. W. 351, 30 L. R. A. 586, 56 Am. St. 464.

[42] Supreme Council C. K. v. Fidelity &c. Co., 63 Fed. 48, 11 C. C. A. 96. In this decision the various authorities on both sides of the question are collected and reviewed. See also, generally, as to evidence of honesty or dishonesty, Guarantee Co. v. Mutual Bldg. &c. Assn., 57 Ill. App. 254; Supreme Ruling v. National Surety Co., 114 App. Div. (N. Y.) 689, 99 N. Y. S. 1033; Reed v. Fidelity &c. Co., 189 Pa. St. 596, 42 Atl. 294; Clifton Mfg. Co. v. United States Fidelity & Guaranty Co., 60 S. Car. 128, 38 S. E. 790.

§ 4416. **Constructive notice.**—A bank is not bound by constructive notice of matters brought to the attention of its president and cashier while they were engaged in a fraudulent design to rob the bank. "The presumption that the agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, or within any authority possessed by him, but to subserve simply his own personal ends to commit some fraud against the principal. In such cases the principal is not bound by the acts or declarations of the agent unless it be proved that he had at the time actual notice of them, or having received notice of them, failed to disavow what was assumed to be said and done in his behalf."[43]

§ 4417. **Supervision of employe.**—The supervision to be exercised over employés by the insured is a very important factor in the risk assumed by a fidelity insurance company. But it has been held that an insured owes no duty of supervision to the insurer, unless it is imposed by the contract of insurance.[44]

There is some controversy as to whether a statement made by an applicant for insurance, as to the kind of supervision exercised and the method of checking accounts, is in the nature of a promissory representation and its future observance vital to the contract. In an English case a guaranty company issued a policy upon statements that the accounts were checked weekly, and it appeared that this had been the practice, but was discontinued after the policy was issued. It was held that there could be no recovery

[43] American Surety Co. v. Pauly, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. 552, citing Henry v. Allen, 151 N. Y. 1, 45 N. E. 355, 36 L. R. A. 658. See 2 Pomeroy Equity Juris. (3d ed.), § 675. In Fidelity &c. Co. v. Gate City Nat. Bank, 97 Ga. 634, 25 S. E. 392, 33 L. R. A. 821, 54 Am. St. 440, it was held that where there is nothing in the contract requiring the insured to notify the insurance company that it has learned that the employé is untrustworthy, the knowledge of the cashier is not imputable to the bank. The doctrine of constructive notice is held to have no application to such a contract. But compare National Bank v. Fidelity &c. Co., 89 Fed. 819, 32 C. C. A. 355; Warren Deposit Bank v. Fidelity & Deposit Co., 116 Ky. 38, 25 Ky. L. 289, 74 S. W. 1111.

[44] Fidelity &c. Co. v. Gate City Nat. Bank, 97 Ga. 634, 25 S. E. 392, 33 L. R. A. 821, 54 Am. St. 440. Compare, however, Atlantic City &c. Fraternal Order v. International Fidelity Ins. Co. (N. J.), 85 Atl. 325.

on the policy.[45] So, in a Canadian case it appeared that the policy was issued upon the express condition that the answers contained in the application embraced a true statement of the manner in which the business was conducted, and accounts kept, and that they would be so kept, and as there had been no proper supervision exercised over the books, the insured was not permitted to recover for a loss caused by the dishonesty of an employé.[46] But a good-faith, customary examination of the books of a bank, such as a committee deemed sufficient for the protection of the bank, is a compliance with a requirement in the bond of a bank teller that the bank shall "observe * * * all due and customary supervision over said employé for the prevention of default."[47] And where a policy stipulates that a bank "shall use all due and customary diligence" in the supervision of its employés, it is not necessarily obliged to comply with the general bank custom as to the taking of a trial balance from the individual ledgers.[48]

In answer to an inquiry, the employer stated that the employé would be authorized to draw checks to which the countersignature of the bookkeeper would invariably be required. It was held that there could be no recovery for losses caused by the drawing of checks to which the signature of the bookkeeper was not required. The court said:[49] "A written statement made by em-

[45] Towle v. National Guardian Ins. Soc., 7 Jur. (N. S.) 1109, revg. 30 L. J. Ch. 900. But in Benham v. United Guarantee &c. Co., 7 Exch. 744, the applicant stated in answer to a question as to what checks would be used to secure accuracy in the accounts of the treasurer, that they were "examined by finance committee every fortnight." It was held that this was a mere representation of intention and that there could be a recovery, although the loss was caused by the failure to make such examination.

[46] Harbour Commissioners of Montreal v. Guarantee Co. of North America, 22 Can. Sup. Ct. 542 (so where the contract provided that the books should be balanced and closed at the end of each quarter); Board of Education of Paris v. Citizens' Ins. &c. Co., 30 U. C. C. P. 132. See also, Hunt v. Fidelity &c. Co., 99 Fed. 242, 30 C. C. A. 496.

[47] Mechanics' Sav. Bank & Trust Co. v. Guarantee Co., 68 Fed. 459, affd. 80 Fed. 766, 26 C. C. A. 146.

[48] Guarantee Co. v. Mechanics' Sav. Bank &c. Co., 80 Fed. 766, 26 C. C. A. 146, revd. 173 U. S. 582, 43 L. ed. 818, 19 Sup. Ct. 551. And it is held that even if an agreement to make monthly examinations is a condition at all, it is a condition subsequent rather than precedent, and the burden is upon the surety to show its breach. Title Guaranty & Surety Co. v. Nichols (U. S.), 32 Sup. Ct. 475.

[49] Rice v. Fidelity & Dep. Co., 103 Fed. 427, 43 C. C. A. 270, citing American Credit Indemnity Co. v. Wood, 73 Fed. 81, 19 C. C. A. 264; American Credit Indem. Co. v. Carrollton Furn. Mfg. Co., 95 Fed. 111, 36 C. C. A. 671. But compare Title Guaranty & Surety Co. v. Nichols (U. S.), 32 Sup. Ct. 475.

ployers to the obligor in a bond of indemnity against the dishonest acts of their employé to the effect that they will invariably apply certain checks to his action, which the parties expressly agree, by the statement itself and the bond, shall be the basis of the latter, and a condition precedent to a recovery upon it, is of the nature of a warranty, and not of a representation, and a failure to comply with the promise it contains is fatal to an action upon the bond."

§ 4418. **Warranties and misrepresentations.**—The rules elsewhere considered as to warranties and misrepresentations apply, in the main at least, to fidelity insurance the same as to other insurance.[50] An important decision upon the subject, refusing to follow carefully considered opinions, was recently rendered by the Supreme Court of the United States. In the case referred to, it is held that where the president of a bank had been told that the employé had been speculating, negative answers of the president, in reliance on which the contract was executed, to the effect that he had never heard anything unfavorable to the habits or associations of the employé, nor of any matters concerning him about which inquiry was deemed advisable, would defeat a recovery on the indemnity contract which provided that any misstatement of any material fact should invalidate it.[51]

§ 4419. **Credit insurance—In general.**—The practice of insuring merchants and traders against loss through the insolvency or dishonesty of their customers is of very recent origin,[52] but

[50] See Missouri &c. Trust Co. v. German Nat. Bank, 77 Fed. 117, 23 C. C. A. 65; Rice v. Fidelity &c. Co., 103 Fed. 427, 43 C. C. A. 270; Carstairs v. American Bonding &c. Co., 112 Fed. 620, affd. 116 Fed. 449, 54 C. C. A. 85. See also, Title Guaranty &c. Co. v. Fulton, 89 Ark. 471, 117 S. W. 537, 33 L. R. A. (N. S.) 676; Warren Deposit Bank v. Fidelity &c. Co., 116 Ky. 38, 25 Ky. L. 289, 74 S. W. 1111; First Nat. Bank v. Fidelity &c. Co., 110 Tenn. 10, 75 S. W. 1076, 100 Am. St. 765; Poultry Producers' Union v. Williams, 58 Wash. 64, 107 Pac. 1040, 137 Am. St. 1041; Goldman v. Fidelity &c. Co., 125 Wis. 390, 104 N. W. 80. As will be seen there is here, also, much the same conflict of authority on some phases of the subject.

[51] Guarantee Co. v. Mechanics' Sav. &c. Co., 183 U. S. 402, 46 L. ed. 253, 22 Sup. Ct. 124. In the still more recent case of Title Guaranty & Surety Co. v. Nichols (U. S.), 32 Sup. Ct. 475, an official certificate that the employés' books had been "examined and found correct and all moneys accounted for" is held not to be a warranty of their correctness.

[52] The first case in which such a contract came before the courts was Solvency Mutual Guar. Co. v. York, 3

Massachusetts seems to be the only state that has refused to recognize such contracts as insurance.[53] As in the case of other insurance contracts, the strict rules of suretyship are not applied. As said in a recent case,[54] "Corporations entering into contracts like the one at bar may call themselves 'guarantee' or 'surety' companies, but their business is in all essential particulars that of insurers, who, upon careful calculation of the risks of such business, and with such restrictions of their liability as may seem to them sufficient to make it safe, undertake to assure persons against loss, in return for premiums sufficiently high to make such business commercially profitable. Their contracts are, in fact, policies of insurance, and should be treated as such." Such contracts are therefore to be construed like other contracts of insurance.[55] There are also other forms of indemnity contracts somewhat similar to ordinary credit insurance,[56] as, for instance, a guaranty insurance bond to indemnify against loss from failure to perform the conditions of the building contract or the like. And the same rule is applied in such cases.[57]

It was held in England that the rule requiring the utmost good

Hurl. & N. 588. See generally, as to such insurance, National Aniline & Chemical Co. v. American Credit Indemnity Co., 228 Pa. St. 588, 77 Atl. 920. See also, Peden Iron & Steel Co. v. Ocean Accident &c. Co., 151 Fed. 992; Jung v. American Credit Indemnity Co., 180 Fed. 510; Shedd v. American &c. Co. (Ind. App.), 95 N. E. 316.

[53] Claflin v. United States Credit System Co., 165 Mass. 501, 43 N. E. 293, 52 Am. St. 528. See Mass. Pub. Stat. (1887), ch. 214, § 78.

[54] Tebbetts v. Mercantile &c. Guar. Co., 73 Fed. 95, 19 C. C. A. 281, and United States Credit System Co. v. Robertson (N. J. L.), 29 Atl. 421. To the same effect, see Chakman v. United States Credit System Co., 92 Wis. 366, 66 N. W. 528, 53 Am. St. 920.

[55] Mercantile &c. Guar. Co. v. Wood, 68 Fed. 529, 15 C. C. A. 563; Mercantile Credit &c. Co. v. Littleford, 9 Ohio C. D. 846, 18 Ohio C. C. 889. See also, George A. Hormel & Co. v. American Bonding Co., 112 Minn. 288, 128 N. W. 12, 33 L. R. A. (N. S.) 513, and note, citing many cases to the same effect.

[56] So, there are many other kinds more or less similar. As to rent insurance, see Heller v. Royal Ins. Co., 133 Pa. St. 152, 19 Atl. 349, 7 L. R. A. 411, and note in 23 L. R. A. (N. S.) 123. As to burial insurance, see note in 23 L. R. A. (N. S.) 197. As to live stock insurance, see Tripp v. Northwestern Live Stock Ins. Co., 91 Iowa 278, 59 N. W. 1; Joplin v. Nat. Live Stock Ins. Assn. (Ore.), 122 Pac. 897; Reck v. Hatboro &c. Ins. Co., 163 Pa. St. 443, 30 Atl. 205. As to plate glass insurance and authority to write it see and compare State v. Schively, 68 Wash. 503, 123 Pac. 784. See also, People v. Van Cleave, 187 Ill. 125, 58 N. E. 422; Employers' Liability Assur. Co. v. Merrill, 155 Mass. 404, 29 N. E. 529; State v. Fricke, 102 Wis. 117, 77 N. W. 734.

[57] Hormel v. American Bonding Co., 112 Minn. 288, 128 N. W. 12, 33 L. R. A. (N. S.) 513, and note.

faith on the part of the insured in disclosing facts affecting the risk extends to instruments in the form of a policy guaranteeing the solvency of a person who is a surety for the repayment of borrowed money.[58] But, as in cases of life and fire insurance, the American cases do not apply the rule with reference to concealment so strictly. As stated in one of them,[59] "We think it is going too far to say that the creditor is, in all cases and without being inquired of, bound to communicate everything that it is important for the surety to know and that would increase his risk. Under such a rule no one would ever know when he could rely upon a bond, and it would lead to a good deal of litigation. Besides, the duty of the defendants, when applying for a renewal of the bond, stands upon a different basis from their duty in applying for original insurance."

§ 4420. **Construction of policy—Amount of recovery.**—A policy which insures against loss on sales, sustained by the insolvency of debtors who have assigned their property for the benefit of creditors, covers an assignment under a state statute, at common law, or for the benefit of a single creditor. "It may be a statutory assignment, a mortgage, a confession of judgment or some other contrivance, the purpose and effect of which is to dispose of all the debtor's assets and disable him from paying his debts. In such cases the loss is fairly within the scope of the indemnity secured by the insured by this policy. It is the completeness of the transfer and its effect upon the debtor in business, and not the name or form of the instrument or transaction, that gives it character. Any transfer by a trader or merchant of all his stock and business, when it covers substantially all his property, may be an assignment within the meaning of the policy in spite of its form or the name given to it. * * * A general assignment within the meaning of the policy may be for the benefit of a single creditor or all. It may be in the form prescribed by state statutes or an assignment at the common law. The form of the transaction is not so material as the result when it operates to divest the debtor of substantially his entire property and closes

[58] Seaton v. Heath, L. J. 68 Q. B. 630.

[59] American Credit Indem. Co. v. Wimpfheimer, 14 App. Div. (N. Y.) 498, 43 N. Y. S. 909. See ch. CXX.

out his business. Such a transfer means insolvency within the fair scope of the indemnity."[60] And it has been held that insolvency means inability of the debtor to pay his debts as they fall due in the ordinary course of business and neither a general assignment nor attachment or return of nulla bona is necessary even though the indemnity bond provides that they shall constitute insolvency.[61]

So, in another case, within the definition of the term "insolvency," as defined in a policy, was included the return of a writ of execution against the debtor unsatisfied, except where such execution has been issued and returned after the appointment of a receiver. The policy required the insured to give notice within ten days after learning of the insolvency of a debtor, upon blanks furnished by the company and in the manner described therein. The blank contained no reference to insolvency, but required the insured to answer certain questions as to the failure of the debtor. The word "failure" was held to be used in its commercial sense, and hence a confession of judgment by a debtor who was in business, and the seizure of his stock by the sheriff, causing a suspension of his business, was a failure, and a report thereof within ten days fulfilled the requirement as to notice, and a second notice after the return of an execution unsatisfied was not necessary.[62]

[60] People v. Mercantile Credit Guar. Co., 166 N. Y. 416, 60 N. E. 24. The policy limited liability to cases where "an execution has been returned unsatisfied on a judgment obtained * * * for merchandise sold to said debtor during the period covered by this policy." It was held that a failure to return an execution until three days after the expiration of the policy did not relieve the insurer from liability where the other requirements of the policy had been complied with. "To sustain the decision under review it is necessary to hold that not only must the goods be sold within the life of the policy, and a judgment rendered and an execution issued, but that it must be returned unsatisfied within that time, which is one year; and that, too, when there is no language in the policy or in the conditions which would warrant such construction. * * * The return of the execution does not constitute the main fact of insolvency, but is simply evidence of that fact; and if the insured, when presenting his proof of loss within the time stipulated, can show that it has then been returned, that is a compliance with the terms of the policy." (Citing Sloman v. Mercantile & Guar. Co., 112 Mich. 258, 70 N. W. 886, and distinguishing Talcott v. National &c. Ins. Co., 9 App. Div. (N. Y.) 433, affd. without opinion, 163 N. Y. 577, 57 N. E. 1125).

[61] Strouse v. American Credit Indem. Co., 91 Md. 244, 46 Atl. 328, 1063.

[62] American Credit Indem. Co. v. Carrollton Furn. Mfg. Co., 95 Fed. 111, 36 C. C. A. 671; Talcott v. National &c. Ins. Co., 9 App. Div. (N. Y.) 433, 75 N. Y. St. 690, 41 N. Y.

A policy insuring the holder against loss "sustained by reason of the insolvency of debtors owing the insured for merchandise" provided that "in adjusting losses * * * before determining the percentage of loss to be borne by the company, there shall first be deducted all sums paid, offered, and accepted, settled or secured, and also the value of any security or collateral." Under this policy the loss insured against was not the whole amount due from the insolvent debtor at the time of his suspension, but the amount remaining due after deducting any payments made by the debtor. It was also held that the clause, "When only a part of a loss is covered by this policy, the proportionate part of everything realized or secured by the insured shall be credited to so much of it as this policy covers," apparently referred to cases where a part of the loss is covered by one policy and part by another. But as it could not be brought into harmony with the rest of the contract, and the instrument considered as a whole was ambiguous, that meaning should be given it which is most favorable to the insured.[63] And where the policy insured against loss by insolvency of debtors owing for merchandise sold "between the first day of April, 1893, and March 31, 1894," and provided that the policy should "expire on the thirty-first day of March, 1894," and that proofs of loss must be presented within ninety days after the expiration of the policy, and that no loss should be paid until presented in such proofs, except that if the policy should be renewed, losses occurring after such expiration in sales made during its existence were payable, it was held that the company was liable for losses occurring after the expiration of the policy on sales made during its existence, although the policy was not renewed.[64]

S. 281, affd. 163 N. Y. 577, 57 N. E. 1125.

[63] Mercantile Credit &c. Co. v. Wood, 68 Fed. 529, 15 C. C. A. 563.

[64] Sloman v. Mercantile &c. Guar. Co., 112 Mich. 258, 70 N. W. 886. The court said: "We are of the opinion that the fairer view to take is that the provision in relation to the expiration of the policy refers to the time when sales, to be covered thereby, shall cease, and that it does not determine the time when losses must occur upon such sales, but that these shall be recoverable, regardless of that date, subject to the limitation as to final proof. This conclusion is justified by the rule that an ambiguity in an instrument is to be resolved against the draftsman." See also, as to notice of insolvency, proof of loss and waiver, Shedd v. American Credit-Indemnity Co. (Ind. App.), 95 N. E. 316.

§ 4421. **Identity of the insured—Partnership.**—In guaranty insurance we find a principle somewhat analogous to that of change in interest or title in fire insurance. Two partners were insured against loss by uncollectible debts, under a policy which provided that "if any member guaranteed with respect to his gross or particular trade-debts shall cease to be such a trader, his guarantee or contract shall become void on his retiring from such trade," and it was held that the retirement of one partner invalidated the contract.[65] Under such a policy the death of a partner effects such a change in the firm as will release the insurer.[66]

§ 4422. **Title insurance—Generally—Insurance of titles—Construction.**—The general principles governing insurance contracts apply, in the main at least, to contracts of title insurance.[67] Thus in a recent case of first impression the Supreme Court of Minnesota applied to such a contract the rule it had applied in fire insurance cases as to return of unearned premium where the company had been adjudged insolvent and a receiver appointed, and held that the insured was entitled to a return of the unearned part of the premium less the amount which the company was entitled to retain for the examination of the title preparatory to issuing the policy.[68] So, the same court has held that

[65] Solvency Mut. Guar. Co. v. Freeman, 7 Hurl. & N. 17.

[66] Cosgrave Brewing & Malting Co. v. Starrs, 5 Ont. 189; Pemberton v. Oakes, 4 Russ. 154.

[67] For definition and explanation of title insurance, see Foehrenbach v. German American Title &c. Co., 217 Pa. St. 331, 66 Atl. 561, 12 L. R. A. (N. S.) 465. See also, Purcell v. Land Title Guarantee Co., 94 Mo. App. 5, 67 S. W. 726. Title insurance companies sometimes not only insure different interests but also act as conveyancers and abstracters. The nature of the liability is different, however. Trenton Potteries Co. v. Title Guaranty &c. Co., 50 App. Div. (N. Y.) 490, 64 N. Y. S. 116. See also, Economy Ben. & Life Assn. v. West Jersey Title &c. Co., 64 N. J. L. 27, 44 Atl. 854. See generally, Banes v. New Jersey Title Guarantee & Trust Co., 142 Fed. 957, 74 C. C. A. 127.

[68] State v. Minnesota Title Ins. &c. Co., 104 Minn. 447, 116 N. W. 944, 19 L. R. A. (N. S.) 639, 124 Am. St. 944. And in the course of the opinion the court discussed the nature of title insurance as follows: "In the case of fire, hail, storm, or other like insurance, the indemnity is against loss which may occur at some time in the future during the life of the policy, and the contract serves as a protection to the policy holder during that time. In the title insurance the situation is the same, save that the loss suffered must arise from some defect in the title existing at the time of or before the policy was issued, and is subsequently successfully asserted to the damage of the policy holder. So that, substantially, the indemnity in either case is against future loss or damage; the loss arising in the one case from the happening of a future event, and

when such a policy contains a condition which renders it void from its inception, and this is known to the insurer when the policy is issued, the condition is waived.[69]

§ 4423. **Insurance of titles—Construction.**—The refusal of an adjoining owner to make compensation for the use of a party-wall does not constitute an encumbrance within the meaning of a policy which guarantees the title of real estate against all liens or encumbrances.[70] The words "tenancy of the present occupants," used in such a policy as a defect in the title not insured against, do not include a claim of one in actual adverse possession asserting ownership in fee against the title insured. They refer to the tenancy which arises through occupation or temporary possession of the premises by those who are tenants in the popular sense of the word.[71] A condition that "no right of action shall accrue * * * unless the insured has contracted to sell the estate or interest insured, and the title has been declared by a court of last resort of competent jurisdiction defective or encumbered by reason of a defect or encumbrance for which the company would be liable under this policy," does not apply in an action on the policy where the land was in actual adverse possession of another at the time the policy was issued, and had been actually lost by reason of a defect in the insured's title.[72]

In one case a policy issued to the holder of a mortgage on certain real estate insured him to the amount named against loss through the defects in the title to the real estate, or by liens or en-

in the other from a loss subsequent to the date of the policy by reason of the successful assertion of an adverse title or interest in the land insured which existed at the time or before the contract was made. That a loss of this kind might arise in the future, though the chances in this class of insurance are strongly against such a result, brings the case, by analogy, within the rule applicable to other insurance contracts, and the trial court was correct in applying it. The difference in probable or possible loss in the two classes of insurance is practically one of degree only; the probability of loss in this class being materially less than in the case of fire insurance."

[69] Quigley v. St. Paul Title Ins. &c. Co., 60 Minn. 275, 62 N. W. 287. See this case for the liabilities assumed by the insurance company when it assumes to defend against claims on the mortgaged premises. The same case was again before the court in 64 Minn. 149, 65 N. W. 364.

[70] Thomas v. Tradesmen's Trust &c. Co., 21 Pa. Co. Ct. 151, 7 Pa. Dist. 375. See also, as to defects not covered, Bothin v. California Title Ins. Co., 153 Cal. 718, 96 Pac. 500.

[71] Place v. St. Paul Title Ins. &c. Co., 67 Minn. 126, 69 N. W. 706, 64 Am. St. 404.

[72] Place v. St. Paul Title Ins. &c. Co., 67 Minn. 126, 69 N. W. 706, 64 Am. St. 404.

cumbrances thereon existing at the date of the policy. It provided that no right of action should accrue until the insured had conveyed or agreed to convey to the company his interest in the property at a price, which, in case of title acquired through foreclosure, should be the amount bid at the foreclosure sale, and that payment, discharge or satisfaction of the mortgage indebtedness, except by foreclosure of the mortgage, should annul the policy, and that the insurance company should have an opportunity to defend any suit affecting the title. Suits were brought to establish mechanics' liens on the property, which were unsuccessfully defended by the company. The property was then sold to satisfy the liens and the insured foreclosed his mortgage by publication, and at the sale bought it in for the amount due on the mortgage, with interest and costs. The insured having died, his representatives offered to convey to the title insurance company for the amount bid at the foreclosure sale, and demanded, in default of purchase for that amount, that the company redeem the property from the sale under the mechanics' liens. This it declined to do, and the insured's representatives redeemed the property and brought suit against the insurance company for the amount so paid. It was held that the purchase of the property by the insured at the foreclosure sale for the amount due on his mortgage did not cancel his mortgage debt and thus annul the policy, and that the title insurance company was bound either to buy the property for the amount bid at the sale or to redeem it from the sale under the liens, and that the plaintiffs were entitled to recover the amount paid by them for that purpose.[73]

In another case a policy insured against "all loss * * * by reason of defects or unmarketableness of the title to the estate or interest insured * * * or because of liens or encumbrances charging the same at the date of this policy, saving the defects, liens or encumbrances excepted in schedule B." This schedule provided that, "Unmarketableness by reason of the possibility of mechanics' and municipal liens is excepted from this insurance,

[73] Minnesota Title Ins. &c. Co. v. Drexel, 70 Fed. 194, 17 C. C. A. 56. There are many other kinds of risks which are insured against, but the cases construing such contracts are few and not yet of great importance. As to insurance against theft, see George v. Goldsmiths' &c. Ins. Assn., 67 L. J. Q. B. D. 807, 78 L. T. 813.

but actual losses by reason of such liens or by reason of the non-completion of the building now in process of erection on the premises (unless such building should happen to be destroyed by fire) are hereby insured against." It was held that claims for municipal work done three years after the policy was issued were not within the policy.[74] And where a policy contained a condition that, "No claim shall arise under this policy unless the party insured has been actually evicted under an adverse title insured against," it was held that no right of action was given thereunder by an adjudication on appeal that an order and decree of an orphans' court confirming the terms of a sale made by an administrator de bonis non cum testamento annexo of the lands in question, and authorizing a deed therefor, should be annulled, reversed and held for nothing.[75]

[74] Wheeler v. Real Estate Title Ins. &c. Co., 160 Pa. St. 408, 28 Atl. 849. See also, Trenton Potteries Co. v. Title Guarantee &c. Co., 176 N. Y. 65, 68 N. E. 132.

[75] Ocean View Land Co. v. West Jersey Title Guaranty Co., 71 N. J. L. 600, 61 Atl. 83.

CHAPTER CXXXII.

MARINE INSURANCE.

§ 4425. Generally.
4426. Description of insured—Interest covered by policy.
4427. Insurable interest—Lost or not lost.
4428. Beginning of the risk—Voyage "from" or "at and from."
4429. Termination of the risk.
4430. Subjects of marine insurance —In general.
4431. The ship—"The body, tackle, apparel, ordnance, munition, artillery, boats and other furniture of and in the good ship."
4432. Cargo, goods or merchandise.
4433. Goods carried on deck.
4434. Freight.
4435. Passage money.
4436. Profits and commission.
4437. Bottomry and respondentia.
4438. Seaman's wages.
4439. Implied warranties — Seaworthiness—Definition.
4440. What constitutes seaworthiness.
4441. Implied warranty in a sea voyage policy.
4442. Time policies—English rule.
4443. Time policies—Rule in the United States.
4444. Different stages of the voyage.
4445. Seaworthiness a relative matter.
4446. Time of seaworthiness—Continuing warranty.
§ 4447. Knowledge and intent of insured.
4448. Exclusion by the terms of the policy.
4449. Presumption — Burden of proof.
4450. Implied warranties — Deviation—Definition.
4451. Departure from route.
4452. Order of visiting ports.
4453. As affected by usage.
4454. Delay.
4455. Departure to save property.
4456. Transhipment of cargo.
4457. To avoid danger.
4458. Change of voyage—Intention.
4459. Excusable deviation.
4460. Restraint justifying deviation.
4461. Entering a port to refit.
4462. Entering a port to recruit crew.
4463. Stress of weather.
4464. To escape capture or join convoy.
4465. To save life or succor distress.
4466. Effect of deviation—Increase of risk.
4467. Implied warranties—Illegality —General statement.
4468. Violation of war policy of state.
4469. Neutrality — Contraband — Blockade.
4470. Violation of revenue laws and foreign statutes.
4471. Proper documents.

§ 4425. **Generally.**—Marine insurance protects against loss or damage to a ship, cargo, freight, profits, and other interests in property which is subjected to the risks of navigation. It is a branch of general maritime law, and ordinarily comes within

the jurisdiction of a court of admiralty.[1] The flag at the mast head of a ship may be that of the country of the parties to the contract, but the wreck of the ship on some foreign shore, may require the loss to be adjusted under the laws of another sovereignty. A shipowner or merchant with large quantities of goods, often takes insurance upon the same in different countries. In some respects, marine insurance is, therefore, international in its character, as the subject-matter with which it deals is continually passing from one jurisdiction to another.[2]

Marine insurance is the oldest branch of the law of insurance, and the principles underlying insurance contracts were therefore developed before the modern systems of insurance against fire and other casualties were known. These principles have been sufficiently discussed in preceding chapters. But some peculiar doctrines and the application of well-known principles to unusual conditions require special consideration.

§ 4426. Description of insured—Interest covered by policy.—A policy covers only the interest of the party who is named or in some manner designated therein.[3] But an insurance, "as agent," is for the benefit of the principal, and where the name of the principal does not appear it is equivalent to an insurance "on account of all * * * to whom the same may appertain," and the undisclosed principal may maintain an action upon the contract.[4] This language covers the interest of the party for whose benefit it was intended by the person who procured the policy.[5] The rule "that an insurance 'for whom it may concern,'

[1] North German Fire Ins. Co. v. Adams, 142 Fed. 439, 73 C. C. A. 555 (so holding even though the vessel was insured against fire risks alone); Boutin v. Rudd, 82 Fed. 685, 27 C. C. A. 526. See also, New England Marine Ins. Co. v. Dunham, 11 Wall. (U. S.) 1, 20 L. ed. 90 (also as to when common-law courts of equity have jurisdiction).

[2] As to what law governs such conflict of laws, generally, see Northwestern Steamship Co. v. Maritime Ins. Co., 161 Fed. 166, and notes in 46 C. C. A. 287, and 83 C. C. A. 100.

[3] Finney v. Warren Ins. Co., 1 Metc. (Mass.) 16, 35 Am. Dec. 343; Burrows v. Turner, 24 Wend. (N. Y.) 276, 35 Am. Dec. 622, and cases cited in note; Graves v. Boston Marine Ins. Co., 2 Cranch (U. S.) 419, 2 L. ed. 324 (power of equity to relieve against mistake in the contract and make it conform to the intention of the parties). See also, New York & Cuba Mail S. S. Co. v. Royal Exch. Assur., 145 Fed. 713.

[4] Anchor Marine Ins. Co. v. Allen, 13 Que. 4; Davis v. Boardman, 12 Mass. 80.

[5] Hagedorn v. Oliverson, 2 M. & S. 485; Duncan v. China Mut. Ins. Co., 39 N. Y. St. 248, 59 N. Y. Super. Ct. 396, 14 N. Y. S. 301, affd. 129 N.

will avail in behalf of the party for whom it is intended, does not mean that any specific individual must be intended. * * * But he may intend it for whatever party shall prove to have an insurable interest in the specified subject, in which case it will be applicable to the interest of any person subsequently ascertained to have such an insurable interest, who adopts the insurance."[6] Applying the rule that the written portion of a policy controls the printed provisions, it has been held that a policy "on account of whom it may concern," covered the interest of a subsequent purchaser of a boat, notwithstanding a written provision that it should be void, if any change should take place in the title or possession of the subject-matter of the insurance.[7]

It may also be stated here that it is a general rule peculiar to marine insurance that, where the value of the insured's interest exceeds the amount of the insurance, the insured is deemed a coinsurer as to such uninsured part and the underwriter is only liable for such proportion of the loss as the amount of the insurance bears to the value of the insured's interest.[8]

§ 4427. **Insurable interest—Lost or not lost.**—The only matter requiring notice in this place, in addition to what has been said elsewhere in regard to insurable interest, is the provision sometimes inserted in the policy whereby the underwriter expressly assumes the risk upon the property, whether "lost or not lost." The practice of effecting insurance, "interest or no interest," which was held valid prior to 19 Geo. II, ch. 37, was forbidden by that statute. Notwithstanding the present rule which requires that the insurer shall have a substantial interest in the subject-matter of the insurance when the policy is issued, it is held that the insurer may, if he desires, assume the risk of the property already having been lost, without the knowledge of the

Y. 237, 29 N. E. 76 (interest need not exist at the time the insurance was effected); Hooper v. Robinson, 98 U. S. 537, 25 L. ed. 219; Hagan v. Scottish Union & National Ins. Co., 186 U. S. 423, 46 L. ed. 1229, 22 Sup. Ct. 862.

[6] Phillip's Ins. (5th ed.), § 385. As to the various forms of this expression, see 2 Duer Ins., p. 29.

[7] Hagan v. Scottish Union & National Ins. Co., 186 U. S. 423, 46 L. ed. 1229, 22 Sup. Ct. 862.

[8] Peninsular & O. S. S. Co. v. Atlantic Mut. Ins. Co., 185 Fed. 172 (also defining and distinguishing "open" and "valued" policies and stating rules for determining loss). Compare, however, Leary v. Murray, 178 Fed. 209, 101 C. C. A. 529.

insured. The policy is thus made retroactive,[9] and the insured may have acquired his interest after the loss which was unknown to him.[10]

§ 4428. Beginning of the risk—Voyage "from" or "at and from."—Where the policy is upon a vessel "from" a designated port it attaches when the ship breaks ground and starts on the voyage insured.[11] The question whether a ship has sailed from the quay where she has been loading, usually depends upon the intention of the master when the ship is moored away from the quay.[12] There is still some uncertainty as to the meaning to be placed on the words "at and from." If the ship is at home, these words cover the time the ship is in port after the policy is signed, and if abroad, the risk is assumed only after she has been safely moored twenty-four hours after her arrival in port.[13] If the ship is expected to arrive at a foreign port, there are cases holding that the risk attaches from the time of her first arrival,[14] if at the time of her arrival she is in a seaworthy condition.[15] Where the ship was insured "at and from St. Michael's to England," and after arriving there and after being at anchor for over twenty-four hours in a condition which required the constant use of pumps,—the crew working "at the pumps spell and spell"—

[9] See 3 Kent's Com. (14th ed.), § 258; 1 Phillip's Ins. (5th ed.), § 925; Mead v. Davidson, 3 Ad. & El. 303; People v. Dimick, 107 N. Y. 13, 14 N. E. 178; Mercantile Mut. Ins. Co. v. Folsom, 18 Wall. (U. S.) 237, 21 L. ed. 827; Kohne v. Insurance Co. of North America, 1 Wash. (U. S.) 93, Fed. Cas. No. 7920.

[10] Sutherland v. Pratt, 11 M. & W. 296, 7 Jur. 261; Hooper v. Robinson, 98 U. S. 537, 25 L. ed. 219. See also, Sparkes v. Marshall, 2 Bing. N. Cas. 761, 29 E. C. L. 488. And see, generally, as to insurable interest, 3 Elliott Ev., § 2429.

[11] Mosher v. Providence Washington Ins. Co., 12 Misc. (N. Y.) 104, 66 N. Y. St. 679, 33 N. Y. S. 85; Murray v. Columbian Ins. Co., 4 Johns. (N. Y.) 443.

[12] Sea Insurance Co. v. Blogg, 67 L. J. Q. B. 757; Cochran v. Fisher, 3 L. J. Exch. (N. S.) 185; Wood v. Smith, 43 L. J. Adm. 11, L. R. 5 P. C. 451.

[13] See Garrigues v. Coxe, 1 Bin. (Pa.) 592, 2 Am. Dec. 493.

[14] Seamans v. Loring, 1 Mason (U. S.) 127, Fed. Cas. No. 12583; Seaver v. The Carroni, 40 Hunt. Mer. Mag. 319, Fed. Cas. No. 12593. See also, Motteaux v. London Assurance Co., 1 Atk. 545; Smith v. Surridge, 4 Esp. 25 (insurance attaches while undergoing repairs); Patrick v. Ludlow, 3 Johns. Cas. (N. Y.) 10, 2 Am. Dec. 130 (in a policy on goods); Snyder v. Atlantic Mutual Insurance Co., 95 N. Y. 196, 47 Am. Rep. 29 (policy attached at the time of the preparation for the voyage).

[15] Haughton v. Empire Marine Ins. Co., 4 H. & C. 44, L. R. 1 Exch. 206 (The policy attaches as soon as the vessel arrives within the port named, although not safely moored). "First arrival" does not mean moored

was blown out to sea, and destroyed, it was held that the insurer was not liable, as the vessel had not been in port in safety.[16] Under such a policy it is not necessary for the vessel to be at the place where the contract is made, but she must begin the voyage within a reasonable time thereafter.[17]

When the policy is upon a cargo "from" an intermediate port, or "on board, or to be shipped," the risk attaches as soon as any portion of the cargo is on board.[18] When it is merely "at and from," it attaches when the cargo is loaded,[19] or if the goods are already on board, from the time of the execution of the contract.[20] A policy on goods from A to B until they should then be discharged and safely landed, covers goods while being taken from the ship to the shore in lighters.[21] Where the insurance is "at and from" a particular port, the policy will attach when the goods arrive at that port after having been loaded at another port,[22] but when it is provided that the adventure shall begin, "from the loading thereof" aboard the said ship at that port, the policy will not attach upon goods previously loaded.[23] This rule is relaxed, however, where it appears that it was the intention of the parties that the goods previously loaded should be covered.[24]

A policy on chartered freight "at and from" a place other than the place of loading, attaches when the vessel sails on the voyage

in safety. St. Paul Fire & Marine Ins. Co. v. Troop, 26 Can. Sup. Ct. 5, and cases cited by King, J.

[16] Parmeter v. Cousins, 2 Camp. 235. In Martiatiqui v. Louisiana Ins. Co., 8 La. 65, 28 Am. Dec. 129, "good safety" was said to mean "the placing of a vessel in a situation to discharge her cargo."

[17] Seamans v. Loring, 1 Mason (U. S.) 127, Fed. Cas. No. 12583 (Unreasonable delay amounts to a noninception of the voyage).

[18] Colonial Ins. Co. v. Adelaide Marine Ins. Co., L. R. 12 App. Cas. 128; Mobile Marine Dock & Mut. Ins. Co. v. McMillan, 31 Ala. 711 (unless custom to the contrary is shown); Patrick v. Ludlow, 3 Johns. Cas. (N. Y.) 10, 2 Am. Dec. 130. See Cleveland v. Fettyplace, 3 Mass. 392; Lewis v. Manufacturers' Fire & Marine Ins. Co., 131 Mass. 364.

[19] The Liscard, 56 Fed. 44, affd. 68 Fed. 247, 15 C. C. A. 379 and 167 U. S. 149, 42 L. ed. 113, 17 Sup. Ct. 785; Augusta Ins. &c. Co. v. Abbott, 12 Md. 348.

[20] Merchants' Ins. Co. v. Clapp, 11 Pick. (Mass.) 56.

[21] Hurry v. Royal Exchange Assurance Co., 2 Bos. & P. (N. R.) 430.

[22] Silloway v. Neptune Ins. Co., 12 Gray (Mass.) 73.

[23] Spitta v. Woodman, 2 Taunt. 416, 11 Rev. Rep. 628; Mellish v. Allnutt, 2 M. & S. 106, 14 Rev. Rep. 599; Richards v. The Marine Ins. Co., 3 Johns. (N. Y.) 307; Murray v. Columbian Ins. Co., 11 Johns. (N. Y.) 302.

[24] Gladstone v. Clay, 1 M. & S. 418; Joyce v. Realm &c. Ins. Co., L. R. 7 Q. B. 580, 41 L. J. Q. B. 356, 19 Am. & Eng. Enc. Laws 970; Clark v. Higgins, 132 Mass. 586.

to the place of loading for the purpose of earning the freight.[25] But where freight is insured "at and from" a designated place, the risk attaches pro rata as the goods are placed on board.[26]

§ 4429. Termination of the risk.—It has been said that the risk usually continues until the ship has been anchored twenty-four hours in good safety, and that this rule applies, although the loss is caused by a death wound received before the arrival of the ship.[27] The common form of policy provides that the insurance shall be in force, "until moored twenty-four hours in good safety." This "does not mean that the vessel is to arrive without any damage or injury whatever from the effects of the voyage, nor, on the other hand, are such words satisfied by the vessel arriving and being moored in a sinking state, or as a mere wreck, nor by mere temporary mooring. The vessel must be in such a state of physical safety as to be able to keep afloat while the cargo is being unloaded, or until she can be repaired."[28]

Where the policy is on a ship to a port named in the policy "until she hath there moored at anchor * * * in good safety" and "for thirty days after arrival in port, however employed," the thirty days are to be reckoned as thirty successive periods of twenty-four hours each, the first of which commences to run as soon as the ship is safely moored at anchor in good safety in her port of destination.[29]

Where the policy is to a country generally, as to Jamaica, the risk ends when the vessed has been safely moored for twenty-four hours at the first port made for the purpose of unloading.[30]

[25] Barber v. Fleming, L. R. 5 Q. B. 59; Mercantile Steamship Co. v. Tyser, 7 Q. B. D. 73; Melcher v. Ocean Ins. Co., 60 Maine 77; Adams v. Warren Ins. Co., 22 Pick. (Mass.) 163.

[26] See 19 Am. & Eng. Enc. Law (2d ed.) 972; Flint v. Flemyng, 1 Barn. & Ad. 45.

[27] 3 Kent's Com. (14th ed.) 308; Lockyer v. Offley, 1 T. R. 260 (vessel seized after having been more than 24 hours in port, for an act of smuggling during the voyage). Contra, Peters v. Phœnix Ins. Co., 3 Serg. & R. (Pa.) 25.

[28] 19 Am. & Eng. Enc. Law (2d ed.) 975; Lidgett v. Secretan, L. R. 5 C. P. 190 (may be in safety though constant pumping is required); Annen v. Woodman, 3 Taunt. 299 (may be seaworthy for purpose of lying in a harbor while not so for going to sea); Shaw v. Felton, 2 East 109.

[29] Cornfoot v. Royal Exchange Assur. Corp., 72 L. J. K. B. 387, 73 L. J. K. B. 22, 1 K. B. (1904) 40, 9 Asp. 489.

[30] Leigh v. Mather, 1 Esp. 411; Cruickshank v. Janson, 2 Taunt. 301 (protected while moving from port to port in the island).

And a policy insuring a ship to Martinique, and all or any of the leeward or windward islands, was held to be terminated when the ship unloaded the greater part of her cargo at Martinique, and sailed with the residue to Antigua, where she stopped, partly to dispose of the rest, and partly to obtain a homeward cargo.[31]

§ 4430. **Subjects of marine insurance—In general.**—As a general rule it may be said broadly that any property or interest therein, which it is legal to own, and which is exposed to the perils of the sea, may be the subject of insurance, unless the use is of a character which is prohibited by law. The ordinary subjects of marine insurance are ships, goods, merchandise, freight, passage money, profits, commissions and wages. These are designated in the policy either by general terms which have acquired a technical significance, or by a more detailed and specific description.

§ 4431. **The ship—"The body, tackle, apparel, ordnance, munition, artillery, boats and other furniture of and in the good ship."**—The word, ship, in its generic sense, and as commonly used designates a vessel of burden, irrespective of the rig, and without regard to the particular motive power or means of locomotion. It is in this sense also that the insurance on a ship without further description or qualifying words is to be taken.

"An insurance on the body of a ship," says Kent, "except when varied by special agreement, sweeps in, by the comprehensiveness of the expression, whatever is appurtenant to the ship. This is the doctrine taught in all the continental writers on insurance, as well as in the English law."[32] The word, "furniture," includes provisions for the use of the crew, placed on board the ship when she sails.[33] The hull and outfit are both protected by the insurance on the ship.[34]

The word, "outfit," when used in connection with a whaling

[31] Inglis v. Vaux, 3 Camp. 447.

[32] 3 Kent's Comm. (14th ed.) § 257.

[33] Brough v. Whitmore, 4 T. R. 206. Excess provisions would be classed as part of the cargo. Provisions consumed and wages paid are not included. Field Steamship Co. v. Burr, L. R. (1898) 1 Q. B. 821, 8 Asp. 384, affd.; L. R. (1899) 1 Q. B. 579, 8 Asp. 529; Steinhoff v. Royal Canadian Ins. Co., 42 U. C. Q. B. 307.

[34] Forbes v. Aspinall, 13 East 323; Hill v. Patten, 8 East 375.

voyage, has a peculiar significance, and refers to the instruments and apparatus for taking care of the fish. Lances, spears, whaling lines, casks, cisterns, boilers, and articles of this character are not covered by a general insurance on the ship, or on the body, tackle, apparatus, etc., of the ship.[35]

"The boat" is sometimes expressly named in the policy as a part of the ship, but in the common designation it forms a part of the outfit that is included.[36] So a policy "on ship" covers the engines and machinery of a steamship as well as the coal in the bunkers, although such parts of the ship are usually specifically mentioned.[37] Likewise, the instruments used for the purpose of navigating the ship are also covered by a policy on the ship.[38] So, generally, when the insurance is upon a vessel engaged in a certain trade, the policy covers all the appliances necessary to that trade. Thus, where a ship was in the grain trade, it was held that the policy covered the appliances, such as cloth and dunnage mats, necessary for the handling of the grain, although not in use on the particular voyage.[39]

§ 4432. **Cargo, goods or merchandise.**—Under a policy containing a general description of the articles insured, as goods or merchandise, the insured can recover for any goods of his not requiring a more specific designation, which are on board at the time of a loss.[40] Such insurance covers goods substituted at an intermediate port for such as were on board at the commencement of the risk. Successive cargoes are, according to the custom of the trade, treated as one continuous subject-matter of insurance.[41] Articles of a perishable nature, and such as are contra-

[35] Hoskins v. Pickersgill, 3 Doug. 222. See, Gale v. Laurie, 5 Barn. & Cr. 156, 164 (custom as to certain fisheries); Hardy v. Smith, 135 Mass. 328; Lewis v. Manufacturers' Fire & Marine Insurance Co., 131 Mass. 364; Taber v. China Mut. Insurance Co., 131 Mass. 239.

[36] Hall v. Ocean Ins. Co., 21 Pick. (Mass.) 472 (liable for the loss of a boat hung to the davits unless it is "shown that the boat was improperly slung or carried in that position." See Blackett v. Royal Exch. Assur. Co., 2 C. & J. 244.

[37] Roddick v. Indemnity &c. Ins. Co., 2 Q. B. 380. As to what is included by the words "hull and machinery," see Roddick v. Indemnity Insurance Co., 64 L. J. Q. B. 733, 8 Asp. M. C. 24.

[38] 1 Phillip's Ins. (3d ed.), § 468.

[39] Hogarth v. Walker, L. R. (1899) 2 Q. B. 401, 68 L. J. Q. B. 888. "I can see no distinction between these things and movable bulkheads, which, it is admitted, would be part of the furniture."

[40] Arnould Mar. Ins. (6th ed.) 25.

[41] Hill v. Patten, 8 East 375.

band of war, according to the French law, must be specifically described, although this has never been held necessary under the English law. But liability on articles peculiarly liable to deterioration is limited by the common memorandum clause.[42] When money, bullion or jewels are put on board as merchandise, they are covered by the general words, "goods, wares and merchandise,"[43] but such property is usually specifically named. Bank bills and notes seem to come under a different rule, as they are not an ordinary subject of commerce. They are not merchantable, and therefore are not goods,—that is, articles used for the purpose of commerce.[44] Merchandise does not include articles which are attached to or carried upon the person, such as jewelry, money or cash, not carried for the purpose of trade, nor does it include the other personal effects of the passengers.[45] Nor does it include provisions for the officers and crew, as these are covered by the insurance upon the ship.[46]

A policy on "cargo" covers household goods,[47] money to be invested in goods,[48] but not live stock, unless it is the usual cargo in the trade in which the ship is engaged, and for which she is insured.[49]

Policies frequently insure against loss of freight "on board or not on board," "carried or not carried," or the like, but such terms have been held not to render the insurer liable for the full valued amount on a partial loss.[50]

§ 4433. Goods carried on deck.—The general language of the policy does not cover goods or merchandise carried on the

[42] See, as to this clause and its purpose, Washburn & Moeri Mfg. Co. v. Reliance Marine Ins. Co., 179 U. S. 1, 45 L. ed. 49, 21 Sup. Ct. 1.

[43] Wolcott v. Eagle Ins. Co., 4 Pick. (Mass.) 429; American Ins. Co. v. Griswold, 14 Wend. (N. Y.) 399; Seton v. Delaware Ins. Co., 2 Wash. (U. S.) 175, Fed. Cas. No. 12675.

[44] See 1 Arnould Mar. Ins. (6th ed.) 26; Palmer v. Pratt, 2 Bing. 185. In Harris v. Moody, 30 N. Y. 266, 86 Am. Dec. 375, it was held that bank notes (not being money and not a legal tender) when carried for an express company as freight are liable to contribute to a general average loss.

[45] Wilkinson v. Hyde, 3 C. B. (N. S.) 30; Duff v. Mackenzie, 3 C. B. (N. S.) 16; Brown v. Stapleton, 4 Bing. 119.

[46] Ross v. Thwaites, 1 Parker Ins. (8th ed.) 23.

[47] Vasse v. Ball, 2 Dallas (Pa.) 270, 275, 2 Yeates (Pa.) 178, 1 L. ed. 377.

[48] Wolcott v. Eagle Ins. Co., 4 Pick. (Mass.) 429.

[49] Allegre's Admrs. v. Maryland Ins. Co., 8 Gill & J. (Md.) 190, 29 Am. Dec. 536.

[50] New York & Cuba Mail S. S. Co. v. Royal Exch. Assur., 145 Fed. 713.

deck of the ship,[51] unless by virtue of a general custom of particular trades which the insurer is presumed to take into consideration in assuming the risk,[52] or the goods insured, by name, are of such a character as are usually carried on deck.[53]

§ 4434. Freight.—In marine insurance the term "freight" has a wider significance than in most other cases, and includes all the benefits to the shipowner "derived from the employment of the ship." As observed by Lord Tenterden, it imports the benefit derived from the employment of the ship. "If the term 'freight,' as used in the policy of insurance, import the benefit derived from the employment of the ship, then there has been a

[51] Apollinaris Co. v. Nord-Deutsche Ins. Co., 1 K. B. 252, 9 Asp. 526; Millward v. Hibbert, 2 G. & D. 142, 3 Q. B. 120, 11 L. J. Q. B. 137; Miller v. Tetherington, 7 H. & N. 954, 31 L. J. Exch. 363; Allegre's Admrs. v. Maryland Ins. Co., 2 Gill & J. (Md.) 136, 20 Am. Dec. 424; Lenox v. United Ins. Co., 3 Johns. Cas. (N. Y.) 178; Orient Mut. Ins. Co. v. Reymershoffer's Sons, 56 Tex. 234 (unless from the nature of the goods they can only be carried on deck). See also, Smith v. Mississippi Marine & Fire Insurance Co., 11 La. 142, 30 Am. Dec. 714; Wolcott v. Eagle Ins. Co., 4 Pick. (Mass.) 429; Brooks v. Oriental Ins. Co., 7 Pick. (Mass.) 259 (hawser lost overboard, stowed in a boat on deck); Adams v. Warren Ins. Co., 22 Pick. (Mass.) 163 (general policy on freight will not cover freight to be earned by carrying goods on deck).

[52] Da Costa v. Edmund, 4 Camp. 142 (carboys of vitriol carried on deck). See also, Apollinaris Co. v. Nord-Deutsche Ins. Co., 1 K. B. 252, 9 Asp. 526. As it is only a certain description of goods in any trade that would be thus exposed, it may be doubtful whether, even where sanctioned by usage, the things ought not to be specifically described in the policies so as to apprise the underwriter of the extra risk that he has to run. 1 Arnould Mar. Ins. (6th ed.) 27. In Blackett v. Royal Exch. Assur. Co., 2 Croomp. & J. 250, Lord Lyndhurst said: Goods carried on deck "are not in the part of the ship where goods are usually carried, they are in more than usual peril, and an usage that they are not covered by an ordinary policy on goods, but that they require a distinct explanation to the underwriter on the part of the ship in which they are to be carried, or (where that will imply the same information) of the nature of the goods, is not at variance with any part of the policy, is essential to that information which the underwriter ought to receive to enable him to estimate the risk and calculate the premiums, and is a portion of that fairness which ought to be rigidly observed upon all these contracts."

[53] Allen v. St. Louis Ins. Co., 85 N. Y. 473 (special provision in policies on canal boats); Merchants' & Manufacturers' Ins. Co. v. Shillito, 15 Ohio St. 559; Rogers v. Mechanics Ins. Co., 1 Story (U. S.) 603. In Apollinaris Co. v. Nord-Deutsche Ins. Co., 73 L. J. K. B. (N. S.) 62, the cases are reviewed, and it is held that the rule exempting the underwriters from liability for the loss of deck cargo on a voyage by sea does not extend to inland voyage by canal and river which is contemplated by the policy, and on which it is the established practice to carry cargoes on deck. Quaere whether the rule in any case is applicable to an inland voyage, citing American cases. See Ursula Bright S. S. Co. v. Amsinck, 115 Fed. 242 (Carrier may insure his liability for carrying goods on deck.).

loss of freight. It is the same thing to the shipowner whether he receives that benefit of the use of his ship by a money payment from one person who charters the whole ship, or from various persons who put specific quantities of goods on board, or from persons who pay him the value of his own goods at the port of delivery, increased by their carriage in his own ship."[54] Insurance on freight covers freight in each of its senses.[55]

The shipowner may thus effect insurance on freight which he expects to earn and which he can be prevented from earning only by the perils insured against.[56] Where the insurance is upon freight, as the hire of a ship under a charter party, the inchoate right of the shipowner arises as soon as there is "an inception of this contract."[57]

"In either case," says Arnould, "the shipowner has put himself in condition to earn freight, and he will earn it provided either the ship, which he has thus let out to the freighter, or the goods, which he has thus engaged to transport for the merchant, arrive safely at their destination."[58]

Freight may be insured for either the whole or a part of the voyage.[59] Advances are also insurable, and whether covered by a policy on freight alone, or required to be specifically described, depends upon the terms of the charter party.[60] Freight must be insured under a specific designation in the policy.[61]

§ 4435. **Passage money.**—Passage money differs from freight in that it is usually payable in advance, and in the absence of a statute, a passenger cannot recover it if the ship is lost. Lord

[54] Flint v. Flemyng, 1 Barn. & Ad. 45; Winter v. Haldimand, 2 Barn. & Ad. 649. See Forbes v. Aspinall, 13 East 323; Devaux v. J'Anson, 5 Bing. N. Cas. 519; Griffiths v. Bramley-Moore, 48 L. J. Q. B. 201, 4 Q. B. D. 70, 4 Asp. M. C. 66.

[55] Etches v. Aldan, 1 M. & R. 165 (charter of a vessel); Winter v. Haldimand, 2 Barn. & Ad. 649; Clark v. Ocean Insurance Co., 16 Pick. (Mass.) 289. See also, Tweedie Trading Co. v. Western Assur. Co., 179 Fed. 103, 102 C. C. A. 397.

[56] Mason v. Marine Ins. Co., 110 Fed. 452, 49 C. C. A. 106, 54 L. R. A. 700, and cases there cited.

[57] Foley v. United Fire & Mar. Ins. Co., L. R. 5 C. P. 155.

[58] 1 Arnould Mar. Ins. (6th ed.) 32.

[59] Taylor v. Wilson, 15 East 324; (A portion only of the freight may be insured.) Griffiths v. Bramley-Moore, 48 L. J. Q. B. 201, 4 Q. B. Div. 70.

[60] Allison v. Bristol Mar. Ins. Co., L. R. (1875) 1 App. Cas. 209; Hall v. Janson, 4 El. & Bl. 500; The Clintonia, 104 Fed. 92; Paradise v. Sun Mut. Ins. Co., 6 La. Ann. 596 (advances made by consignee). See, Thames &c. Mar. Ins. Co. v. Pitts, 1 Q. B. 476.

[61] 1 Arnould Mar. Ins. (6th ed.) 34.

Campbell made a statement to the effect that no liability is by the common law thrown upon the owner or master of a ship if the ship be lost, to forward passengers to their places of destination. Nor usually is there any obligation to do this imposed by actual contract between the parties.[62] But the British Statute now imposes upon the owners and masters of passenger ships, in certain cases, the duty, notwithstanding a wreck, of forwarding passengers to their places of destination.[63] Under this statute, parties thus subjected to the additional liability may cover this risk by insurance, as under the common law could a passenger who had paid his passage money in advance.[64] At common law, when the passage money was not payable in advance, the shipowner had an insurable interest therein.[65]

§ 4436. Profits and commissions.—Probably in all maritime countries, anticipated profits may be the subject of insurance by an open or valued policy.[66] In England it must be shown before there can be a recovery under such a policy, that but for the intervention of the perils insured against, some profit would in fact have been realized by the sale of the goods upon their arrival.[67] In the United States this is not necessary under a valued policy, as there is a conclusive presumption that a profit would have accrued had the goods arrived at the place of destination.[68] In England profits and commissions are not covered by a policy on goods or merchandise, but must be specifically named.[69] In Massachusetts it is held that the right to a certain percentage,

[62] Gibson v. Bradford, 4 El. & Bl. 586, 24 L. J. Q. B. 159; Gillan v. Simpkin, 4 Camp. 241.

[63] Merchants' Shipping Act, 1894, §§ 331–335.

[64] Denoon v. Home & Col. Ins. Co., L. R. 7 C. P. 341. Whether a policy on "freight" covers passage money must depend upon the circumstances of each case. In this case it was held that passage money was not covered by the policy on freight.

[65] Truscott v. Christie, 2 Br. & B. 320, 5 Moore 33.

[66] Eyre v. Glover, 3 Camp. 276; Canada Sugar Refining Co. v. Ins. Co. of North America, 175 U. S. 609, 44 L. ed. 292; Barclay v. Cousins, 2 East 544.

[67] Hodgson v. Glover, 6 East 316. See also, Arnould Mar. Ins. (6th ed.) 38. It must also appear that the insured was interested in the goods at the time of the loss. Stockdale v. Dunlop, 6 M. & W. 224.

[68] Patapsco Ins. Co. v. Coulter, 3 Pet. (U. S.) 222, 7 L. ed. 659; Canada Sugar Refining Co. v. Insurance Co. of North America, 175 U. S. 609, quoting from 2 Phillip's Ins., § 1209; Loomis v. Shaw, 2 Johns. Cas. (N. Y.) 36.

[69] Lucena v. Crawford, 2 B. & P. (N. R.) 269.

proportion or share of the cargo, or commission on profits, is covered by a policy on the "property."[70]

§ 4437. Bottomry and respondentia.—The risk from the perils of the sea, which is assumed by one who loans money upon bottomry or respondentia bonds, may be the subject of insurance.[71] In Great Britain and the United States, the anticipated maritime interest, as well as the amount loaned, may be protected by insurance.[72] Unless there is a usage to the contrary,[73] however, interests of this character are not included within the designation of goods and merchandise, but must be specifically named in the policy,[74] as, says Kent, J., "The risk on a bottomry policy is peculiar. There is neither average nor salvage; and capture does not mean a temporary taking merely, but one that occasions a total loss. If the nature of the interest was not disclosed, the insurer might pay for a total loss on an immediate capture, without being apprised of his rights."[75]

§ 4438. Seaman's wages.—A master could always insure his wages, commissions, share in the ship or cargo, and personal effects on board the ship,[76] but seamen have never been granted the privilege of insuring their wages.[77] As the loss of freight involved the loss of the wages of the crew, it was said that freight was the mother of wages. This hard rule rested upon the theory that by thus involving the wages of the seamen, their zeal was stimulated and the safety of the ship and cargo greatly increased.

[70] Holbrook v. Brown, 2 Mass. 280.

[71] As to what is meant by these terms, see 4 Am. & Eng. Enc. of Law (2d ed.) 73, et seq.

[72] Glover v. Black, 3 Burr. 1394. An assured on bottomry cannot recover against the underwriter unless there has been an actual total loss of the ship. If the ship exists in specie, in the hands of the owners, though under circumstances which would entitle the insured to abandon, it will not be a total loss within the meaning of the bottomry bond. Thomson v. Royal Exch. Assur. Co., 1 M. & S. 30; Broomfield v. Southern Ins. Co., L. R. 5 Exch. 192, 39 L. J. Exch. 186.

[73] Gregory v. Christie, 3 Doug. 419.

[74] Glover v. Black, 3 Burr. 1394.

[75] Robertson v. United Ins. Co., 2 Johns. Cas. (N. Y.) 250.

[76] Duff v. Mackenzie, 3 C. B. (N. S.) 16, 26 L. J. C. P. 313.

[77] Webster v. De Tastet, 7 Term. Rep. 157; Lady Durham, 3 Hagg. Adm. 196; The Neptune, 1 Hagg. Adm. 227; Lucena v. Crawford, 2 B. & P. (N. S.) 269; Galloway v. Morris, 3 Yeates (Pa.) 445; Hancox v. Fishing Insurance Co., 3 Sumn. (U. S.) 132. A seaman can insure any goods he may have on board. Galloway v. Morris, 3 Yeates (Pa.) 445.

Upon the same ground of public policy seamen were denied a claim for wages out of the owner's insurance.[78]

Lord Stowell held that a seaman had a lien upon the wreck for his wages earned, although the freight was lost.[79] But now, by statute, the loss of the freight no longer involves the loss of wages already earned, and there would seem to be no reason why seamen should longer be denied the right to protect their future wages by insurance.[80]

§ 4439. Implied warranties—Seaworthiness—Definition.—In one of the early leading cases, it is said that seaworthiness means that the vessel "shall be in a fit state as to repairs, equipment and crew, and in all other respects, to encounter the ordinary perils of the voyage insured at the time of sailing upon it."[81] In another case, it is said that seaworthiness implies the relation between the state of the ship and the perils it has to meet in the situation it is in.[82] A marine policy is intended to protect the insured against extraordinary perils of the sea only, and the risks arising from the ordinary perils are not usually covered by the contract, as these are to be borne by the insured. Seaworthiness, therefore, means that the vessel is in good condition to encounter these ordinary perils.

§ 4440. What constitutes seaworthiness.—It may be said in a general way that to be in a seaworthy condition it is necessary that the vessel should be in good physical condition to meet the ordinary perils of the voyage for which she is destined, and to carry the cargo which is to be placed upon her. She must also be properly loaded, stowed,[83] trimmed and ballasted, and equipped

[78] The Neptune, 1 Hagg. Adm. 227.

[79] Lady Durham, 3 Hagg. Adm. 196.

[80] 1 Arnould Mar. Ins. (6th ed.) 44. In the 7th edition of this work (1901) it is said as the Merchant Shipping Act does not deal with the law in respect to wages for the remainder of the voyage, it is very doubtful that the act would be held to have had the desirable effect of making them insurable.

[81] Dixon v. Sadler, 5 M. & W. 405. For other definitions of seaworthiness, see Knill v. Hooper, 2 Hurl. & N. 277; Erle, J., in Gibson v. Small, 4 H. of L. 353; Moares v. Louisville Underwriters, 14 Fed. 226.

[82] Gibson v. Small, 4 H. of L. 353.

[83] Chase v. Insurance Co., 5 Pick. (Mass.), 51. See Anderson Lumber Co. v. Greenwich Ins. Co., 79 Fed. 125. A ship ought not be treated as unseaworthy because of something objectionable, but easily curable by those on board. Ajum Goolam Hossen v. Union Marine Ins. Co., 70 L. J. P. C. 34. The cargo must not be greater than the ship can safely carry.

for the voyage with suitable sails, cables, anchors and compass,[84] machinery in good condition,[85] with stores and supplies, and provided with a master and crew of competent skill to discharge the usual duties and meet the usual dangers to which the vessel will be exposed upon the contemplated voyage.[86] There must also be a person on board competent to navigate the vessel on the contemplated voyage in the event of the disability of the master.[87]

Where the nature of the navigation requires that a pilot shall be taken on board in entering a port or harbor, and pilots are there present, it is said that the warranty of seaworthiness requires that one shall be taken on and kept as long as the necessity for his services exists.[88] But the question is not free from doubt, and, unless the law expressly requires a pilot, it would seem that all that is necessary is that there be some one on board sufficiently skilful to navigate the vessel under the conditions, and if this requirement is met, the vessel is not rendered unseaworthy by a failure to take on a pilot, even though it is usual and customary to do so at the place in question.[89] If the master is unable to obtain a pilot, he may, under certain circumstances of danger and necessity, attempt to proceed without a pilot, and if a loss occurs the insurer may still be liable therefor. Where the statutory law requires a pilot to be taken, it is held in this country that a failure

Anderson Lumber Co. v. Greenwich Ins. Co., 79 Fed. 125.

[84] Wedderburn v. Bell, 1 Camp. 1; Merchants' Ins. Co. v. Morrison, 62 Ill. 242, 14 Am. Rep. 93; Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 135 U. S. 408, 34 L. ed. 398, 10 Sup. Ct. 934; The Orient, 16 Fed. 916, 4 Woods (U. S.) 255, affd. 121 U. S. 67, 30 L. ed. 858, 7 Sup. Ct. 821. See also, Hogarth v. Walker, L. R. (1900) 2 Q. B. 283, 9 Asp. 84.

[85] Quebec Marine Ins. Co. v. Commercial Bank, L. R. 3 P. C. 234; Merchants' Ins. Co. v. Morrison, 62 Ill. 242, 14 Am. Rep. 93.

[86] 19 Am. & Eng. Enc. of Law (2d ed.) 1006, and cases there cited. McLanahan v. Universal Ins. Co., 1 Pet. (U. S.) 170, 7 L. ed. 98.

[87] Clifford v. Hunter, 3 Car. & P. 16; Copeland v. New England Marine Ins. Co., 2 Metc. (Mass.) 432.

[88] Phillips v. Headlam, 2 Barn. & Ald. 380; Law v. Hollingsworth, 7 T. R. 160 (pilot improperly allowed to leave vessel). This case is limited in Phillips v. Headlam, 2 Barn. & Ald. 380.

[89] Phillips v. Headlam, 2 Barn. & Ald. 380; Lapene v. Sun Mutual Ins. Co. of New York, 8 La. Ann. 1, 58 Am. Dec. 668, and note on the subject of unseaworthiness; Keeler v. Firemen's Ins. Co., 3 Hill (N. Y.) 250; McMillan v. Union Ins. Co., Rice L. (S. C.) 248, 33 Am. Dec. 112. But neglect to employ a pilot discharges the insurers only when the loss is the direct and immediate consequence of the neglect. Leaving an intermediate port without a pilot, where it is proper to have one, may render the vessel unseaworthy, although entering port without a pilot may not be a breach of the warranty of seaworthiness. See Phillip's Ins., § 715.

to do so only raises the presumption of unseaworthiness, which may be overthrown by evidence that the master was competent to navigate the vessel.[90] In England, however, the failure under such a condition to take a pilot establishes unseaworthiness.[91]

There must be a crew competent to handle the vessel,[92] but the insured does not warrant the good conduct of the master or crew during the voyage.[93] The men must not only be on board, but sufficiently sober when the vessel sails to properly perform their duties.[94] Where the voyage is to be made entirely by day, it is not necessary that a night crew shall be taken on.[95] The general rule is, that the vessel must have a full complement of men engaged for the whole voyage, when she sails,[96] unless a different complement is required for the different stages of the voyage, when they may be obtained as their services are required.[97]

§ 4441. Implied warranty in a voyage policy.—In contracts of marine insurance upon voyage policies on a ship, cargo or freight, there is an implied warranty that the vessel, at the time she sails, is seaworthy and competent to perform her voyage, and a breach of this warranty avoids the contract.[98] She must be

[90] Borland v. Mercantile Mut. Ins. Co., 46 N. Y. Super. Ct. 433; Flanigen v. Washington Ins. Co., 7 Pa. St. 306.

[91] Law v. Hollingsworth, 7 Term. Rep. 160; Hollingsworth v. Brodrick, 7 A. & E. 40. See Sadler v. Dixon, 8 M. & W. 895.

[92] Louisville Ins. Co. v. Monarch, 99 Ky. 578, 18 Ky. L. 444, 36 S. W. 563.

[93] Trinder v. Thames &c. Marine Ins. Co., L. R. (1898) 2 Q. B. 114; Busk v. Royal Exch. Assur. Co., 2 Barn. & Ald. 73; Walker v. Maitland, 5 Barn. & Ald. 175.

[94] United States v. Hunt, 2 Story (U. S.) 120, Fed. Cas. No. 15423.

[95] Louisville Ins. Co. v. Monarch, 99 Ky. 578, 18 Ky. L. 444, 36 S. W. 563.

[96] Forshaw v. Chabert, 3 Br. & B. 158.

[97] Dixon v. Sadler, 5 M. & W. 405; Treadwell v. Union Ins. Co., 6 Cow. (N. Y.) 270. As to matter of carrying proper papers as affecting seaworthiness, see Christie v. Secretan, 8 Term. Rep. 192; Elting v. Scott, 2 Johns. (N. Y.) 157.

[98] Dixon v. Sadler, 5 Mees. & W. 415, 14 Eng. Rul. Cas. 58; Watson v. Clark, 1 Dow. 336; Wedderburn v. Bell, 1 Champ. 1; Dudgeon v. Pembroke, L. R. 1 Q. B. Div. 96; Forshaw v. Chabert, 3 Br. & B. 158; Keobel v. Saunders, 17 C. B. (N. S.) 71; Douglass v. Scougall, 4 Dow. 269; Knill v. Hooper, 2 Hurl. & N. 277; Brooking v. Maudslay, L. R. 38 Ch. Div. 636; Christie v. Secretan, 8 Term. Rep. 198; Quebec Mar. Ins. Co. v. Commercial Bank, L. R. 3 P. C. 234; Rouse v. Insurance Co., 3 Wall. Jr. (U. S.) 367, Fed. Cas. No. 12087; Pope v. Swiss Life Ins Co., 4 Fed. 153, 6 Saw. (U. S.) 533. There is no warranty under time policy under Cal. laws. Watson v. Ins. Co., 2 Wash. (U. S.) 480, Fed. Cas. No. 17285; Hoxin v. Home Ins. Co., 32 Conn. 21, 85 Am. Dec. 240; Higgie v. American Lloyds, 14 Fed. 143, 11 Biss. (U. S.) 395; Seaman v. Enterprise Fire & Marine Ins. Co., 21 Fed. 778; Guy v. Citizens' Mut. Ins.

"tight, stanch, and strong, properly manned and equipped, and otherwise fit and in a navigable state for the service and voyage contemplated."[99]

There is no implied warranty of seaworthiness, however, in an ordinary policy insuring a vessel against fire.[1] The warranty applies only to the ship, and there is no implied agreement that the cargo is, at the time of the commencement of the voyage, in

Co., 30 Fed. 695 (unseaworthiness presumed); Merchants' Ins. Co. v. Morrison, 62 Ill. 242, 14 Am. Rep. 93; Snethen v. Memphis Ins. Co., 3 La. Ann. 474, 48 Am. Dec. 462; Marcy v. Sun Ins. Co., 11 La. Ann. 748 (warranty of seaworthiness of dock); Donnally v. Merchants' Mut. Ins. Co., 28 La. Ann. 939, 26 Am. Rep. 129; Dupeyre v. Western Ins. Co., 2 Rob. (La.) 457, 38 Am. Dec. 218; Dodge v. Boston Marine Ins. Co., 85 Maine 215, 27 Atl. 105; Field v. Ins. Co. of North America, 3 Md. 244; Augusta Ins. &c. Co. v. Abbott, 12 Md. 348; Taylor v. Lowell, 3 Mass. 331, 3 Am. Dec. 141; Merchants' Ins. Co. v. Clapp, 11 Pick. (Mass.) 56; Paddock v. Franklin Ins. Co., 11 Pick. (Mass.) 227; Starbuck v. New England Marine Ins. Co., 19 Pick. (Mass.) 198; Hoxie v. Pacific Mut. Ins. Co., 7 Allen (Mass.) 211; Natchez Ins. Co. v. Stanton, 2 Smedes & M. (Miss.) 340, 41 Am. Dec. 592; Talcot v. Commonwealth Ins. Co., 2 Johns. (N. Y.) 124, 3 Am. Dec. 406; American Ins. Co. v. Ogden, 15 Wend. (N. Y.) 532, revd. 20 Wend. (N. Y.) 287; Barnewall v. Church, 1 Caines (N. Y.) 217, 2 Am. Dec. 180; Warren v. U. Ins. Co., 2 Johns. Cas. (N. Y.) 231, 1 Am. Dec. 164; Van Wickle v. Mechanics' & Traders' Ins. Co., 97 N. Y. 350; Rogers v. Sun Mut. Ins. Co., 46 N. Y. Super. Ct. 65; Patrick v. Hallett, 1 Johns. (N. Y.) 241; Draper v. Commonwealth Ins. Co., 21 N. Y. 378; Walsh v. Washington Marine Ins. Co., 32 N. Y. 427; Allison v. Corn Exch. Ins Co., 57 N. Y. 87; Howard v. Orient Mut. Ins. Co., 25 N. Y. Super. Ct. 539; Walden v. New York Firemen's Ins. Co., 12 Johns. (N. Y.) 128; Hudson v. Williamson, 3 Brev. (S. Car.) 342, 1 Tread. Const. 360; Ingraham v. South Carolina Ins. Co., 2 Tread. Const. (S. Car.) 707, 3 Brev. (S. Car.) 522; McLanahan v. Universal Ins. Co., 1 Pet. (U. S.) 170, 7 L. ed. 98.

[99] 3 Joyce Ins., § 2151, and cases there cited. "There is," says Marshall, "in every insurance, whether on ship or goods, an implied warranty that the ship shall be seaworthy when she sails on the voyage insured; that is, that she shall be 'tight, staunch, and strong, properly manned, and provided with all necessary stores, and in all respects fit for the intended voyage.' The consideration of the insurance is paid, to the intent that the insured may be indemnified against certain contingencies; and it supposes that the insurer may gain the premium. But if the ship be incapable of performing the voyage, there is no possibility of his gaining the premiums; and in that case, the contract, on his part, would be without consideration, and consequently void—the insurer undertakes to indemnify the insured against the extraordinary and unforeseen perils of the sea; and it would be absurd to suppose that any man would insure against those perils, but in the confidence that the ship is in a condition to encounter the ordinary peril to which every ship must be exposed in the usual course of the voyage proposed." 1 Marshall Ins. (1810) 153.

[1] Mark v. National Fire Ins. Co., 91 N. Y. 663, affg. 24 Hun (N. Y.) 565. But see North German Fire Ins. Co. v. Adams, 142 Fed. 439, 73 C. C. A. 555. The implied warranty on the part of the shipowner that the vessel is seaworthy is a condition precedent to performance by the shipper in every charter party or contract of affreightment. The Director, 34 Fed. 57, 13 Sawy. (U. S.) 172; McAdams v. Leverich, 35 Fed. 305, annotated.

a seaworthy condition.[2] But where the policy is upon the cargo, there is an implied warranty that the ship in which it is to be carried is seaworthy.[3]

The warranty does not extend to the seaworthiness of lighters used in landing the cargo,[4] but it has been held to apply to a tug employed to tow the insured boat down a river.[5]

§ 4442. Time policies—English rule.—In the earlier English cases it was assumed, and afterward decided, that there was no difference between time and voyage policies in respect to the implied warranty of seaworthiness.[6] The question was again raised and received elaborate consideration in a comparatively recent leading case.[7] The court of Queen's Bench held that there was no implied warranty in a time policy. This was reversed by the Exchequer Chamber, which in turn was reversed by the House of Lords, which apparently put the question at rest for all time as far as the English courts are concerned.[8] But if by the personal misconduct—that is, the wilful act—of the owner, the ship is sent to sea in an unseaworthy condition, and a loss is occasioned thereby, there can be no recovery.[9]

§ 4443. Time policies—Rule in the United States.—The English rule that there is no implied warranty of seaworthiness

[2] Koebel v. Saunders, 17 C. B. (N. S.) 71; Acatos v. Burns, L. R. 3 Exch. Div. 282. A raft of logs is treated as a vessel. Moores v. Louisville Underwriters, 14 Fed. 226.

[3] Knill v. Hooper, 2 Hurl. & N. 277; Higgie v. American Lloyds, 14 Fed. 143, 11 Biss. (U. S.) 395; Horter v. Merchants' Mut. Ins. Co., 28 La. Ann. 730; Van Winkle v. Mechanics' & Traders' Ins. Co., 97 N. Y. 350; Howard v. Orient Mut. Ins. Co., 25 N. Y. Super. Ct. 539; The Caledonia, 157 U. S. 124, 39 L. ed. 644, 15 Sup. Ct. 537. See also, Dodge v. Boston Marine Ins. Co., 85 Maine 215, 27 Atl. 105.

[4] Lane v. Nixon, L. R. 1 C. P. 412.

[5] Merchants' Ins. Co. v. Algeo, 31 Pa. St. 446.

[6] Dixon v. Sadler, 5 M. & W. 405, 8 M. & W. 895. (This celebrated case was upon a time policy.) Small v. Gibson, 16 Q. B. 128, s. c. in Exch. affd. 4 H. of L. 353 (1852); 14 Eng. Rul. Cas. 85. The substance of this decision is stated in Thompson v. Hopper, 6 El. & Bl. 172, 25 L. J., Q. B. 240. See also, Fawcus v. Sarsfield, 6 El. & Bl. 192, 25 L. J. Q. B. 249; Biccard v. Shepherd, 14 Moore P. C. 471; Jenkins v. Heycock, 8 Moore P. C. 351; Michael v. Tredwin, 17 C. Q. 551, 25 L. J. C. P. 83.

[7] Dudgeon v. Pembroke, L. R. 9 Q. B. 581, L. R. 1 Q. B. Div. 96, 2 App. Cas. 284.

[8] Dudgeon v. Pembroke, L. R. 2 App. Cas. 284, 46 L. J. Exch. 409. See Anchor Marine Insurance Co. v. Keith, 9 Can. Sup. Ct. 483; Phœnix Ins. Co. v. Anchor Ins. Co., 4 Ont. 524.

[9] Thompson v. Hopper, 6 El. & Bl., 172, 25 L. J. Q. B. 240; Trinder v. Thames &c. Marine Ins. Co., L. R. (1898) 2 Q. B. 114.

in a time policy is not accepted in its entirety by the American courts. The extremes are represented by the courts of Illinois and Connecticut. The former seem to accept the English doctrine to its fullest extent,[10] while in the latter it is held that the warranty of seaworthiness is a necessary condition of every contract of marine insurance.[11] In New York it is held that seaworthiness at the inception of the risk is implied when the vessel is in port.[12] In an earlier case a policy was held invalid where the vessel was unseaworthy when it left an intermediate port, although it had been seaworthy when it left the original port at a time subsequent to the commencement of the risk.[13] In line with the New York cases, it is held in the federal courts that under a time policy, "lost or not lost," issued when the vessel is at sea, there is no implied warranty of seaworthiness, but otherwise, when the policy is issued, while the vessel is in the home port, or any other port where she then was refitting.[14] The American authorities[15] are confusing, but they seem to establish the rule that there is no implied warranty of seaworthiness in a time policy issued upon a vessel which is then out at sea, but otherwise when the vessel is in port where it can be put in a seaworthy condition before it sails.[16]

§ 4444. **Different stages of the voyage.**—The voyage from the port of sailing to that of ultimate destination, is often made under conditions which create different stages. Thus, one stage

[10] Merchants' Ins. Co. v. Morrison, 62 Ill. 242, 14 Am. Dec. 93.

[11] Hoxie v. Home Ins. Co., 32 Conn. 21, 85 Am. Dec. 240; Pope v. Swiss Lloyd Ins. Co., 4 Fed. 153, 6 Sawy. (U. S.) 533, to the same effect, was decided under the California statute.

[12] Berwind v. Greenwich Ins. Co., 114 N. Y. 231, 21 N. E. 151.

[13] American Ins. Co. v. Ogden, 20 Wend. (N. Y.) 287. See also, Jones v. The Insurance Co., 2 Wall. Jr. (U. S.) 278, Fed. Cas. No. 7470.

[14] Jones v. The Insurance Co., 2 Wall. Jr. (U. S.) 278, Fed. Cas. No. 7470; Rouse v. Insurance Co., 3 Wall. Jr. (U. S.) 367, Fed. Cas. No. 12089; Union Ins. Co. v. Smith, 124 U. S. 405, 31 L. ed. 497, 8 Sup. Ct. 534.

[15] Capen v. Washington Ins. Co., 12 Cush. (Mass.) 517; Macey v. Mutual Mar. Ins. Co., 12 Gray (Mass.) 497; Hathaway v. Sun Mut. Ins. Co., 21 N. Y. Super. Ct. 33; Rouse v. Insurance Co., 3 Wall. Jr. (U. S.) 367, Fed. Cas. No. 12089; Jones v. The Insurance Co., 2 Wall. Jr. (U. S.) 278, Fed. Cas. No. 7470; Union Ins. Co. v. Smith, 124 U. S. 405, 31 L. ed. 497, 8 Sup. Ct. 534. See Capen v. Washington Ins. Co., 12 Cush. (Mass.) 517. See also, 1 Phillip's Ins. (5th ed.), § 727, and note in 14 Eng. Rul. Cas. 121.

[16] Hoxie v. Pacific Mut. Ins. Co., 7 Allen (Mass.) 211; Dallam v. Insurance Co., 6 Phila. (Pa.) 15, and cases cited in the preceding notes. As to latent defect held not to render the vessel unseaworthy so as to prevent the attaching of the policy, see Cleveland & B. Transit Co. v. Insurance Co. of North America, 115 Fed. 431.

may consist of a river and lake navigation and another of open sea, and yet another of difficult and dangerous inshore navigation, where an experienced crew and expert navigator is necessary. What is a sufficient equipment in one stage of such a voyage might be entirely inadequate for another stage. The implied warranty of seaworthiness is complied with if the vessel is seaworthy at the commencement of the voyage for the first stage of the voyage, and is made seaworthy at the beginning of each subsequent stage for that stage.[17] Hence, if the voyage be such as to require a different complement of men, and a different state of equipment in different parts of it, as where it is a voyage down a canal or river, and thence across the open sea, it is enough if the vessel is in each stage of the navigation properly manned and equipped for it.[18]

The voyage may be divided into stages for the purpose of coaling, and it is only necessary to have on board at the beginning of the voyage enough coal to carry the vessel to an intermediate port where it is the intention to take on a fresh supply, sufficient for the next stage. The warranty of seaworthiness thus attaches at each coaling port for the stage which ends at the next coaling port.[19]

§ 4445. **Seaworthiness a relative matter.**—It is apparent that seaworthiness is a relative and not an absolute condition, determined largely by the time, place and nature of the voyage, the character of the vessel and the purposes for which it is to be used.[20] When the vessel is in a harbor it may be entirely sea-

[17] The Vortigern, 68 L. J. P. 49; Dixon v. Sadler, 5 Mees. & W. 405; Oliverson v. Loughman, cited in 4 M. & S. 346; Parmeter v. Cousins, 2 Camp. 235; Haughton v. Empire Marine Ins. Co., Ltd., L. R. 1 Exch. 206; Bouillon v. Lupton, 33 L. J. C. P. 37, 14 Eng. Rul. Cas. 72; Burgess v. Wickham, 33 L. J. Q. B. 17; Quebec Mar. Ins. Co. v. Commercial Bank, L. R. 3 P. C. 234; Treadwell & Thorne v. Union Ins. Co., 6 Cow. (N. Y.) 270; Bell v. Reed, 4 Bin. (Pa.) 127, 5 Am. Dec. 398. See also, Northwestern Steamship Co. v. Maritime Ins. Co., 161 Fed. 166.

[18] Baron Parke in Dixon v. Sadler, 5 Mees. & W. 405.

[19] Thin v. Richards, 2 Q. B. 141; The Vortigern, 68 L. J. P. 49; Greenock Steamship Co. v. Maritime Ins. Co., 72 L. J. K. B. (N. S.) 868.

[20] Hibbart v. Martin, 1 Park Ins. 473; Forbes v. Wilson, 1 Park Ins. 472; Knill v. Hooper, 2 H. & N. 277; Gibson v. Small, 4 H. L. 353; Smith v. Surridge, 4 Esp. 25; Moores v. Louisville Underwriters, 14 Fed. 226. See also, Farmers' Feed Co. v. Insurance Co. of North America, 166 Fed. 111, 92 C. C. A. 95. As to the character of the ship, see Burgess v

worthy for that place, although it may be out of repair and with a crew insufficient to go to sea.[21] Where a river vessel is insured for a sea voyage and the character of the ship is fully made known to the insurer, the vessel will be considered as seaworthy if she is put in as good condition and character as the ship permits.[22]

§ 4446. Time of seaworthiness—Continuing warranty.—The English doctrine is that there is no implied warranty of seaworthiness except at the beginning of the voyage. "Every ship," said Lord Mansfield, "must be seaworthy when she first sails on the voyage insured, but she need not continue so throughout the voyage."[23] The voyage out and home is treated as one voyage, and there is no breach of warranty if the vessel is unseaworthy when it sails from the out port on the homeward voyage.[24] This principle applies not only to the physical condition of the ship, but also to the equipment and the master and crew. If the owner has his ship in proper condition, properly equipped, and provides a competent master and crew in the first instance, he is considered as having discharged his whole duty.[25]

Wickham, 33 L. J. Q. B. 17; Parmeter v. Cousins, 2 Camp. 235, 3 Kent Com. (14th ed.) 239; Thebaud v. Phenix Ins. Co., 52 Hun (N. Y.) 495, 5 N. Y. S. 619, 23 N. Y. St. 814, 1 Silvernail (N. Y.) 449.

[21] Annen v. Woodman, 3 Taunt. 299.

[22] Turnbull v. Janson, 36 L. T. 635; Clapham v. Langton, 34 L. J. Q. B. 46, 10 L. T. 875; Farmers' Feed Co. v. Insurance Co. of North America, 166 Fed. 111, 92 C. C. A. 95; Rogers v. Sun Mut. Ins. Co., 46 N. Y. Super. Ct. 65; Thebaud v. Great Western Ins. Co., 155 N. Y. 516, 50 N. E. 284 (Especially is this true where a higher premium was exacted.).

[23] Bermon v. Woodbridge, 2 Doug. 781; Watson v. Clark, 1 Dow. 336; Dixon v. Sadler, 5 M. & W. 415; Walker v. Maitland, 5 B. & Ald. 175; Phillips v. Headlam, 2 B. & Ald. 380; Eden v. Parkinson, 2 Doug. 733; Parfitt v. Thompson, 13 M. & W. 392; Woodhouse v. Provincial Ins. Co., 31 U. C. Q. B. 176. See general discussion in Dudgeon v. Pembroke, 2 App. Cas. 284.

[24] Bermon v. Woodbridge, 2 Doug. 781.

[25] "But the assured makes no warranty to the underwriters," says Parke, B., "that the vessel shall continue seaworthy, or that the master and crew shall do their duty during the voyage; and their negligence or misconduct is no defence to an action on the policy, where the loss has been immediately occasioned by the perils insured against. * * * Nor can any distinction be made between the omission by the master and crew to do an act which ought to be done, or the doing an act which ought not, in the course of the navigation. It matters not whether a fire which causes a loss be lighted improperly, or, after being properly lighted, be negligently attended; whether the loss of an anchor, which renders the vessel unseaworthy, be attributable to the omission to take proper care of it, or to the improper act of slipping it, or cutting it away; nor could it make any difference whether any other part of the equipment were lost, by mere neglect, or thrown away or destroyed,

In this country, however, the implied warranty of unseaworthiness is given a much wider application.[26] The insured is generally held bound not only to have his ship seaworthy at the commencement of the risk, but to keep her in that condition so far as it depends upon himself during the continuance thereof and at the commencement of all the subsequent stages. He is at least required to abstain from misconduct during the voyage, and negligence in not keeping the ship in a proper condition of repair and equipment under this rule is held to release the insurer when it causes a loss. As said by Mr. Justice Blatchford,[27] "A defect of seaworthiness, arising after the commencement of the risk, and permitted to continue from bad faith or want of ordinary prudence or diligence on the part of the insured or his agents, discharges the insurer from liability for any loss which is the consequence of such bad faith, or want of prudence or diligence; but does not affect the contract of insurance as to any other risk or loss covered by the policy not caused or increased by such particular defects."

§ 4447. **Knowledge and intent of insured.**—As the seaworthiness of a vessel is a condition precedent to the inception of the contract, it is held immaterial whether the loss is traceable to a breach of this warranty.[28] It is equally immaterial that the

in the exercise of an improper discretion by those on board." Dixon v. Sadler, 5 M. & W. 405.

[26] McDowell v. Gen. M. Ins. Co., 7 La. Ann. 684, 56 Am. Dec. 619. See also, 3 Elliott Ev., §§ 2437, 2438; Lapene v. Sun Mut. Ins. Co. of New York, 8 La. Ann. 1, 58 Am. Dec. 668; Paddock v. Franklin Ins. Co., 11 Pick. (Mass.) 227. In Berwind v. Greenwich Ins. Co., 114 N. Y. 231, 21 N. E. 151, the court said: "In time policies there is implied a warranty that the vessel will be kept in repair and made seaworthy at all times during the continuance of the risk, so far as that is reasonably possible, and this implied covenant imposes upon the insured the duty of active diligence to keep the vessel in good order and in a seaworthy condition."

[27] Union Ins. Co. v. Smith, 124 U. S. 405, 31 L. ed. 497, 8 Sup. Ct. 534. But see Copeland v. New England Marine Ins. Co., 2 Metc. (Mass.) 432; Lockwood v. Sangamo Ins. Co., 46 Mo. 71; American Ins. Co. v. Ogden, 20 Wend. (N. Y.) 287. In Morse v. St. Paul &c. Ins. Co., 122 Fed. 748. Putnam, J., held that this rule did not apply to the cargo, and that the underwriters were not discharged by the negligence of the master in leaving an intermediate port with the vessel in an unseaworthy condition. The court also expresses a doubt as to whether Union Ins. Co. v. Smith, 124 U. S. 405, 31 L. ed. 497, 8 Sup. Ct. 534, will be adhered to.

[28] Forshaw v. Chabert, 3 Br. & B. 158; Quebec M. I. Co. v. Commercial Bank, L. R. 3 C. P. 234. In this case the ship sailed from Montreal with a defective boiler. On reaching salt water the defect became apparent and was repaired. She was afterward

insured was not aware of the unseaworthy condition of the vessel.[29] In England and the United States the warranty of seaworthiness at the beginning of the voyage is absolute. The condition is broken by the fact of unseaworthiness, and not by the fraud or want of good faith of the insured. It is, therefore, as said by Lord Eldon,[30] "not necessary to inquire, whether the owner acted honestly and fairly in the transaction; for it is clear law that, however just and honest the intentions and conduct of the owner may be, if he is mistaken in the fact, and the vessel is in fact not seaworthy, the underwriter is not liable."

The existence of a latent defect in the timbers of the keel of a vessel, which was not disclosed while the vessel was being overhauled and repaired, was held by Lord Mansfield to discharge the insurer.[31] But some decisions seem to tend to the contrary,[32] and there is some difference of opinion as to the effect of a survey for the purpose of discovering the condition of the vessel. In New York, it was held that the fact that the owner had a careful survey of the vessel made, which failed to disclose the defect, was not material.[33] In England, where the ship's carpenter certified that the repairs made were all that was necessary to prepare the ship for the voyage, it was held there could be no recovery where the vessel in fact proved to have been unseaworthy and not

lost, owing to bad weather. It was held that there could be no recovery, as there had been a breach of condition. On the continent of Europe the insurer is released only when the unseaworthiness causes the loss.

[29] Standard Sugar Refining Co. v. Schooner Centennial, 2 Fed. 409; Marcy v. Sun Ins. Co., 11 La. Ann. 748; Rogers v. Sun Mutual Ins. Co., 46 N. Y. Super. Ct. 65; Richelieu & O. Navigation Co. v. Boston Marine Ins. Co., 136 U. S. 408, 34 L. ed. 398, 10 Sup. Ct. 934 (defective compass).

[30] Douglas v. Scougall, 4 Dow. 269. In The Bradley Fertilizer Co. v. The Edwin L. Morrison, 153 U. S. 199, 38 L. ed. 689, Mr. Justice Gray said: "In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning the voyage, and not merely that he does not know her to be unseaworthy. * * * The warranty is absolute that the ship is, or shall be, in fact seaworthy at that time, and does not depend on his knowledge or ignorance, his care or negligence." Quoted by Chief Justice Fuller in The Caledonia, 157 U. S. 124, 39 L. ed. 644, 15 Sup. Ct. 537.

[31] Lee v. Beach, 1 Park. Ins. 468. See also, to the same effect, Oliver v. Cowley, 1 Marshall Ins. (1810) 160; The Caledonia, 157 U. S. 124, 39 L. ed. 644, 15 Sup. Ct. 537.

[32] See Cleveland & B. Transit Co. v. Insurance Co. of North America, 115 Fed. 431; St. Paul Fire & Marine Ins. Co. v. Pacific Cold Storage Co., 157 Fed. 625, 87 C. C. A. 14, 14 L. R. A. (N. S.) 1161n.

[33] Warren v. United Ins. Co., 2 Johns. Cas. (N. Y.) 232, 1 Am. Dec. 164. and cases cited in note.

able to stand the ordinary perils of the sea.[34] But the federal courts seem to give more effect to such a survey. In one case, the report of the surveyor was said to be enough to establish seaworthiness until it was overcome by other evidence.[35] And, although the boilers of a vessel began to leak soon after the beginning of the voyage, after she had gone aground, it was held that this did not show that she was unseaworthy at the time of commencing the voyage, so as to avoid insurance on her cargo, where they had stood a standard test just before the voyage began.[36] It is held, however, that, where there is a provision in the policy which exempts the insurer from liability from loss occasioned by unseaworthiness, it is immaterial whether the actual condition of the vessel was known or unknown to the insured.[37]

§ 4448. **Exclusion by the terms of the policy.**—The warranty of seaworthiness may be excluded by the insertion of clear and express terms to that effect in the policy, but such exclusion will not be inferred from doubtful or ambiguous language. Thus, where a voyage policy excepted losses caused by rottenness and inherent defects, "or other unseaworthiness," it was held not to have excluded seaworthiness as an implied condition precedent to the attaching of the policy. As the boilers were defective when the voyage began, the plaintiff was not allowed to recover although the defect had been made good before the loss occurred.[38]

[34] Douglas v. Scougall, 4 Dow. 269. See also, Stewart v. Wilson, 12 M. & W. 11.

[35] Batchelder v. Ins. Co. of North America, 30 Fed. 459. See further, as to the effect of a certificate as to evidence of seaworthiness, Perkins v. Augusta Ins. &c. Co., 10 Gray (Mass.) 312, 71 Am. Dec. 654; Berwind v. Greenwich Ins. Co., 114 N. Y. 231, 21 N. E. 151; Lunt v. Boston Marine Ins. Co., 19 Blatchf. (U. S.) 151, 6 Fed. 562. In France the warranty is absolute as to the ship's soundness, but as to the equipment the insured is only liable for want of proper care. In the United States, under the act of congress (Harter Act, 1893), the shipowner's obligation to his freighters is to use due diligence to have the ship seaworthy. The new German Code of 1900 makes the shipowner "answerable to the charterer for every damage arising from the defective condition of the vessel unless the defects could not have been discovered in spite of the application of the care of a careful shipowner." It is probable that in time a similar rule will be made to apply to contracts of insurance.

[36] St. Paul Fire & Marine Ins. Co. v. Pacific Cold Storage Co., 157 Fed. 625, 87 C. C. A. 14, 14 L. R. A. (N. S.) 1161n (also construing and determining the effect of the "sue and labor" clause for moving cargo overland).

[37] Richelieu & O. Navigation Co. v. Boston Mar. Ins. Co., 136 U. S. 408, 34 L. ed. 398, 10 Sup. Ct. 934.

[38] Quebec Mar. Ins. Co. v. Commercial Bank, L. R. 3 P. C. 234. Where the condition is broken by the de-

§ 4449. **Presumption—Burden of proof.**—There is some difference of opinion as to the party upon whom rests the burden in regard to seaworthiness. It has been held that the burden is upon the defendant,[39] but other decisions are to the effect that the insured must show that the vessel was seaworthy when she left port. Probably the weight of authority supports the view that seaworthiness on the commencement of the voyage is to be presumed, although the burden is shifted if the vessel becomes unseaworthy very soon after sailing, and before any particular sea peril has been encountered.[40]

Lord Eldon said that it was a clear and established principle that, if the ship was seaworthy at the commencement of the voyage although she became otherwise only an hour after, the warranty was complied with, and the insurer was liable. But, when the inability of the ship to perform the voyage became evident, in a short time after the commencement of the risk, the presumption was that it was from causes existing before she set sail on the intended voyage, and that the ship was then not seaworthy, and the burden then rested with the insured to show that the inability arose from causes arising subsequent to the commencement of the voyage.[41] This so-called presumption has been treated, however, as merely an inference of fact which the courts feel justified in drawing from a condition which is disclosed soon after sailing; and, in one case, it was held that the presumption in case of the loss of the ship soon after leaving port, of which the insured could not show the cause, was rebutted when the balance of the evidence was to the effect that the ship was neither overloaded nor top-heavy when she left port, and that the loss was at-

parture of the ship in an unseaworthy condition the insurer may waive the breach of condition by a proper endorsement on the policy. Thus the insurer may even after the condition is broken assume liability for a loss. Weir v. Aberdeen, 2 Barn. & Ald. 320. See comment of Lord Penzance in Quebec Mar. Ins. Co. v. Commercial Bank, L. R. 3 P. C. 234.

[39] Nome Beach Lighterage & Transp. Co. v. Munich Assur. Co., 123 Fed. 820; Adderly v. American Mut. Ins. Co., Taney (U. S.) 126, Fed. Cas. No. 75.

[40] See 3 Elliott Ev., §§ 2432, 2433, 2434, 2435, 2436; Pickup v. Thames &c. Ins. Co., 3 Q. B. D. 594, 47 L. J. Q. B. 749; Watson v. Clark, 1 Dow. 336; Patrick v. Hallett, 3 Johns. Cas. (N. Y.) 76.

[41] Watson v. Clark, 1 Dow. 336. See also, Dodge v. Boston Marine Ins. Co., 85 Maine 215, 27 Atl. 105; Berwind v. Greenwich Ins. Co., 114 N. Y. 231, 21 N. E. 151.

tributable rather to a mistake of management after she started than to unseaworthiness when she left port.[42]

§ 4450. Implied warranties—Deviation—Definition.—In a contract of marine insurance there is, also, an implied agreement that the ship will not be guilty of deviation. Originally, deviation meant a voluntary departure, without necessity or reasonable excuse, from the regular and usual course of the voyage described in the policy.[43] But a broader meaning has been given to the term in modern times, and the warranty against deviation now includes any improper departure from the stipulated or customary route, or other change in the risk covered by the insurance.[44] It thus includes not merely the unnecessary going out of the track or course usually taken by vessels, but also a departure from any of the express or implied terms of the contract.[45]

The words deviation and departure are, in law, usually synonymous, but the one is sometimes used to express a variation from the usual course or conduct of the voyage, and the other to denote some other violation of the contract of insurance while touching at intermediate ports.[46] For an extra premium, however, the underwriter often expressly agrees to carry the insurance although there is a deviation.[47]

§ 4451. Departure from route.—The implied warranty against deviation requires that the vessel shall proceed with all reasonable despatch by the shortest, safest and most usual route

[42] Ajum Goolmam Hossen v. Union Marine Ins. Co., 70 L. J. P. C. 34, approving Pickup v. Thames &c. Mar. Ins. Co., 47 L. J. Q. B. 749, 3 Q. B. D. 594; Anderson v. Morice, 44 L. J. C. P. 10, 341.

[43] Coffin v. Newburyport Maritime Ins. Co., 9 Mass. 436 (delay); Burgess v. Equitable Marine Ins. Co., 126 Mass. 70, 30 Am. Rep. 654 (putting into port for bait); Amsinck v. American Ins. Co., 129 Mass. 185 (unreasonable delay); Lawrence v. Ocean Ins. Co., 11 Johns. (N. Y.) 241, affd. 14 Johns. (N. Y.) 46 (it is in this sense that the word is used in the English Marine Insurance Bill, 1899, § 47); Hostetter v. Park, 137 U. S. 30, 34 L. ed. 568, 11 Sup. Ct. 1; Bond v. The Brig Cora, 2 Wash. (U. S.) 80, 2 Peters Adm. 361 (to save human life).

[44] 15 Am. Law Rep. 108, article by Mr. S. G. Crosswell, on Deviation, citing and reviewing numerous cases. Warder v. La Belle Creole, Fed. Cas. 17165, 1 Pet. Adm. 31.

[45] 1 Arnould Marine Ins. (6th ed.) 450; Amsinck v. American Ins. Co., 129 Mass. 185 (delay); Phœnix Ins. Co. v. Cochran, 51 Pa. St. 143.

[46] Phœnix Ins. Co. v. Cochran, 51 Pa. St. 143.

[47] See Institute Voyage Clause, Appendix 2 Arnould Mar. Ins. (7th ed.) 1505.

from the port of departure to that of destination, and the policy therefore remains in force only so long as the insured pursues the prescribed course of the voyage from beginning to end throughout, with all safe, convenient and practicable expedition, without touching at any interjacent port, or pursuing any intermediate adventure.[48] And it is said that whatever the vessel "does to the contrary of this (implied warranty), unjustified by any of the emergent causes that shall be considered hereafter, or without leave expressly given in the policy, however trifling in extent or duration, is a fatal deviation, although the ship afterward return to her proper course nothing damaged in consequence of this departure from it.[49]" But a distinction has been made between time policies and insurance for a particular voyage in this regard.[50]

§ 4452. Order of visiting ports.—The order in which the various ports must be visited is generally determined either by the express terms of the policy or by their geographical order, subject to any well-established usage varying the order of calling. Where the ports to be visited are named in the policy, they must be called at in the specified order,[51] although it is not necessary that

[48] 1 Arnould Marine Ins. (6th ed.) 462; 3 Kent Com. (14th ed.) 312; Hare v. Travis, 7 B. & C. 14, 9 D. & R. 748; Spinney v. Ocean Mut. Marine Ins. Co., 17 Can. Sup. Ct. 326; Hartley v. Buggin, 3 Dougl. 39 (changing nature of ship); Riggin v. Patapsco Ins. Co., 7 Har. & J. (Md.) 279, 16 Am. Dec. 302 (departure caused by fear of capture); Coffin v Newburyport Marine Ins. Co., 9 Mass. 436; Burgess v. Equitable Marine Ins. Co., 126 Mass. 70, 30 Am. Rep. 654; Audenreid v. Mercantile Mut. Ins. Co., 60 N. Y. 482, 19 Am. Rep. 204; Snyder v. Atlantic Mut. Ins. Co., 95 N. Y. 196, 47 Am. Rep. 29 (going on towing trip); Himely v. South Carolina Ins. Co., 1 Mill Const. (S. C.) 154, 12 Am. Dec. 623; Wilkins v. Tobacco Ins. Co., 30 Ohio St. 317, 27 Am. Rep. 455 (going outside of permitted waters—loss after return to safe water—insurers liable); Hood v. Nesbit, 1 Yeates (Pa.) 114, 2 Dall. (Pa.) 137, 1 L. ed. 321, 1 Am. Dec. 265 (not barratry but deviation). As to the effect of the special clauses giving liberty "to call" or "to touch" or "to touch and stay" or "to touch and stay and trade," see Urquhart v. Barnard, 1 Taunt. 450; 1 Arnould Mar. Ins. (6th ed.) 469; Metcalfe v. Parry, 4 Camp. 123.

[49] Fox v. Black, 2 Park. Ins. 620; 1 Arnould Marine Ins. (6th ed.) 462; Burgess v. Equitable Marine Ins. Co., 126 Mass. 70, 30 Am. Rep. 654.

[50] Jolly's Exrs. v. Ohio Ins. Co., Wright (Ohio) 539; Wilkins v. Tobacco Ins. Co., 30 Ohio St. 317, 27 Am. Rep. 455.

[51] Emerigon Ins., ch. XIII, § 12; Brown v. Vigne, 12 East 283, 11 R. R. 375; Beatson v. Haworth, 6 Term. Rep. 533 (when the ship is insured for a voyage covering several ports, it may terminate the voyage at one of the intermediate ports without being guilty of deviation); Andrews v. Mellish, 5 Taunt. 496; Gairdner v.

all the specified ports shall be visited.[52] Where certain designated ports are not called at, those remaining must be taken in the order named in the policy, unless there is a usage to the contrary not excluded by the terms of the policy.[53] It has also been held that a permit to call at certain intermediate ports, by implication excludes the right to call at all others. Thus, where the policy covered a voyage from "C. to H., with liberty to call [at L.] as usual," and the ship called at M. instead of L., it afterward being again safely upon the direct route to H., and was wrecked during a violent storm, it was held that there had been a deviation, and that the underwriters were discharged.[54] And, where a ship is insured merely for a voyage "to her ports of discharge," without naming them, it must visit such ports in the geographical order of their distance from the terminus a quo, or port of departure.[55]

The captain of a vessel is bound to know, as far as the ordinary means of information can afford such knowledge, the various routes and ports in the course of his voyage, and a departure from the proper course caused by his mistake, ignorance, or negligence, discharges the underwriter. And it has even been held that a deviation is not excused by the fact that the voyage was thereby expedited.[56]

So, in line with this case, it was held that it was a departure to take a vessel through a chute used only in high water, for the

Senhouse, 3 Taunt. 16; Stevens v. Commercial Mut. Ins. Co., 26 N. Y. 397. To revisit a port is a deviation (Gairdner v. Senhouse, 3 Taunt. 16), unless authorized by the express or implied terms of the policy. Deblois v. Ocean Ins. Co., 16 Pick. (Mass.) 303, 28 Am. Rep. 245; Andrews v. Mellish, 5 Taunt. 496 (Trading at a port where the ship had a right to call, which does not occasion delay, is not a deviation.); Raine v. Bell, 9 East 195; Cormack v. Gladstone, 11 East 347; Hughes v. Union Ins. Co., 3 Wheat. (U. S.) 159, 4 L. ed. 357.

[52] Marsden v. Reid, 3 East 571; Ashley v. Pratt, 16 Mees. & W. 471; Hale v. Mercantile Marine Ins. Co., 6 Pick. (Mass.) 172; Kane v. Columbian Ins. Co., 2 Johns. (N. Y.) 264; Cross v. Shutliffe, 2 Bay (S. C.) 220, 1 Am. Dec. 645.

[53] Marsden v. Reid, 3 East 571; Commonwealth Ins. Co. v. Cropper, 21 Md. 311; Kane v. Columbian Ins. Co., 2 Johns. (N. Y.) 264.

[54] Elliot v. Wilson, 7 Brown's P. C. 459, 9 Eng. Rul. Cas. 351.

[55] Beatson v. Haworth, 6 Term Rep. 533; Andrews v. Mellish, 5 Taunt. 496; Deblois v. Ocean Ins. Co., 16 Pick. (Mass.) 303, 28 Am. Dec. 245.

[56] Tait v. Levi, 14 East 481; Phyn v. Royal Exchange Assurance Co., 7 Term Rep. 505; Riggin v. Patapsco Ins. Co., 7 Har. & J. (Md.) 279, 16 Am. Dec. 302; Brazier v. Clap, 5 Mass. 1.

purpose of shortening the distance.[58] The strictness with which this rule is applied is also illustrated by a case in which it was held a departure for a ship to leave the port of destination and go to a place seven miles away on the same bay, to test repairs and to take on coal.[59]

Where the policy permitted the insured ship to go on a "voyage to a port on the north side of Cuba, 'with the liberty of a second port thereon,'" it was held that a visit to a port on the south side of the island was a departure.[60] So, a master has no right, for the purpose of hastening his departure, to take a different route from that contemplated when the insurance was effected; and where the usual course from New York to Norwich was through Long Island Sound, it was held that it was a deviation to make a voyage by the open sea, although the Sound was obstructed by ice, and that it was the duty of the master to delay his departure, although the ice had continued in the Sound longer than usual.[61]

§ 4453. **As affected by usage.**—Usage, however, is often important in determining such questions.[62] If it is made to appear clearly that it is customary in the course of the voyage insured to stop at interjacent ports, although outside of a direct line, it is no deviation to stop there, although leave has not been expressly reserved in the policy, as such a stop is in the regular course of the voyage, and within the contemplation of the parties. Thus, where all the ships sailing through the sound were in the habit of stopping at S. to pay sound dues, a stop may properly be made, although there is no reference to it in the policy.[63]

[58] Jolly's Exrs. v. Ohio Insurance Co., Wright (Ohio) 539.

[59] Snyder v. Atlantic Mut. Ins. Co., 95 N. Y. 196, 47 Am. Rep. 29. See also, Fernandez v. Western Ins. Co., 48 N. Y. 571, 8 Am. Rep. 571, overruling 3 Robert (N. Y.) 457 (trial trip of sixteen miles after repairs and to take on coal held a deviation).

[60] Nicholson v. Mercantile Marine Ins. Co., 106 Mass. 399.

[61] Crosby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745. See also, Standard Marine Ins. Co. v. Nome Beach &c. Co., 133 Fed. 636, 67 C. C. A. 602, 1 L. R. A. (N. S.) 1095.

[62] See Bentaloe v. Pratt, Wall. Sr. (U. S.) 58, Fed. Cas. No. 1330; Oliver v. Maryland Ins. Co., 7 Cranch (U. S.) 487, 3 L. ed. 414; Columbia Ins. Co. v. Catlett, 12 Wheat. (U. S.) 383, 6 L. ed. 234; Lockett v. Merchants' Ins. Co. of New Orleans, 10 Rob. (La.) 339.

[63] Cormack v. Gladstone, 11 East 347; Hostetter v. Park, 137 U. S. 30, 34 L. ed. 568, 11 Sup. Ct. 1. ("It is no deviation, in respect to such a

But the occasional stopping by vessels at a particular port will not establish a usage. Thus, evidence of two instances merely of stopping at a particular port, is not sufficient to establish a usage which will justify a departure from the regular course.[64] The right to engage in certain intermediate voyages in connection with certain trade, such as the Newfoundland or West Indian trade, was fully recognized by the English courts.[65] As said by Arnould,[66] "Where the termini only of the voyage insured are indicated by the policy, and the parties to the contract have done nothing else toward indicating its course, the sole guide in determining what that course should be is mercantile usage; nothing can be considered a deviation which follows only the course that usage has sanctioned."

§ 4454. **Delay.**—After a policy has once attached, any unreasonable delay in commencing[67] or pursuing the insured voyage,[68] constitutes a deviation which will relieve the insurer.[69] What is unnecessary delay must be determined by the facts of each case. No arbitrary rule can be laid down, as the reasonableness must be determined by the state of affairs in the place where

voyage, to touch and stay at a port out of its course, if such departure is within the usage of the trade.")

[64] Martin v. Delaware Ins. Co., Fed. Cas. No. 9161, 2 Wash. (U. S.) 254.

[65] Vallance v. Dewar, 1 Camp. 503.

[66] 1 Arnould Marine Ins. (6th ed.) 463.

[67] Hartley v. Buggin, 3 Doug. 39 (delay for repairs); Smith v. Surridge, 4 Esp. 25; Palmer v. Marshall, 8 Bing. 79; Mount v. Larkins, 8 Bing. 108, 1 M. & S. 165; 3 Kent's Com. (14th ed.) 315; Spinney v. Ocean Mut. Marine Ins. Co., 17 Can. Sup. Ct. 326; Augusta Ins. &c. Co. v. Abbott, 12 Md. 348; Upton v. Salem Commercial Ins. Co., 8 Met. (Mass.) 605; Himely v. South Carolina Ins. Co., 1 Mill Const. (S. Car.) 154, 12 Am. Dec. 623; Arnold v. Pacific Mut. Ins. Co., 78 N. Y. 7. (It is no excuse that the insured is detained in port by proceedings in admiralty.)

[68] Burgess v. Equitable Marine Ins. Co., 126 Mass. 70, 30 Am. Rep. 654; Amsinck v. American Ins. Co., 129 Mass. 185; Natchez Ins. Co. v. Stanton, 2 Smedes & M. (Miss.) 340, 41 Am. Dec. 592 (taking a tow); Settle v. St. Louis Perpetual &c. Ins. Co., 7 Mo. 379 (departure to save property); Audenreid v. Mercantile Mut. Ins. Co., 60 N. Y. 482, 19 Am. Rep. 204; Arnold v. Pacific Mut. Ins. Co., 78 N. Y. 7; Kingston v. Girard, 4 Dall. (Pa.) 274, 1 L. ed. 831 (captain of ship remaining in port for the purpose of trading); Columbia Ins. Co. v. Catlett, 12 Wheat. (U. S.) 383, 6 L. ed. 234.

[69] Marine Insurance Co. v. Stearns, 71 L. J. K. B. 86 (delay of about a month in sailing). That deviation refers to time as well as space or locality, see Hartley v. Buggin, 3 Doug. 39; African Merchants v. British &c. Mar. Ins. Co., L. R. 8 Exch. 154.

the vessel is at the time.[70] As said by Chief Justice Tyndall,[71] "Detention, for a reasonable time for the purposes of the adventure insured, must be allowed; and that, whether the time is reasonable or not, must be determined, not by any positive and arbitrary rule, but by the state of things existing at the time at the port where the ship happens to be. It may be collected from numerous cases, that delay before or after the commencement of a voyage insured, is not equivalent to a deviation, unless it be unreasonable."[72]

§ 4455. **Departure to save property.**—A distinction is made between departures for the purpose of saving life, and those for the purpose of saving property. The former rests upon humanitarian grounds, and the insurer is held to assume the risk involved in such a departure. But it is settled that no such right exists in the case of property. Efforts of this kind may enable the insurer to earn salvage, but the effect is to increase the risk of the underwriter by increasing the cargo, diminishing the crew, and subjecting the vessel to additional dangers.[73] Yet the mere fact that, while engaged in saving life, some property is also saved, will not invalidate the insurance.[74]

§ 4456. **Transhipment of cargo.**—The unnecessary transfer of a cargo from one vessel to another, has been held to be a

[70] Phillips v. Irving, 7 M. & Gr. 325; Schroeder v. Thompson, 7 Taunt. 462 (as to when departure is justified with a view to promote the main objects of the voyage); Stocker v. Harris, 3 Mass. 409; Coffin v. Newburyport Maritime Ins. Co., 9 Mass. 436; Ellery v. New England Ins. Co., 8 Pick. (Mass.) 14; Earl v. Shaw, 1 Johns. (N. Y.) 313, 1 Am. Dec. 117; Columbia Ins. Co. v. Catlett, 12 Wheat. (U. S.) 383, 6 L. ed. 234.

[71] Phillips v. Irving, 7 M. & Gr. 325. See also, Smith v. Surridge, 4 Esp. 25.

[72] And to the same effect see, Columbia Insurance Co. v. Catlett, 12 Wheat. (U. S.) 383, 6 L. ed. 234; Grant v. King, 4 Esp. 175.

[73] Scaramanga v. Stamp, 5 C. P. Div. 295, affg. 4 C. P. Div. 316; African Merchants v. British &c. Mar. Ins. Co., L. R. 8 Exch. 154, 42 L. J. Exch. 60; Dabney v. New England Mut. &c. Ins. Co., 14 Allen (Mass.) 300; Burgess v. Equitable Marine Ins. Co., 126 Mass 70, 30 Am Rep. 654; Settle v. St. Louis Perpetual &c. Ins. Co., 7 Mo. 379 (river steamer), overruled on question of usage in Walsh v. Homer, 10 Mo. 6, 45 Am. Dec. 342; The Schooner Boston, 1 Sumn. (U. S.) 328; The Henry Ewbank, 1 Sumn. (U. S.) 400, Fed. Cas. No. 6376; Taylor v. The Cato, Fed. Cas. No. 13786, 1 Pet. Adm. (U. S.) 64; Mason v. The Ship Blaireau, 2 Cranch (U. S.) 240, 2 L. ed. 266.

[74] Scaramanga v. Stamp, 5 C. P. Div. 295; Crocker v. Jackson, 1 Sprague (U. S.) 141, Fed. Cas. No. 3398; Williams v. Box of Bullion, 1 Sprague (U. S.) 57, Fed. Cas. No. 17717. Towing a vessel in distress unreasonably retards the progress of the towing vessel, and thereby prolongs the risk of the voyage. Scaramanga v. Stamp, 5 C. P. Div. 295.

deviation which will release the insurer from liability.[75] So, it has been held that transhipment is not justified by a delay caused by low water,[76] nor by the necessity for repairing a vessel where the want of repairs or defects are not so serious as to endanger the cargo.[77]

§ 4457. **To avoid danger.**—A voluntary and unnecessary deviation from the regular course to escape a danger not insured against and not imminent is not an excuse.[78] In other words, necessity only will justify a deviation on account of a peril not insured against. But "where a departure from the course of the voyage is the necessary effect of the immediate and irresistible operation of a peril not insured against, it will not be held to amount to a deviation, whether the peril be one not included among the ordinary risks, or be expressly excluded by the specific terms of the policy."[79] Hence, where the deviation is the result of a superior force, no distinction is made between policies covering the particular risks, and those embracing all risks. Where a neutral ship was insured against "sea risk and fire only," and was carried out of her course and detained for six weeks by a vessel of war, it was held no deviation.[80] So, where a ship insured against sea risks only was turned from her destination by a blockading squadron and thus driven into another port out of her course by bad weather, it was held excusable. "I am of the opinion," said Kent, C. J., "that a deviation from necessity will excuse the assured, in case of an insurance against a particular risk, as well as in the case of a general insurance."[81]

As to the effect of being towed, see Stewart v. Tennessee Mar. & Fire Ins. Co., 1 Humph. (Tenn.) 242.

[75] Oliverson v. Brightman, 8 Q. B. 781, 1 Car. & K. 360, 15 L. J. Q. B. 274; Schroeder v. Schweizer Lloyd Transp. Co., 60 Cal. 467, 44 Am. Rep. 61.

[76] Malinckrodt v. Jefferson Mut. Fire Ins. Co., 1 Mo. App. 205.

[77] Salisbury v. Marine Ins. Co., 23 Mo. 553, 66 Am. Dec. 687.

[78] O'Reilly v. Royal Exchange Assurance Co., 4 Camp. 249; Lee v. Gray, 7 Mass. 349; Breed v. Eaton, 10 Mass. 21.

[79] 1 Arnould Marine Ins. (6th ed.) 508.

[80] Scott v. Thompson, 1 Boss. & P. (N. R.) 181.

[81] Robinson v. Marine Ins. Co., 2 Johns. (N. Y.) 89. See also, Riggin v. Patapsco Ins. Co., 7 Har. & J. (Md.) 279, 16 Am. Dec. 302 (mere apprehension of danger).

§ 4458. Change of voyage—Intention.—The abandonment of a voyage is distinguished from a deviation. In the latter it is said that the intention to pursue the original voyage always remains, while in the former the identity of the voyage is gone and a new and distinct voyage is substituted. A change of voyage involves the substitution of a different port of final destination, while a deviation arises where the ship pursues a route other than that contemplated by the contract, between the proper termini. The test is whether the terminus ad quem specified in the policy remains the ultimate place of intended destination. If it does, then the design, though formed before sailing, of putting into any other port, or conducting an intermediate voyage on the way to such ultimate place of destination, does not necessarily amount to a change of the voyage.[82]

Where the intention to change the voyage is formed after the ship has started from the home port, according to some authorities the insurer is released from the time the intention is formed, although other authorities are to the effect that where a part of the course is over the same route as that contemplated by the policy, and there is a loss before the point of departure is reached, it is a mere intention to deviate not carried into effect and therefore not a deviation.[83]

It has been held that after the intention to abandon the voyage is formed by deciding to go to a different port of ultimate destination, there has been a change of voyage which avoids the policy, although the ship may, up to the time of the loss, be on the exact course originally contemplated.[84]

Where the original port of destination is not changed, a mere contemplated change of route not carried into effect does not amount even to a deviation.[85] The same rule has been applied

[82] 1 Arnould Marine Ins. (6th ed.) 450, 3 Kent's Com. (14th ed.) 317; The New York Firemen Ins. Co. v. Lawrence, 14 Johns. (N. Y.) 46. In Simon v. Sedgwick, 4 Rep. 128, 1 Q. B. 303, 62 L. J. Q. B. 163. (A clause allowing a "change of voyage" for an extra premium was held inoperative when the ship sailed for a different port from that named in the policy.)

[83] Kewley v. Ryan, 2 H. Bl. 343; Thellusson v. Ferguson, 1 Dougl. 361; Elliot v. Wilson, 4 Brown's P. C. 470, 9 Eng. Rul. Cas. 351; Marine Insurance Co. v. Tucker, 3 Cranch (U. S.) 357.

[84] Wooldridge v. Boydell, 1 Dougl. 17; Merrill v. Boylston F. & M. Ins. Co., 3 Allen (Mass.) 247. But see infra note 87.

[85] Wooldridge v. Boydell, 1 Dougl. 17; Thelluson v. Ferguson, 1 Dougl.

even where there was an intention to change the ultimate termination of the voyage. In a leading case in New York the ship was insured, "At and from New York to Gottenberg, and at and from thence to one port in the Baltic or North Sea." After leaving Gottenberg for St. Petersburg the vessel was obliged to stop at Carlsham for repairs, and while there the captain decided to sail to Stockholm instead of St. Petersburg. While still on the common route to Stockholm and St. Petersburg, the vessel was captured, and it was held that, although the captain had decided to change the ultimate port of destination, it was, under the circumstances, no more than intention to deviate, and that the insurer was liable for the loss.[86] And a mere intention to deviate has often been held not sufficient to constitute a deviation where it has not been carried into effect before the loss.[87]

§ 4459. **Excusable deviation.**—From what has already been shown it appears that it is only a voluntary and unjustifiable or inexcusable departure from the terms of the policy that will discharge the underwriters from a subsequent loss. It follows that a departure which is necessitated either by moral or physical force, or excused by a justifiable cause, does not affect the validity of the insurance.[88] As said by Chancellor Kent, "There is not, probably, any exception to be met with, to the application of the general principle, that if the vessel departs from the usual course of the voyage from necessity, and deviates no further than that necessity requires, the voyage will still be protected by the policy."[89] The conditions which thus justify a

361; Kewley v. Ryan, 2 H. Bl. 343; Hare v. Travis, 7 B. & C. 14, 9 Eng. Rul. Cas. 357; Hobart v. Norton, 8 Pick. (Mass.) 159 (distinction between deviation and a change of voyage).

[86] Lawrence v. Ocean Ins. Co., 11 Johns. (N. Y.) 241, affd. in 14 Johns. (N. Y.) 46. See also, Winter v. Delaware Mut. Safety Ins. Co., 30 Pa. St. 334 (Where a policy on goods covers both a land and sea transit, the terminus ad quem of the sea voyage only should be considered.); Simon v. Sedgwick, 4 Rep. 128 (1893), 1 Q. B. 303, 62 L. J. Q. B. 163.

[87] Arnold v. Pac. Mut. Ins. Co., 78 N. Y. 7; Middlewood v. Blakes, 7 Dunford & East (T. R.) 158; Reed v. Weldon, 1 Han. (N. B.) 460; Thatcher v. McCulloch, 23 Fed. Cas. 891.

[88] Urquhart v. Barnard, 1 Taunt. 450; Scott v. Thompson, 1 B. & P. (N. R.) 181; Brazier v. Clap, 5 Mass. 1; Burgess v. Equitable Marine Ins. Co., 126 Mass. 70, 30 Am. Rep. 654; Robertson v. Columbian Ins. Co., 8 Johns. (N. Y.) 491; Fernandez v. Great Western Ins. Co., 48 N. Y. 571, 8 Am. Rep. 571; Maryland Ins. Co. v. Leroy, 7 Cranch (U. S.) 26, 3 L. ed. 257; Warder v. La Belle Creole, Fed. Cas. No. 17165, 1 Pet. Adm. (U. S.) 31.

[89] Robinson v. Marine Ins. Co., 2 Johns. (N. Y.) 89.

departure from the express or implied terms of the policy must result from necessity, and there must be no unnecessary waste of time or needless divergence,—that is, if the ship leave the prescribed course from necessity, she must pursue such new voyage of necessity in the direct course, and in the shortest time, or the underwriters will be released.[90]

§ 4460. Restraint justifying deviation.—The restraint which will excuse a deviation may be either moral or physical in its character, if it be sufficient in degree.[91] It may be the act of a mutinous crew which compels the vessel to return to port,[92] or the act of a naval cruiser carrying a neutral ship out of her course and detaining her for a number of weeks far beyond the limits allowed by the policy for the voyage.[93] But in such cases it must appear that a degree of force was exercised toward the captain which either physically he could not resist, or morally as a good subject, he ought not to resist.[94]

A deviation may be excused by causes short of restraint, but the general rule is, that it cannot be justified unless the state of circumstances be such as to leave the master no alternative as a reasonable man acting for the interests of all concerned, and mere problematical apprehension of danger or possible loss is not sufficient.[95]

[90] 1 Arnould Marine Ins. (6th ed.), p. 499 (When deviation is shown the burden is said to be on the insured to show justification therefor.); 3 Elliott Ev., § 2443 and cases cited; Lavabre v. Wilson, 1 Dougl. 284; Hyderabad Co. v. Willoughby, L. R. (1899) 2 Q. B. 530.

[91] Riggin v. Patapsco Ins. Co., 7 Har. & J. (Md.) 279, 16 Am. Dec. 302.

[92] Elton v. Brogden, 2 Str. 1264, 9 Eng. Rul. Cas. 413; Driscol v. Bovil, 1 Bos. & P. 313.

[93] Scott v. Thompson, 1 B. & P. (N. R.) 181.

[94] Phelps v. Auldjo, 2 Camp. 351. Where a merchant-man was ordered by the captain of a naval vessel of his own country to go out to sea and discover the nationality of a strange ship, and without remonstrance complied, it was held an inexcusable deviation. "If a degree of force was exercised toward him which either physically he could not resist, or morally as a good subject he ought not to have resisted, the deviation is justified. But if he chose to go out in the hope of making a prize, he could not thereby extend the risk of the underwriters." Crosby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745; Lee v. Gray, 7 Mass. 349; Wiggin v. Amory, 13 Mass. 118; Kettell v. Wiggin, 13 Mass. 68; Robertson v. Columbian Ins. Co., 8 Johns. (N. Y.) 491; Riggin v. Patapsco Ins. Co., 7 Har. & J. (Md.) 279, 16 Am. Dec. 302.

[95] See Riggin v. Patapsco Ins. Co., 7 H. & J. (Md.) 279, 16 Am. Dec. 302.

§ 4461. **Entering a port to refit.**—A ship has the right in a proper case to enter a port for necessary repairs and to stay until they are completed. This is an excusable deviation if it appears that such repairs under the circumstances were reasonably necessary, and the delay is not longer than is requisite for the purpose.[96] And it has been held that if the vessel does not find what is necessary to enable her to refit in the first port, she may proceed to other ports for that purpose.[97]

§ 4462. **Entering a port to recruit crew.**—Where a ship is properly manned and equipped at the commencement of the voyage, and it thereafter loses such proportion of the officers or crew by sickness or other causes that it is impossible to continue the voyage, and no more can be obtained without entering a port out of the direct course of the voyage, the putting into such port for that purpose is an excusable deviation.[98] As said by Lord Eldon, "That if by visitation of God so many of the crew, who were otherwise sufficient, became so afflicted with sickness, as to be incapable of navigating the ship, such an illness of the crew was a necessity, which might justify a deviation."[99]

§ 4463. **Stress of weather.**—It is no deviation if a ship be driven out of her course by stress of weather,[1] or if the captain puts into a port out of his course or delays his sailing to take refuge from a tempest or to wait for the wind, provided that in so doing, the captain did what a prudent man, in the exercise of

[96] 1 Phillips on Insurance (5th ed.) 585; Motteux v. London Assur. Co., 1 Atkyns 545; Smith v. Surridge, 4 Esp. 25; Scott v. Thompson, 1 B. & P. (N. R.) 181; Kane v. Columbian Ins. Co., 2 Johns. (N. Y.) 264; Miller v. Russell, 1 Bay (S. C.) 309; Turner v. Protection Insurance Co., 25 Maine 515, 43 Am. Dec. 294. "The rule seems to be," said Mr. Justice Washington, "that if the accident happened whilst the property is at the risk of the underwriters, and cannot be repaired at the port of her departure, she may, without prejudice to the insurance, go to the nearest port where the damage may be repaired, and that in doing so she stands in the same situation as if she had been repaired at the place of departure." Cruder v. Philadelphia Ins. Co., 2 Wash. (U. S.) 262, Fed. Cas. No. 3453.

[97] Hall v. Franklin Ins. Co., 9 Pick. (Mass.) 466. See Silloway v. Neptune Ins. Co., 12 Gray (Mass.) 73.

[98] Woolf v. Claggett, 3 Esp. 257; Forshaw v. Chabert, 6 Moore P. C. 369, 3 Br. & B. 158; Burgess v. Equitable Marine Ins. Co., 126 Mass. 70, 30 Am. Rep. 654; Winthrop v. Union Ins. Co., Fed. Cas. No. 17901, 2 Wash. (U. S.) 7.

[99] Woolf v. Claggett, 3 Esp. 257.

[1] Burgess v. Equitable Marine Ins. Co., 126 Mass. 70, 30 Am. Rep. 654.

a sound judgment, would have done under the circumstances with a view to the benefit of all concerned.[2] It follows that a vessel driven out of her course by a storm is covered by the policy until she is able to return to her course. She is not required to return to the place in the course from which she was driven by the storm, but it is sufficient if she makes the best of her way to her port of destination.[3] So, it has been held that where the port of destination is blockaded by ice or otherwise rendered inaccessible, a ship may go to the nearest practicable port and remain there until her original port is open, without being guilty of deviation.[4]

§ 4464. **To escape capture or join convoy.**—Real and immediate danger of capture, or reasonable apprehension thereof, will justify a vessel in delaying its departure or in departing from the voyage insured, or in leaving her port without proper preparation for sailing, but to justify such a departure, the danger must be real and immediate.[5] So, if upon approaching the port of destination, the master of a vessel obtains information which leads him to believe that the port is blockaded, he may properly, without danger to the insurance, visit a neighboring port for the purpose of securing information as to existing conditions, and remain there at least for a reasonable time.[6] And where necessary for the safety of the ship, she may depart from the direct course of the voyage in order to seek a convoy.[7]

[2] Barber on Principles of the Law of Insurance, 258.

[3] Harrington v. Halkepd, 2 Park Ins. 639; Delaney v. Stoddart, 1 Term. Rep. 22; Winthrop v. Union Ins. Co., Fed. Cas. No. 17901, 2 Wash. (U. S.) 7; Fernandez v. Great Western Ins. Co., 48 N. Y. 571, 8 Am. Rep. 571.

[4] Graham v. Commercial Ins. Co., 11 Johns. (N. Y.) 352.

[5] Driscoll v. Bovil, 1 Bos. & P. 313; Blackenhagen v. London Ins. Co., 1 Camp. 454 (to return home would be to abandon the voyage); O'Reilly v. Gonne, 4 Camp. 249; Winthrop v. Union Ins. Co., Fed. Cas. No. 17901, 2 Wash. (U. S.) 7; Whitney v. Haven, 13 Mass. 172; Burgess v. Equitable Marine Ins. Co., 126 Mass. 70, 30 Am. Rep. 654; Patrick v. Ludlow, 3 Johns. Cas. (N. Y.) 10, 2 Am. Dec. 130; Reade v. Commercial Ins. Co., 3 Johns. (N. Y.) 352, 3 Am. Dec. 495; Snowden v. Phœnix Ins. Co., 3 Binney (Pa.) 457; Miller v. Russell, 1 Bay (S. C.) 309.

[6] Blackenhagen v. London Assurance Co., 1 Camp. 454; Riggin v. Patapsco Ins. Co., 7 Har. & J. (Md.) 279, 16 Am. Dec. 302; Savage v. Pleasants, 5 Bin. (Pa.) 403, 6 Am. Dec. 424.

[7] Bond v. Gonsales, 2 Salk. 445; D'Aguilar v. Tobin, Holt N. P. 185; Burgess v. Equitable Marine Ins. Co., 126 Mass. 80, 30 Am. Rep. 654; Warder v. La Belle Creole, Fed. Cas.

§ 4465. To save life or succor distress.—A deviation from the direct course of the voyage for the purpose of saving the lives of men threatened with imminent danger of shipwreck or foundering, sanctioned alike by the true interests of commerce and the clearest precepts of humanity, will not discharge the underwriters.[8] "Deviation," said Chief Justice Cockburn, "for the purpose of saving life is protected, and involves neither forfeiture of insurance nor liability to the goods owner in respect of loss which would otherwise be within the exception of 'perils of the seas.' And, as a necessary consequence of the foregoing, deviation for the purpose of communicating with a ship in distress is allowable, inasmuch as the state of the vessel in distress may involve danger to life. On the other hand, deviation for the sole purpose of saving property is not thus privileged, but entails all the usual consequences of deviation. If, therefore, the lives of the persons on board a disabled ship can be saved without saving the ship, as by taking them off, deviation for the purpose of saving the ship will carry with it all the consequences of an unauthorized deviation. But where the preservation of life can only be effected through the concurrent saving of property, and the bona fide purpose of saving life forms part of the motive which leads to the deviation, the privilege will not be lost by reason of the purpose of saving property having formed the second motive for deviating."[9]

The principles which justify a departure for the purpose of saving life, apply where it becomes necessary to seek medical attention and supplies for the sick on board the vessel, and for this purpose the master is justified in putting into a port out of his course.[10] But it is the duty of the insured to see that the vessel

No. 17165, 1 Pet. Adm. (U. S.) 31; Patrick v. Ludlow, 3 Johns. Cas. (N. Y.) 10, 2 Am. Dec. 130.

[8] 1 Phillips' Insurance, § 1027; 3 Kent's Comm. 313 (14th ed.); 1 Arnould Marine Ins. (6th ed.) 518; Dabney v. New England Mut. Marine Ins. Co., 14 Allen (Mass.) 300; Burgess v. Equitable Marine Ins. Co., 126 Mass. 70, 30 Am. Rep. 654; Fernandez v. Great Western Ins. Co., 48 N. Y. 571, 8 Am. Rep. 571; Bond v. The Brig Cora, 2 Peters Adm. 361, 2 Wash. (U. S.) 80; Crocker v. Jackson, 1 Sprague (U. S.) 141, Fed. Cas. No. 3398; The Boston, 1 Sumn. (U. S.) 328, Fed. Cas. No. 1673.

[9] Scaramanga v. Stamp, 5 C. P. D. 295.

[10] Burgess v. Equitable Marine Ins. Co., 126 Mass. 70, 30 Am. Rep. 654. In Perkins v. Augusta Ins. &c. Co., 10 Gray (Mass.) 312, 71 Am. Dec. 654, Merrick, J., said: "It makes no difference whether the object of such departure is to alleviate the distress

is properly equipped with medical stores before it sails, and it has been held that where this is not done, a departure for the purpose of obtaining such stores during the voyage, is a deviation which releases the underwriters.[11]

§ 4466. Effect of deviation—Increase of risk.—An unauthorized and unexcused deviation discharges the underwriter from all liability for losses occurring subsequent to the deviation, but leaves him liable for a loss occurring prior to the deviation.[12] As said in a standard work on the subject: "Deviation does not, however, like unseaworthiness, discharge the underwriter from liability on the policy, ab initio; he still remains liable for losses incurred prior to the deviation. This condition differs in this effect from that other relating to seaworthiness, only because this latter respects the state of the ship the instant before the commencement of the risk, and consequently is a condition precedent to the policy attaching. The implied condition not to deviate relates to the conduct of the ship in the course of the voyage, and cannot by relation be carried back, so as to exempt the underwriter from liabilities incurred prior to its being broken."[13]

It is not necessary, however, that the deviation increase the risk, as the policy is issued upon the implied agreement that the risk shall remain precisely as it appears upon the face of the policy. If that risk is "varied, although not aggravated," there

and administer to the necessities of persons who are lawfully on board, or of strangers suffering from the disasters sustained by the loss or wreck of another vessel. * * * To make the excuse valid and effectual, it must, without doubt, be shown that there was a real necessity for the departure of the vessel from her proper course. The exigency which demands relief must be equal in importance to the intervention which is required in its behalf. * * * To determine rightly all the circumstances of infirmity and suffering, and the relief afforded on the one hand, must be considered in connection with the increased length of the voyage, the prolonged time required to accomplish it, and the additional risk incurred, on the other." The Iroquois, 118 Fed. 1003, 55 C. C. A. 497, affd. 194 U. S. 240, 48 L. ed. 955, 24 Sup. Ct. 640.

[11] Woolf v. Claggett, 3 Esp. 257; Kettell v. Wiggin, 13 Mass. 68.

[12] Hare v. Travis, 7 B. & C. 14; Schroeder v. Schweizer Lloyd Transp. &c. Co., 66 Cal. 294, 5 Pac. 478; Riggin v. Patapsco Ins. Co., 7 Har. & J. (Md.) 279, 16 Am. Dec. 302; Burgess v. Equitable Marine Ins. Co., 126 Mass. 70, 30 Am. Rep. 654; Kettell v. Wiggin, 13 Mass. 68; Natchez Ins. Co. v. Stanton, 2 Smedes & M. (Miss.) 340, 41 Am. Dec. 592; Wilkins v. Tobacco Ins. Co., 30 Ohio St. 317, 27 Am. Rep. 455; Hearn v. New England Mut. Marine Ins. Co., 20 Wall. (U. S.) 488, 22 L. ed. 395.

[13] 1 Arnould Mar. Ins. (6th ed.) 451.

is a breach of the agreement, and the underwriter's liability is at an end.[14] Nor need the subsequent loss be shown to be due to the deviation.[15]

§ 4467. Implied warranties — Illegality — General statement.—There is also in every contract of marine insurance an implied agreement that the adventure is lawful in its nature, and that it will be carried on in a manner and by means which are in accordance with law.

§ 4468. Violation of war policy of state.—During a maritime war each belligerent is permitted by the laws of war to decrease the strength and wealth of the enemy by destroying its sea commerce and the property of individual citizens as well as that belonging to the government. This being the war policy of the state, it is illegal for any citizen to enter into any contract of insurance upon the property of the enemy which would protect the owner from loss in the event of its capture. All such contracts with alien enemies are void. When entered into before the beginning of the war there can be no recovery for a loss which occurred during the war, but if the loss also occurs before the commencement of the war, the right of action is merely suspended until after the restoration of peace.[16]

It is settled that all trading with the enemy without a license, except by one domiciled in the enemy's country,[17] is illegal, and insurance effected to protect such trading is therefore void.[18] Insurance may, however, be effected on goods sent to a neutral port to be delivered to a neutral, although the port is in fact in the possession of the military forces of the enemy. For this purpose the port is considered as neutral so long as the administration of the civil power is still in the hands of the neutral authorities.[19] This

[14] 1 Arnould Mar. Ins. (6th ed.) 451; Hartley v. Buggin, 3 Doug. 40.

[15] Lord Campbell in Thompson v. Hopper, 27 L. J. Q. B. 441, 6 El. Bl. & El. 1038; Hartley v. Buggin, 3 Doug. 39; Davis v. Garrett, 6 Bing. 716, and cases cited, note 12, supra.

[16] Flindt v. Waters, 15 East 260; Furtado v. Rogers, 3 Bos. & P. 191, 14 Eng. Rul. Cas. 125.

[17] Taylor Ins. Law, § 465. As to the effect of war on contracts see vol. 1, § 265. See also, Bell v. Buller, 1 M. & S. 726.

[18] Potts v. Bell, 8 Term Rep. 548, overruling Bell v. Gilson, 1 B. & P. 345.

[19] Hagedorn v. Bell, 1 M. & S. 451, 459, 14 Rev. Rep. 497. See also, Donaldson v. Thompson, 1 Camp. 429; Muller v. Thompson, 2 Camp. 610;

is true where there is naked military possession, but when the conqueror has seized the port and is exercising all the powers of civil government, the port is no longer to be treated as neutral.[20] A port will be treated as neutral by the courts so long as it is so regarded by the executive power of the government to which the court belongs.[21]

§ 4469. **Neutrality—Contraband—Blockade.**—There is an implied warranty in every contract of marine insurance that in the conduct of the voyage the vessel will not violate the neutral duty of the state toward either belligerent. These duties are determined by international law and municipal statutes, such as the neutrality acts of the United States and Great Britain. As the violation of these neutral duties may subject the ship to seizure and confiscation, the risk of loss is thereby greatly increased, and one of the conditions of the contract is thereby broken, and the underwriter is released from liability.

It is universally admitted that a neutral must not furnish either belligerent with those stores and articles which are directly adapted to warlike purposes, and which are known as contraband of war.[22]

Contraband articles are infectious and contaminate the whole cargo as well as the ship when it also belongs to the owner of the contraband goods. Where the contraband goods do not belong to the ship owner, and there is no fraud on his part for the purpose of protecting the contraband articles, the ship owner loses only the freight and his expense charges.[23] While the carrying of contraband goods to a belligerent is not unlawful, yet the belligerent has the admitted right to capture the same. The rights are coexistent, and therefore insurance by a neutral upon contraband

Bromley v. Hasseltine, 1 Camp. 75, and comment thereon in 1 Duer Mar. Ins. 486.

[20] Bentzon v. Boyle, 9 Cranch (U. S.) 191.

[21] Johnson v. Greaves, 2 Taunt. 344.

[22] As to what are such articles, see Grotius De Jure Belli, lib. iii, c. 1; s. v, § 1. That goods contraband in their nature are subject to seizure while on the way nominally to a neutral port, but really used as a cover to aid in forwarding them to the belligerent, see The Springbok, 5 Wall. (U. S.) 1, and an article on "The Doctrine of Continuous Voyages," 13 Yale Law Journal 289, where the authorities are cited and reviewed. See also, Hall Int. Law, Pt. IV, Ch. V. See article by Dr. C. N. Gregory, Yale Law Journal, April, 1903.

[23] The Mercurius, 1 C. Rob. Adm. 288, and note.

goods and the ship in which they are to be carried is legal when effected in a neutral country, and the underwriter is liable provided the nature of the trade was disclosed to him, or the circumstances were such as to raise a presumption that he had such knowledge. An implied warranty against such breach of neutrality exists where the intention to violate the laws of neutrality is thus concealed from the underwriter.[24]

A violation of the law of blockade subjects both the ship and the cargo to confiscation.[25] As in the case of carrying contraband goods for the use of a belligerent, an attempt by a neutral to trade with a blockaded port is not illegal on the part of the neutral, and he simply takes his chances of capture by the belligerent in the exercise of his belligerent rights. He may insure the adventure in a neutral country, but there is always an implied agreement that he will not engage in so perilous an enterprise without the knowledge of the insurer, so that the insurer may determine whether he will assume such a risk, and if so, at what rate of premium.[26]

§ 4470. Violation of revenue laws and foreign statutes.— Contracts of marine insurance contain an implied warranty that the ship will not violate any of the revenue[27] or navigation laws,[28]

[24] Kent's Com. (14th ed.) 267; Elton v. Larkins, 5 Car. & P. 385. See Skidmore & Skidmore v. Desdoity, 2 Johns. Cas. (N. Y.) 77; The Santissima Trinidad, 7 Wheat. (U. S.) 283, 5 L. ed. 454. But this may be controlled by the language of the policy.

[25] As to blockade, see Taylor Int. Law, Pt. V, Ch. VII; Lawrence Int. Law, Pt. IV, Ch. V.

[26] In Robinson Gold Mining Co. v. Alliance &c. Assur. Co., 73 L. J. K. B. 898, L. R. (1904) App. Cas. 359, 91 L. T. 202, the insurer was held not liable under a policy containing an express warranty by the insured against "capture, seizure and detention and the consequences thereof," where gold consigned by a company in the late South African Republic to Europe was requisitioned on the eve of war by the Republic although no resistance was made and the gold was surrendered and a receipt given.

[27] 3 Kent's Com. (14th ed.) 262; 1 Emerigon, ch. VIII, § 5; 2 Arnould Mar. Ins. (6th ed.) 692.

[28] If the adventure can be carried on without violating the law, the policy is not invalidated by an illegal act on the part of the master or crew without the consent of the insured. Waugh v. Morris, L. R. 8 Q. B. 202; Wilson v. Rankin, L. R. (1865) 1 Q. B. 162 (sailing without proper clearance papers); Dudgeon v. Pembroke, L. R. 2 App. Cas. 284, 3 Asp. Mar. Cas. 323 (illegally carrying passengers).

or commercial treaties,[29] or embargo[30] statutes of the state in which the insured is domiciled. No court will lend its aid to carry into effect a contract which violates the laws which it is its duty to administer. It is equally well settled that the courts of one country are under no obligation to enforce the laws of another, and Lord Mansfield's decision that a policy is not invalidated because the property covered by it is used in violation of the revenue laws of a foreign state[31] has been very generally accepted by the courts.[32]

§ 4471. **Proper documents.**—There is likewise an implied warranty in every marine policy taken out by a ship owner that the ship in the course of the voyage, and at the time of its capture, shall have on board all such documents as are regarded by international law as necessary to prove her national character and thus protect her from capture and condemnation for want thereof. But a failure to comply with this condition will discharge the underwriter only when the sentence of the foreign prize court shows that the condemnation proceedings were based upon the absence of such papers.[33] Arnould says that, in order to release the insurer,[34] (1) it must appear from the holding of the foreign sentence taken altogether that it proceeded in part or in whole on a want of such documents;[35] (2) the condition extends to such

[29] Wilson v. Marryat, 8 Dunford & East (T. R.) 31; Bird v. Appleton, 8 Dunford & East (T. R.) 562; The Eenrom, 2 C. Rob. 1, 6. See note Arnould Mar. Ins., vol. 2 (7th ed.) 697.

[30] Delmoda v. Motteaux, 1 Park Ins. 505; Odlin v. Insurance Co. of Pennsylvania, 2 Wash. (U. S.) 312.

[31] Lever v. Fletcher, Parke Insurance (8th ed.) 507; Planche v. Fletcher, 1 Doug. 253. "One nation does not take notice of the revenue laws of another." Decrow v. Waldo Ins. Co., 43 Maine 460; Parker v. Jones, 13 Mass. 173; Skidmore & Skidmore v. Desdoity, 2 Johns. Cas. (N. Y.) 77 (insurance "against all risks" covers contraband of war). See Richardson v. Maine Fire &c. Ins. Co., 6 Mass. 102, 4 Am. Dec. 92.

[32] As to the policy of encouraging or not encouraging violation of revenue laws of other countries, see 1 Marshall Ins. 55; 3 Kent Com. (14th ed.) 263, 265; Story Conflict of Laws, § 256; Story Agency (9th ed.), § 195; 2 Arnould Ins. (6th ed.) 693.

[33] Price v. Bell, 1 East 663; Christie v. Secretan, 8 D. & E. 197 (is required to be seaworthy). In Elting v. Scott, 2 Johns. (N. Y.) 157, Kent, C. J., held the possession of certain designated papers is not necessary to constitute seaworthiness, and that the requirements stand upon another foundation. See Ballantyne v. Mackinnon, L. R. (1896) 2 Q. B. 455; Cleveland v. Union Ins. Co., 8 Mass. 308; Nelson v. Suffolk Ins. Co., 8 Cush. (Mass.) 477, 54 Am. Dec. 770.

[34] 2 Arnould Mar. Ins. (6th ed.) 681.

[35] Bell v. Carstairs, 14 East 374; Bell v. Bromfield, 15 East 364; Steel v. Lacy, 3 Taunt. 285.

papers only as are required by international law or existing treaties; (3) the warranty exists only when the insurance is effected for the ship owner and not for the owner of the goods.[36]

[36] Carruthers v. Gray, 3 Camp. 142; Hobbs v. Henning, 17 C. B. (N. S.) 791, 34 L. J. C. P. 117. As to the effect of carrying simulated papers, see Horneyer v. Lushington, 15 East 46; Oswell v. Vigney, 15 East 70.

CHAPTER CXXXIII.

MARINE INSURANCE—PERILS AND RISKS.

§ 4475. Enumeration in the policy.
4476. Perils of the sea.
4477. Foundering at sea.
4478. Stranding.
4479. Collision.
4480. Shipwreck.
4481. Salvage.
4482. Loss by fire.
4483. Loss by thieves.
4484. Capture and seizure—Taking at sea.
§ 4485. Arrest—Restraint—Detention.
4486. Barratry.
4487. "All other perils, losses and misfortunes," etc.
4488. Proximate cause of loss.
4489. Negligence—Misconduct.
4490. The sue and labor clause.
4491. Excluded risks and limitations upon liability.

§ 4475. **Enumeration in the policy.**—A form of marine policy prescribed by statute in England and in common use in the United States, contains the following enumeration of risks or perils against which the insurer undertakes to indemnify the insured: "Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage: they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandise, and ship, etc., or any part thereof."

The policy also generally contains an express provision limiting the liability of the underwriter to losses occasioned by these risks only when they occur at certain times and places.[1]

§ 4476. **Perils of the sea.**—Under this head fall all marine casualties, and damage to the ship or cargo or other interest in-

[1] 6 Edw. 7 (1906), ch. 41, p. 238; St. Paul Fire & Marine Ins. Co. v. Knickerbocker Steam Towage Co., 93 Fed. 931, 36 C. C. A. 19; see Huntley v. Providence Washington Ins. Co., 77 App. Div. N. Y. 196, 79 N. Y.

sured which are occasioned by the violent and immediate action of the wind and waves,[2] not included in the ordinary wear and tear of the voyage or directly referable to acts of negligence of the assured as the proximate cause.[3]

§ 4477. Foundering at sea.—Foundering is one of the common perils of the sea. When a ship disappears with all on board, or after it has been abandoned and lost sight of by the crew, and is not heard of for a reasonable time, it is presumed that it has foundered at sea. In France the period is fixed by the Code of Commerce at one and two years, depending upon the time ordinarily required to make the contemplated voyage, but in England and the United States it is left to be determined in each case as circumstances seem to require. Where a ship sailed on a voyage which ordinarily took seven weeks and was not heard of at the end of nine weeks, it was held that she had foundered at sea.[4] It must, of course, be proven that the ship sailed from the port

S. 35 (liability for damage occasioned by ice, "except when the vessel is lying between piers").

[2] The perils must be connected with navigation. Thames &c. Ins. Co. v. Hamilton, L. R. 12 App. Cas. 484.

[3] Lush, J., in Merchants' Trading Co. v. Universal Mar. Ins. Co., quoted in Dudgeon v. Pembroke, L. R. 9 Q. B. 581, 596; Hagedorn v. Whitmore, 1 Stark 157; Covington v. Roberts, 2 Bos. & P. (N. R.) 378; Montoya v. London Assurance Co., 6 Exch. 451, 20 L. J. Exch. 354 (cargo injured by sea water); Rohl v. Parr, 1 Esp. 445 (bottom eaten by worms). See also, Baker v. Manufacturers' Ins. Co., 12 Gray (Mass.) 603; Cory v. Bolyston Fire & Marine Ins. Co., 107 Mass. 140, 9 Am. Rep. 14; Fleming v. Marine Insurance Co., 3 Watts & S. (Pa.) 144, 38 Am. Dec. 747 (injury by sea water due to bad storage); Hazard v. New England Marine Ins. Co., 8 Pet. (U. S.) 557, 8 L. ed. 1043, reversing 1 Sumn. (U. S.) 218, Fed. Cas. No. 6282. "I think the idea of something fortuitous and unexpected is involved in both words, 'peril' and 'accident;' you could not speak of the danger of a ship's decay; you would know that it must decay, and the destruction of the ship's bottom by vermin is assumed to be one of the natural and certain effects of an unprotected wooden vessel sailing through certain seas." Lord Halsbury, L. C., in Hamilton v. Pandorf, 12 App. Cas. 518. See also, language of Lord Herschell, in the Xantho, 12 App. Cas. 503; Ajum Goolam Hossen v. Union Marine Ins. Co., 70 L. J. P. C. 34. See elaborate note on dangers of the sea in 41 Am. Dec. 279 (Van Hern v. Taylor, 7 Rob. (La.) 201). An injury to cotton by being thrown into water by the sudden careening of a steamboat is by a "peril of the river," although the careening was due to the negligence of the crew. Crescent Ins. Co. v. Vicksburg Y. & S. R. Packet Co., 69 Miss. 208, 13 So. 254, 30 Am. St. 537. "Perils of the seas, canals, rivers, etc.," covers the loss of a canal boat which grounded and sank after reaching its destination at tide water. Petrie v. Phenix Ins. Co., 132 N. Y. 137, 30 N. E. 380. See also, Protection Ins. Co. v. Wilson, 6 Ohio St. 553.

[4] Green v. Brown, 2 Str. 1199. In this case the vessel was not heard of for four years after sailing from North Carolina to London.

of departure on the voyage insured.[5] "The fact of her never having arrived there, supposing a reasonable time for such arrival to have elapsed before the action brought, coupled with the prevalence of a rumor at her port of departure that she had foundered at sea, will be sufficient prima facie evidence of a loss by the perils of the sea."[6]

§ 4478. Stranding.—The stranding of the ship is one of the perils of the sea, but the insurer is liable only where it is the result of fortuitous or accidental circumstances.[7] A ship may be expected, in the ordinary course of events, to occasionally strike or rest upon the bottom of a harbor when the tide is out, and the insurer is not liable therefor under such circumstances or the like where there is nothing unusual or extraordinary.[8] But where a vessel was resting upon the ground, and upon the return of the tide an unusual ground swell set into the harbor, and caused the ship to strike ground several times, the underwriter was held liable for the result of the ground swell, which was treated as a causus fortuitus.[9]

Injuries resulting while making repairs are not included within the perils of the sea.[10]

[5] Cohen v. Hinckley, 2 Camp. 51.

[6] Arnould Mar. Ins. (6th ed.) 746; Koster v. Reed, 6 B. & Cr. 19, 14 Eng. Rul. Cas. 358, 30 Rev. Rep. 239; Paddock v. Franklin, 11 Pick. (Mass.) 227.

[7] Hahn v. Corbett, 2 Bing. 205. In this case the insurance was upon goods warranted free from capture and seizure. The ship was stranded on a shoal, and while she lay in a disabled condition she was seized and confiscated by people from the shore. It was held that the loss was due to a peril of the sea, distinguished from Livie v. Jansen, 10 East 648, and Green v. Elmslie, Peake 278; Corcoran v. Gurney, 1 El. & Bl. 456; Potter v. Suffolk Ins. Co., 2 Sumn. (U. S.) 197, Fed. Cas. No. 11339. To constitute a stranding within the policy, the vessel must be on the strand under extraordinary circumstances. Fireman's Ins. Co. v. Powell, 13 B. Mon. (Ky.) 311. See Lewis v. Ætna Ins. Co., 123 Fed. 157, affd. 129 Fed. 1006, 64 C. C. A. 210; Ferguson v. Prov. Wash. Ins. Co., 125 Fed. 141, affd. 137 Fed. 1018, 70 C. C. A. 62 (construction of policy); Hager v. New England Marine Ins. Co., 59 Maine 460. See also, Bishop v. Pentland, 7 Barn. & C. 214.

[8] 3 Elliott Ev., § 2445; Magnus v. Buttermere, 11 C. B. 876, 21 L. J. C. P. 119; Firemen's Ins. Co. v. Powell, 13 B. Mon. (Ky.) 311. See also, Lake v. Columbus Ins. Co., 13 Ohio 48, 42 Am. Dec. 188.

[9] Fletcher v. Inglis, 2 B. & Ald. 315. This case is criticised in 2 Arnould Marine Ins. (6th ed.), p. 749, on the theory that the circumstances were such as might have been expected in such a harbor.

[10] Thompson v. Whitmore, 3 Taunt. 227 (The ship was hove down on a beach within the tideway to be repaired, and thereby bilged and damaged. It was held not a loss by one of the perils of the sea). So damage caused a lighter in New York

§ 4479. Collision.—A collision is one of the perils of the sea covered by the ordinary marine policy.[11] In the strict sense of the word, a collision is the striking of one vessel against another,[12] but it is probable that usage has so extended its significance that it will now be understood to include the striking of a vessel against any sunken or floating object.[13] A ship includes its appurtenances. Thus, where a tug collided with an anchor lying in the bed of a river attached to the bow of a vessel by twenty or thirty fathoms of chain, it was held that the anchor, under these circumstances, was a part of the ship.[14]

Vessels may be in collision although but one of them is in motion, while the other is at a wharf fully loaded and ready to proceed upon her voyage.[15] But where the policy is against "any accident caused by collision," the words, although they may be construed to apply to the impact with floating objects, refer only to accidental or chance collisions, and do not include injuries

harbor caused by explosion of dynamite which was being loaded on another vessel from a pier nearby, has been held not "a peril of the harbor." Listers Agricultural &c. Works v. Home Ins. Co., 202 Fed. 1011.

[11] Xenos v. Fox, L. R. 4 C. P. 665; Nelson v. Suffolk Ins. Co., 8 Cush. (Mass.) 477, 54 Am. Dec. 770; Street v. Augusta Ins. & Banking Co., 12 Rich. L. (S. Car.) 13, 75 Am. Dec. 714; Peters v. Warren Ins. Co., 14 Pet. (U. S.) 99, 10 L. ed. 370; Liverpool & G. W. S. Co. v. Phenix Ins. Co., 128 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. 469. As to the effect of the decree of a foreign court, see New England Mut. Ins. Co. v. Dunham, 3 Cliff. (U. S.) 332, Fed. Cas. No. 10155. As to the construction of provision for liability for collision "with any object," see Reischer v. Borwick, 2 Q. B. 548, 63 L. J. Q. B. 753. With piers, stages or similar structures, Union Mar. Ins. Co. v. Borwick, 2 Q. B. 279, 15 Rep. 546. For detention resulting from collision, Shelbourne v. Law Investment Co., 67 L. J. Q. B. 944. As to the right and liabilities of owners and masters in cases of collision, see Lord Stowell's decision in The Woodrop-Sims, 2 Dod. Adm. 85.

[12] Chandler v. Blogg, 67 L. J. Q. B. 336; Reischer v. Borwick, 63 L. J. Q. B. 753, 9 Rep. 588; Union Marine Insurance Co. v. Borwick, L. R. (1895) 2 Q. B. 279; Hough v. Head, 55 L. J. Q. B. 43. These cases are cited with approval in Cline v. Western Assur. Co., 101 Va. 496, 44 S. E. 700, where it was held that, as used in a policy which excepted from the risks assumed, "Loss or damage caused by the bursting or collapsing of the boiler or boilers, or the breaking of machinery, unless caused by stress of weather, stranding, burning or collision," the word "collision" meant the act of ships or vessels striking together, and did not include a striking upon some object floating in the water.

[13] Spencer Mar. Collisions, § 10; New Town Creek Towing Co. v. Ætna Ins. Co., 163 N. Y. 114, 57 N. E. 302.

[14] In re Margetts & Ocean Accident Corporation, 70 L. J. K. B. 762. See The Niobe, 70 L. J. P. 1.

[15] London Assur. v. Companhia De Moagens Do Barreiro, 167 U. S. 149, 42 L. ed. 113, 17 Sup. Ct. 785.

caused by a deliberate attempt to force the vessel through a field of ice.[16]

The underwriter is, under the common form of policy against perils of the sea, liable for any damage to the ship or other property insured, whether it be the result of inevitable accident, negligence of the other vessel, negligence of the insured vessel, or where both are at fault and the amount of damage is apportioned between the ships.[17] In the latter case the amount which the insured ship has to pay is a particular average loss for which the insurer is liable.[18] But when the insurance is against the perils of the sea, including barratry, the underwriter is not liable to repay to the insured the damages paid by him to the owner of another vessel and cargo, suffered in a collision caused solely by the negligence of the master or crew of the insured ship.[19] In Massachusetts damages of this character are recoverable.[20]

It is not uncommon to find attached to policies a special clause providing that under such circumstances the insurer "will contribute toward the payment of three-fourths part of the total amount of such damage, in the proportion that the sum insured under this policy bears to the total value of the vessel stated herein, provided that the company shall not, in any event, be held

[16] New Town Creek Towing Co. v. Ætna Ins. Co., 163 N. Y. 114, 57 N. E. 302.

[17] 2 Arnould Mar. Ins. (6th ed.) 757; 2 Phillip's Ins. (5th ed.), § 1477; Buller v. Fischer, 3 Esp. 67; Smith v. Scott, 4 Taunt. 126; Patterson v. Continental Ins. Co., 18 U. C. Q. B. 9. See also, Caldwell v. St. Louis Perpetual Ins. Co., 1 La. Ann. 85; Liverpool & G. W. S. Co. v. Phenix Ins. Co., 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. 469; Peters v. Warren Ins. Co., 14 Pet. (U. S.) 99, 10 L. ed. 370, affirming 3 Sumn. (U. S.) 389.

[18] Stoomvaart Maatschappy Nederland v. Peninsular &c. Co., 7 App. Cas. 795; London Steamship Owners' Ins. Co. v. Grampian Steamship Co., 24 Q. B. Div. 663. Arnould says that in England "the sum of the damage sustained by both ships is equally divided, then any excess over the loss sustained by the insured ship is held not to be recoverable from the underwriter as a loss by perils of the sea." 2 Arnould Mar. Ins. (6th ed.) 759; De Vaux v. Salvador, 4 A. & E. 420.

[19] Matthews v. Howard Ins. Co., 11 N. Y. 9, revg. 13 Barb. (N. Y.) 234; General Mut. Ins. Co. v. Sherwood, 14 How. (U. S.) 351, 14 L. ed. 452, affg. 1 Blatchf. (U. S.) 251, and overruling Hale v. Washington Ins. Co., 2 Story (U. S.) 176, Fed. Cas. No. 5916, citing De Vaux v. Salvador, 4 A. & E. 420, 14 Eng. Rul. Cas. 305, and numerous foreign authorities. But see, Ferguson v. Provident &c. Ins. Co., 125 Fed. 141, affd. in 137 Fed. 1018, 70 C. C. A. 62. And compare Chapman v. Fisher, 20 T. L. R. (1904) 319.

[20] Nelson v. Suffolk Ins. Co., 8 Cush. (Mass.) 477, 54 Am. Dec. 770; Thwing v. Great Western Ins. Co., 111 Mass. 93; Whorf v. Equitable Marine Ins. Co., 144 Mass. 68, 10 N. E. 513.

liable under this agreement for a greater sum than three-fourths part of the amount insured under this policy." The same clause generally provides that the insurer shall not be liable for the costs and expenses incurred in contesting the liability, or for damages for injuries suffered by individuals, or for wages, provisions or expenses of the master, officers or crews.[21] But where a policy provided that the underwriter should be liable "to fully indemnify the assured for loss and damage arising from or growing out of any accident caused by collision, * * * for which said steam tug or its owners may be legally liable," it was held that the insured could recover the costs incurred in an unsuccessful defense against such a claim.[22]

§ 4480. Shipwreck.—When a ship is driven ashore or cast upon some rock in mid-ocean and wrecked, the insurer is liable for the loss thus caused by one of the perils of the sea. The immediate and necessary consequences of the wreck are attributable to the same cause. Thus where, after the ship ran on the rocks, a part of the cargo was landed and placed in the hands of a consul who afterward charged it with certain expenses incurred in attempting to save the ship and the balance of the cargo, it was held a loss which came within the perils of the sea.[23]

§ 4481. Salvage.—Salvage is a general term describing the property which is abandoned after a loss, and also the services performed by outside parties in recovering the property from a marine peril, and the compensation claimed therefor.[24] Salvage losses and expenses are directly within the contract of insurance against sea perils.[25]

[21] Taylor v. Dewar, 10 Jur. (N. S.) 361.

[22] Xenos v. Fox, L. R. 4 C. P. 665. See Burger v. Indemnity &c. Assur. Co., 69 L. J. Q. B. 838; Egbert v. St. Paul Fire & Marine Ins. Co., 92 Fed. 517.

[23] Dent v. Smith, L. R. 4 Q. B. 414.

[24] Ballantyne v. Mackinnon, 65 L. J. Q. B. 395; Lord Russell said: "The liability of an insurer to pay salvage does not rest upon any express or implied contract to pay for salvage expenses as such, but upon the principle that, where such expenses are incurred as the direct and unavoidable consequence of a peril against which he has insured, they are to be treated as an average loss under the policy." International Nav. Co. v. Atlantic Mut. Ins. Co., 108 Fed. 987, 48 C. C. A. 181.

[25] Aitchison v. Lahre, L. R. 4 App. Cas. 755; International Nav. Co. v. Atlantic Mut. Ins. Co., 100 Fed. 304, affd. 108 Fed. 987, 48 C. C. A. 181. See Nourse v. Liverpool Sailing Ship &c. Assn., 2 Q. B. 16. Insurer aid-

§ 4482. Loss by fire.—The form of policy enumerates fire as one of the perils which the assurers are content to bear. Where the insurance is against a fire hazard only, and the vessel is still unfinished and not afloat, the contract is an ordinary fire risk.[26] In the ordinary marine policy the underwriter is liable for a loss by fire, when caused by lightning, or the enemy, or when resorted to for the purpose of preventing capture,[27] or by collision,[28] or any other cause not expressly excepted, such as the bursting of a boiler,[29] and not due to an inherent vice of the property, as by spontaneous combustion due to the inherent quality of the goods,[30] or to the wilful acts of the insured or his agents.[31]

"It was for a long time a vexed question," says Arnould,[32] "whether the underwriters, under a policy in the common form,

ing vessel in distress in own interest is held not entitled to salvage reward in The Lydia A. Harvey, 84 Fed. 1000.

[26] Detroit v. Grummond, 121 Fed. 963, 58 C. C. A. 301 (policy on ship while lying moored and in use as a hospital); The Richard Winslow, 71 Fed. 426, 18 C. C. A. 344; Eureka Ins. Co. v. Robinson, 56 Pa. St. 256, 94 Am. Dec. 65 (policy on unfinished steamer at a landing). Issuing ordinary fire insurance policies on boats navigating the great lakes is marine insurance within the meaning of §§ 27, 29, ch. 175, Laws Minn. 1895; Dwinnell v. Minneapolis &c. Ins. Co., 90 Minn. 383, 97 N. W. 110. As to when a ship is "burnt," see The Glenlivet, 6 Rep. 665. As to loss of freight due to imminent danger of fire, see The Knight of St. Michael, L. R. (1898) Prob. Div. 30.

[27] Gordon v. Rimmington, 1 Camp. 122. The ship, being chased by an enemy, was set on fire and abandoned by the crew. Lord Ellenborough said: "Fire is expressly mentioned in the policy, as one of the perils against which the underwriters undertake to indemnify the assured; and if the ship is destroyed by fire, it is of no consequence whether this is occasioned by a common accident, or by lightning, or by act done in duty to the state. Nor can it make any difference whether the ship is thus destroyed by third persons, subjects of the king, or by the captain and crew acting with loyalty and good faith. Fire is still the causa causans, and the loss is covered by the policy."

[28] The insurers against fire are responsible for a loss occasioned by the sinking of a vessel insured when caused by fire, although the fire itself is the result of a collision not insured against, if the effect of the collision without the fire would have been only to cause the vessel to settle to her upper deck, and she could have been saved from further injury. Howard Fire Ins. Co. v. Norwich & N. Y. Transp. Co., 12 Wall. (U. S.) 194, 20 L. ed. 378, affg. 34 Conn. 561; Germania Ins. Co. v. Sherlock, 25 Ohio St. 33. (In this case collision was not excepted.)

[29] See Louisville Underwriters v. Durland, 123 Ind. 544, 24 N. E. 221, 7 L. R. A. 399.

[30] Boyd v. Dubois, 3 Camp. 133 (hemp loaded in a condition liable to effervesce); Providence Washington Ins. Co. v. Adler, 65 Md. 162, 4 Atl. 121, 57 Am. Rep. 314. As to whether the apprehension of disease will justify the burning of the ship, see Gow Mar. Ins. 102.

[31] Louisville Underwriters v. Durland, 123 Ind. 544, 24 N. E. 221, 7 L. R. A. 399.

[32] Arnould Ins. (6th ed.) 760.

were liable for a loss proximately caused by fire, but remotely occasioned by the negligence of the master and crew or other agents of the assured. This question in our law is now settled in the affirmative."[33] After some fluctuations in the decisions, the law in the United States seems now to be settled in the same way.[34] Articles, such as fittings and tackle taken out of the ship temporarily and stored on shore, while the ship is undergoing repairs, are covered by the policy.[35] But, of course, articles which have never been attached to the vessel, although constructed for that purpose, are not covered by the policy.[36]

§ 4483. Loss by thieves.—The English courts so construe the provision of the policy which makes the underwriter liable for a loss caused by the depredations of thieves as to make it apply only to external thieves; that is, to the acts of assailing parties other than passengers, or members of the crew.[37] This rule met with the approval of Chancellor Kent,[38] and has been adopted by the Supreme Court of Tennessee.[39] Chancellor Walworth held that the provision covered a loss caused by thieves who were in no way connected with the ship, whether by simple larceny, or by open violence, and suggested that it would cover a loss caused by a simple theft by a passenger on the ship.[40] And this is probably supported by the weight of authority, as it was subsequently approved by the Court of Appeals of New York, which held that the provision covered theft by a member of the crew, or by passengers.[41]

[33] Busk v. Royal Exch. Assur., 2 B. & Ald. 73, 14 Eng. Rul. Cas. 332.

[34] Patapsco Insurance Co. v. Coulter, 3 Pet. (U. S.) 222, 7 L. ed. 659; Columbia Insurance Co. v. Lawrence, 10 Pet. (U. S.) 507, 9 L. ed. 512; Waters v. Merchants' Ins. Co., 11 Pet. (U. S.) 213, 9 L. ed. 691, 3 Kent's Com. (14th ed.) 304.

[35] Pelly v. Royal Exchange Assurance Co., 1 Burr. 341. The rigging had been stowed on shore according to the usage of the China trade.

[36] Mason v. Franklin Insurance Co., 12 Gill & J. (Md.) 468.

[37] Hartford v. Maynard, 1 Parke Ins. 36; Steinman v. Angier Line, 1 Q. B. 619; Taylor v. Liverpool &c. Ins. Co., L. R. 9 Q. B. 546. See also, King v. Shepherd, 3 Story (U. S.) 349, Fed Cas. No. 7804.

[38] 3 Kent's Com. (14th ed.) 303, and note.

[39] Marshall v. Nashville Ins. Co., 1 Humph. (Tenn.) 99.

[40] Atlantic Ins. Co. v. Storrow, 5 Paige (N. Y.) 285; American Ins. Co. v. Bryan, 26 Wend. (N. Y.) 563, 1 Hill (N. Y.) 25, 37 Am. Dec. 278. The plunder of shipwrecked goods by wreckers on shore is a peril of the sea. Bondrett v. Hentigg, Holt 149.

[41] Spinetti v. Atlas Steamship Co., 80 N. Y. 71, 36 Am. Rep. 579.

§ 4484. Capture and seizure—Taking at sea.—Capture as distinguished from arrest, restraint or detention, is the taking, lawfully or unlawfully, by the enemy as a prize in time of war, or by way of reprisals, with the intent to deprive the owner of all dominion over or right of property in the thing so taken.[42] Seizure is a somewhat broader term, and includes the taking of a vessel by the revenue officers of another state.[43]

There is always an implied exception against liability for capture during existing or future hostilities between the countries of the insured and the insurer.[44] But a policy which in general terms covers the risk of capture and seizure, protects against all other belligerent capture, even where the war has commenced after the policy is effected.[45]

An exception is occasionally made against seizures "in port." The underwriter in such a policy is liable for a seizure made outside of the limits thus determined.[46] The word "port" in this connection signifies the opposite of "high sea," and does not include the open road beyond the mouth of the harbor.[47] There is no objection on the ground of legality to insurance upon a ship or goods embarked in an adventure which is contrary to the municipal laws of another state, but the nature of the proposed venture must be disclosed to the insurer, or he will not be liable for a loss occasioned thereby. The words "taking at sea" cover a taking by the government of the parties,[48] and the underwriter is

[42] 2 Arnould Mar. Ins. (6th ed.) 765; Cory v. Burr, 8 App. Cas. 393; Powell v. Hyde, 5 E. & B. 607 (lawfully or unlawfully); Greene v. Pac. Mut. Insurance Co., 9 Allen (Mass.) 217 (Seizure does not include the taking of the ship by a mutinous crew.).

[43] Cory v. Burr, 8 App. Cas. 393. Compare Robinson Gold Mining Co. v. Alliance &c. Assur. Co., 73 L. J. K. B. 898, L. R. (1904) App. Cas. 359, 91 L. T. 202.

[44] Ex parte Lee, 13 Ves. 64. That an insurance against capture upon enemy's property is invalid, was first held in Furtado v. Rogers, 3 B. & P. 191.

[45] Barnewall v. Church, 1 Caines (N. Y.) 217, 2 Am. Dec. 180; Saltus v. United Ins. Co., 15 Johns. (N. Y.) 523; Hodgson v. Marine Ins. Co. of Alexandria, 5 Cranch (U. S.) 100, 3 L. ed. 48; Buck v. Chesapeake Ins. Co., 1 Pet. (U. S.) 151, 7 L. ed. 90. If, after the commencement of the voyage insured, a war breaks out between the country to which the property belongs and a foreign country, the policy is not vacated, and the insurers are liable for a loss arising out of the war. Richardson v. Maine Fire Ins. Co., 6 Mass. 102, 4 Am. Dec. 92.

[46] Baring v. Vaux, 2 Camp. 541.

[47] Levy v. Vaughan, 4 Taunt. 387; Reyner v. Pearson, 4 Taunt. 663; Watson v. Marine Ins. Co., 7 Johns. (N. Y.) 57.

[48] Lozano v. Jansen, 2 El. & El. 160.

thus liable whether the capture is legal or illegal, and whether made by a belligerent in a lawful war, or by other parties having no connection with the ship.[49]

There may be a recovery where the capture is the proximate cause of the loss, although other causes may have contributed, as where the ship was driven ashore with slight damage and there captured.[50] Apart from the question of abandonment the underwriter is liable for any damage the ship may actually have sustained, and also for all necessary expenses, such as salvage, etc., which the assured has been put to, for the recovery of his property; for instance, for a sum of money paid by a neutral assured to belligerent captors in a compromise, bona fide made, to prevent the ship from being condemned as a prize.[51] But under the English law money paid for the ransom of a ship cannot be recovered from the underwriters.[52]

§ 4485. Arrest — Restraint — Detention. — The ordinary clause insuring against loss caused by "arrests, restraints, and detainments, of all kings, princes and people of what nation, condition or quality soever," refers to the acts of a state, and does not indemnify against the acts of a mob. The word "people," as here used, refers to a ruling power.[53] The clause refers to extraordinary acts done during a time of war, or threatened war, under the authority of some sovereign power, and does not include such as are occasioned by ordinary legal proceedings for the enforcement of municipal laws and rights thereunder.[54]

[49] Goss v. Withers, 2 Burr. 683, per Ld. Mansfield; Powell v. Hyde, 5 El. & Bl. 607, 25 L. J. Q. B. 65; Kleinwort v. Shepard, 1 El. & El. 447, 28 L. J. Q. B. 147 (seizure by Chinese emigrants on board); Dean v. Hornby, 3 El. & Bl. 180, 23 L. J. Q. B. 129; Swinnerton v. Columbian Ins. Co., 37 N. Y. 174, 93 Am. Dec. 560; Fifield v. Pennsylvania Ins. Co., 47 Pa. St. 166, 86 Am. Dec. 523 (covers capture by privateers); Mauran v. Lyons Ins. Co., 6 Wall. (U. S.) 1, 18 L. ed. 836 (taking by Confederates after fall of the Confederacy).

[50] Green v. Elmslie, 1 Peake 278; Livie v. Janson, 10 East 648.

[51] Berens v. Rucker, 1 W. Bl. 313.

[52] Havelock v. Rockwood, 8 Term. Rep. 277.

[53] Nesbitt v. Lushington, 4 Term. Rep. 783; Simpson v. Charleston Fire & Marine Ins. Co., Dudley (S. Car.) 239.

[54] Finlay v. Liverpool &c. Ins. Co., 23 L. T. 251; Miller v. Law Accident Insurance Society, 71 L. J. K. B. 551; Janson v. Driefontein Consolidated Mines, 71 L. J. K. B. 857, L. R. (1902) App. Cas. 484, 87 L. T. 372, affg. 70 L. J. K. B. 881, 2 K. B. 419. See, Robinson Gold Mining Co. v. Alliance &c. Assur. Co., 71 L. J. K. B. 942, L. R. (1902), 2 K. B. 489, 86 L. T. 858.

In a capture, as we have seen, there is a forcible taking of property with the intention of depriving the owner of the same. In the cases included under the head of arrests and restraints, there is a forcible taking of temporary possession with a view of possible ultimate release or payment of value.[55] The most common instances are detentions by embargoes which prohibit the departure of vessels from port. Where a ship is thus detained by an embargo imposed by either the home or a foreign government, the assured may at once give notice of abandonment, and unless there has been a release before the action is brought, recover as though for a total loss of the vessel and cargo.[56] But the underwriter is not liable for the wages of the crew and the cost of provisions required for their support during the time of detention, as these are included within the ordinary and usual expenses of the voyage.[57]

Another instance of detention within the meaning of the policy is found where the ship is detained in port, by the declaration of a blockade after the vessel is loaded.[58] There has been considerable doubt as to the right of the insured to abandon the voyage where, after sailing, he discovered that the port of destination is blockaded. The mere interruption of trade by exclusion from the port of destination, by the establishment of a blockade, is certainly not covered by this provision unless the circumstances are such that proceeding to port would inevitably, or at least highly probably, lead to the capture and loss of the vessel.[59] Phillips, after con-

[55] Johnston v. Hogg, L. R. 10 Q. B. Div. 432; Rodocanachi v. Elliott, L. R. 8 C. P. 649.

[56] Rotch v. Edie, 6 Term. Rep. 413 (embargo by foreign government on ships of other than its own subjects); Aubert v. Gray, 3 B. & S. 163, 32 L. J. Q. B. 50 (embargo laid by sovereign of the assured), overruling Conway v. Gray, 10 East 536, and Campbell v. Innes, 4 B. & Ald. 423; Touteng v. Hubbard, 3 Bos. & P. 291 (embargo by a foreign government upon ships of its own subjects in time of peace); Green v. Young, 2 Salk. 444, note (ship seized by its own government and converted into a fire ship); Hagedorn v. Whitmore, 1 Stark. 157 (ship seized by mistake and taken in tow by a warship); Fowler v. English &c. Ins. Co., 18 C. B. (N. S.) 919; Ogden v. New York Fire Ins. Co., 10 Johns. (N. Y.) 177, affd. 12 Johns. (N. Y.) 25; Odlin v. Insurance Co. of Pennsylvania, 2 Wash. (U. S.) 312, Fed Cas. No. 10433 (embargo suspends the contract).

[57] Robertson v. Ewer, 1 Term. Rep. 127.

[58] Olivera v. Union Ins. Co., 3 Wheat. (U. S.) 183, 4 L. ed. 365.

[59] Vigers v. Ocean Ins. Co., 12 La. Ann. 362, 32 Am. Dec. 118 (prevention from entering breaks up the voyage and there may be a recovery); Patterson v. The Marine Ins. Co., 5 Har. & J. (Md.) 417;

sidering the conflicting decisions, concludes that the better doctrine is that, "Where, after the risk has begun, the voyage is inevitably defeated by a blockade, or interdiction at the port of departure, or destination, or by a hostile fleet being in the way, rendering proceeding upon it utterly impracticable, or capture or seizure so extremely probable that proceeding would be inexcusable, the risk continues till the vessel has arrived at another port of discharge adopted instead of that originally intended; and also, that the assured on the cargo has the right to abandon."[60]

In a recent English case,[61] an order of the government of the port of destination, made in accordance with the municipal laws of the country, was held to fall within the meaning of the words "arrests, restraints, and detainments of all kings, princes and peoples," but it was further held that the underwriters were exempt from liability because the policy contained a warranty against "capture, seizure and detention." The master was directed by the authorities to leave the port and land the cattle elsewhere, on the ground that they were diseased, which he did at a considerable loss. "I think also that that which occurred," said Stirling, L. J., "was none the less an act of the Government of the Argentine Republic because it was done in accordance with the laws in force in that country. It has been decided that it was a peril insured against by a policy of marine insurance in the same terms as those used in the policy in the present case when an act of intervention by the government of the country took place in enforcing the revenue laws of that country, and I do not see any vital distinction between an act of intervention for the purpose

Brewer v. Union Ins. Co., 12 Mass. 170, 7 Am. Dec. 53 (mere fear of capture no ground for abandonment); Craig v. United States Ins. Co., 6 Johns. (N. Y.) 226, 5 Am. Dec. 222 (mere fear of capture will not justify abandonment); Wilson v. United Ins. Co., 14 Johns. (N. Y.) 227 (being turned back by a blockading squadron is a loss by detention); Suydam v. Marine Ins. Co., 1 Johns. (N. Y.) 181, 3 Am. Dec. 307 (refusal of entrance to port did not create a loss under policy); Olivera v. Union Ins. Co., 3 Wheat. (U. S.) 183, 4 L. ed. 365; King v. Delaware Ins. Co., 6 Cranch (U. S.) 71, 3 L. ed. 155. In Rodocanochi v. Elliott, 28 L. T. (N. S.) 841, the goods were in course of transit through the city of Paris during the siege, and the owner was prevented from getting possession of them. Savage v. Pleasants, 5 Binn. (Pa.) 403, 6 Am. Dec. 424.

[60] 1 Phillips' Mar. Ins., § 1115. See Nickels v. London &c. Ins. Co., 70 L. J. K. B. 29.

[61] Miller v. Law Accident Ins. Soc., 72 L. J. K. B. 428, affg. 71 L. J. K. B. 551, 2 K. B. 694, on other grounds.

of enforcing the revenue laws of a country and an act of intervention for enforcing its sanitary laws."[62]

Where a shipment of gold, covered by a policy containing the same clause, was, a few days before the commencement, but in contemplation of war, seized by the authorities of the South African Republic while it was in transit through its territory, it was held that the underwriters were not liable, as it had been "seized" within the meaning of the warranty.[63] But the insured was held liable for the loss of gold covered by a policy insuring against "arrests of all kings, princes and peoples of what nation, condition or quality soever," which was seized by the South African Republic some days before the actual outbreak of the war.[64]

§ 4486. **Barratry.**—Barratry is not covered by a marine policy unless enumerated or clearly included therein.[65] It is, however, one of the risks usually insured against, and is included by appropriate general language in the policy. As it is one of the common risks, it would seem to be included within the words "the usual marine risks."[66]

Lord Ellenborough, in an elaborate decision, established the rule that any wilful act of known criminality or gross malversation, although not intended to the owner's prejudice, would, if in fact it operated to their prejudice by causing a loss to the ship, be sufficient to constitute barratry.[68] It "may be said to compre-

[62] The learned judge continues: "It seems to me that this follows from the principle recognized in Cory v. Burr, 52 L. J. Q. B. 657, 8 App. Cas. 393, where the act of intervention was for the purpose of preventing smuggling; and also in Robinson Gold Mining Co. v. Alliance &c. Assur. Co., 71 L. J. K. B. 942, L. R. (1902) 2 K. B. 489." He then proceeds to distinguish: Hadkinson v. Robinson, 3 Bos. & P. 388. With reference to the use of force, Matthews, L. J., said: "If actual force was not used, it was because there was no opposition. The master submitted to the orders of the administration. The result to the assured was the same as if force had been used." It was also said that the fact that the acts of the Argentine authorities were illegal, was immaterial.

[63] Robinson Gold Mining Co. v. Alliance Mar. &c. Assur. Co., 71 L. J. K. B. 942, L. R. (1902) 2 K. B. 489, affd. 73 L. J. K. B. 898, (1904) App. Cas. 359, 91 L. T. 202.

[64] Janson v. Driesfontein Consol. Mines, 71 L. J. K. B. 857, (1902) App. Cas. 484, 87 L. T. 372, affg. 70 L. J. K. B. 881, L. R. (1901) 2 K. B. 419.

[65] O'Connor v. Merchants' Marine Ins. Co., 20 Nova Scotia 514, 16 Can. Sup. Ct. 331; Williams v. Suffolk Ins. Co., 13 Pet. (U. S.) 415, 10 L. ed. 226; Waters v. Merchants' &c. Ins. Co., 11 Pet. (U. S.) 213, 9 L. ed. 691.

[66] Parkhurst v. Gloucester Mut. &c. Ins. Co., 100 Mass. 301, 97 Am. Dec. 100, 1 Am. Rep. 105, a learned opinion by Mr. Justice Gray.

[68] Earle v. Rowcroft, 8 East 126, 14 Eng. Rul. Cas. 345; Phœnix Ins.

hend not only every species of fraud and knavery covinously committed by the master with the intention of benefiting himself at the expense of his owners, but every wilful act on his part of known illegality, gross malversation, or criminal negligence by whatever motive induced, whereby the owners or charterers of the ship (in case the latter are considered the owners pro tempore), are, in fact, damnified."[69] But mere negligence is not barratry.

A loss arising from the ignorance or mistake of the captain, as where a mistake is made as to the meaning of his instructions, or a misapprehension as to the proper mode of carrying them into effect, does not amount to barratry, and improper treatment of the vessel by the captain will not necessarily constitute barratry. As said by Lord Ellenborough, "the captain must be proved to have acted against his better judgment."[70] It is also said that

Co. v. Moog, 78 Ala. 284, 56 Am. Rep. 31; Atkinson v. Great Western Ins. Co., 65 N. Y. 531; Voisin v. Com. Mut. Ins. Co., 62 Hun (N. Y.) 4, 41 N. Y. St. 884, 16 N. Y. S. 410; Wilcocks v. The Union Ins. Co., 2 Binn. (Pa.) 574, 4 Am. Dec. 480 (Misconduct of the master amounting to gross malversation in his office may amount to barratry.). Heyman v. Parish, 2 Camp. 148. Patapsco Ins. Co. v. Coulter, 3 Pet. (U. S.) 222, 7 L. ed. 659 (also, in extreme cases, may nonfeasance).

[69] 2 Arnould Mar. Ins. (6th ed.) 774. That mere negligence is not barratry, see Grill v. General Iron Screw Co., 37 L. J. C. P. 205, 18 L. R. 3 C. P. 476. See also, Compania De Navigecion la Flecha &c. v. Brauer, 168 U. S. 104, 42 L. ed. 398, 18 Sup. Ct. 12.

[70] Todd v. Richie, 1 Stark. 190; Phyn v. Royal Exch. Assurance Co., 7 Term. Rep. 505 (deviation through ignorance); Wiggin v. Amory, 14 Mass. 1, 7 Am. Dec. 175; Dederer v. Delaware Ins. Co., 2 Wash. (U. S.) 61, Fed. Cas. No. 3733 (must be criminal or fraudulent). See also, Atkinson v. Great Western Ins. Co., 65 N. Y. 531. Illustrations of barratry are found in the following cases: Smuggling in fraud of the owners, Havelock v. Hancill, 3 Term. Rep. 277; purposely running the ship on shore without justifying necessity, Soares v. Thornton, 7 Taunt. 628. See also, Standard Marine Ins. Co. v. Nome Beach &c. Co., 133 Fed. 636, 67 C. C. A. 602, 1 L. R. A. (N. S.) 1095, and note. But compare, Hutchins v. Ford, 82 Maine 363, 19 Atl. 832. Illegally cruising and taking a prize contrary to the instructions of the owners. Moss v. Byrom, 6 Term Rep. 379; sailing out of port without paying port dues, thus subjecting the ship to forfeiture. Knight v. Cambridge, cited in Stamma v. Brown, 2 Str. 1173, and Earle v. Rowcroft, 8 East 126; leaving port in violation of embargo, Robertson v. Ewer, 1 Term Rep. 127; intentional breach of blockade by attempting to enter a blockaded port, Goldsmith v. Whitmore, 3 Taunt. 508; wilful resistance to right of search, Dederer v. Delaware Ins. Co., 2 Wash. (U. S.) 61, Fed. Cas. 3733. See also, Wilcocks v. Union Ins. Co., 2 Binn. (Pa.) 574, 4 Am. Dec. 180 (any trick, cheat or fraud, "and any crime committed by the master, to the prejudice of his owners, is barratry"). Illegal trading without the privity of the owner, resulting in confiscation, Earle v. Rowcroft, 8 East 126.

"criminal delay is to all intents a barratrous act,"[71] and barratry by the mariners, by which the captain is compelled to act against his wishes, is not covered by a policy of insurance against barratry of the master.[72]

It is the duty of the owner or master to use ordinary force and reasonable vigilance to prevent barratrous acts of the mariners, such as smuggling, and if this is not done, it seems there can be no recovery for a loss caused thereby.[73] "The rule, in fact, is that where the cause of the loss is a superior force originating with the crew, the underwriters are liable as for barratry by the mariners."[74]

It follows from what has been said that no act can be strictly barratrous which is sanctioned or authorized by those who are either the absolute owners of the ship, or are the owners for the voyage.[75] "Barratry," said Lord Mansfield, "is something contrary to the duty of the master and mariners, the very terms of which imply that it must be in the relation in which they stand to the owners of the ship. * * * An owner cannot commit barratry. He may make himself liable by his fraudulent conduct to the owner of the goods, but not as for barratry. And, besides, barratry cannot be committed against the owner with his consent."[76] The better view is that a part owner, however, may commit barratry against his co-owner.[77] And a master who has merely an equitable interest in the ship can nevertheless commit barratry.[78]

Where the charterers of a vessel are so situated at the time of

[71] Roscow v. Corson, 8 Taunt. 684.

[72] See language of Lord Mansfield in Vallejo v. Wheeler, 1 Cowp. 143.

[73] See Pipon v. Cope, 1 Camp. 434.

[74] 2 Arnould Ins. (6th ed.) 782; Dixon v. Reid, 5 Barn. & Ald. 597; Phœnix Ins. Co. v. Moog, 78 Ala. 284, 56 Am. Rep. 31; Meyer v. Great Western Ins. Co., 104 Cal. 381, 38 Pac. 82; New Orleans Ins. Co. v. Albro, 112 U. S. 506, 28 L. ed. 809, 5 Sup. Ct. 289 (selling cargo).

[75] Nutt v. Bourdieu, 1 Term. Rep. 323; Stamma v. Brown, 2 Str. 1173; Ward v. Wood, 13 Mass. 539; Marcardier v. Chesapeake Ins. Co., 8 Cranch (U. S.) 39, 3 L. ed. 481.

[76] Nutt v. Bourdieu, 1 Term. Rep. 323.

[77] Phœnix Insurance Co. v. Moog, 78 Ala. 284; Hutchins v. Ford, 82 Maine 363, 19 Atl. 832; Voisin v. Com. Mut. Ins. Co., 62 Hun (N. Y.) 4, 16 N. Y. Sup. 410, 41 N. Y. St. 884. See also, Small v. U. K. Mar. Ins. Co., 2 Q. B. 311, 66 L. J. Q. B. 736; Jones v. Nicholson, 10 Exch. 28; Wilson v. General Mut. Ins. Co., 12 Cush. (Mass.) 360, 59 Am. Dec. 188; and compare, Meyer v. Great Western Ins. Co., 104 Cal. 381, 38 Pac. 82.

[78] Berry v. Louisiana Ins. Co., 11 Mart. (O. S.) (La.) 630. See also, Meyer v. Great Western Ins. Co., 104 Cal. 381, 38 Pac. 82.

a loss as to have the right to the complete control and management of the ship, they are treated by the English law as the owners for the purpose of barratry, and barratry may therefore be committed against them with the connivance of the general owners. In the United States the rule seems to be different. The charterer here seems not to be considered as the owner for the purpose of barratry, except in those cases where the ship is absolutely rented to him, and the master and mariners are hired, paid and victualed by him.[79]

§ 4487. "All other perils, losses and misfortunes," etc.— The clause, "all other perils, losses or misfortunes that had or should come to the hurt, detriment or damage of the said goods, wares and merchandise, or any part thereof," covers all cases of marine damage of like kind with those specifically enumerated, and occasioned by similar causes.[80] Indeed, it has been said that such a clause covers "every accidental circumstance not the result of ordinary wear and tear, delay, or of the act of the assured, happening in the course of the navigation of the ship, and incidental to the navigation, and causing loss to the subject-matter of the insurance."[81]

It has been held to cover a loss caused by the striking of the ship on the ways, while being launched;[82] by the beaching of the vessel in preparation for repairs;[83] by the ship being blown over while in dock for repairs;[84] by the breaking of tackle and supports used in moving the ship from the dock where she had been for repairs;[85] while being hauled out on a marine railway;[86] the breaking of a rope which caused the vessel to fall over at low tide;[87] sinking of the vessel caused by being fired on by mistake by a man of war;[88] seizure of the ship by passengers;[89] injury to

[79] 2 Arnould Mar. Ins. (6th ed.) 782; 1 Phillip's Ins. 1083; 1 Parsons' Ins. 566.

[80] Moses v. Sun Mut. Ins. Co., 8 N. Y. Super. Ct. 159.

[81] Thames &c. Insurance Co. v. Hamilton, 12 App. Cas. 484.

[82] Fritchette v. State Mut. &c. Ins. Co., 3 Bos. (N. Y.) 190.

[83] Swift v. Union Mutual Marine Ins. Co., 122 Mass. 573.

[84] Phillips v. Barber, 5 B. & Ald. 161.

[85] Devaux v. J'Anson, 5 Bing. N. Cas. 519.

[86] Ellery v. New England &c. Ins. Co., 8 Pick. (Mass.) 14.

[87] Laurie v. Douglas, 15 M. & M. 746.

[88] Cullen v. Butler, 4 Camp. 289, 5 M. & S. 461. So as to collision caused by negligence of officers of another vessel, Caldwell v. St. Louis &c. Ins. Co., 1 La. Ann. 85.

[89] Palmer v. Naylor, 10 Exch. 382, 18 Jur. 961, 23 L. J. Exch. 323.

the cargo caused by seawater negligently permitted to enter through a cock;[90] specie thrown overboard to prevent its capture by a pursuing enemy;[91] loss of freight caused by the discharge of a cargo of coal threatened by spontaneous combustion.[92] It does not, however, cover a loss occasioned by the bursting of machinery within a vessel,[93] nor by barratry.[94]

§ 4488. **Proximate cause of loss.**—In determining whether the risk insured against is the proximate cause of the loss, the courts are usually satisfied to look no further than the nearest efficient cause,[95] recognizing the truth of Lord Bacon's oft-quoted statement, that it were infinite for the law to consider the cause of causes, and their impulsions one of another.[96] But the rule is often difficult to apply. Where a ship and goods, "warranted free from American condemnation," after being damaged by the perils of the sea, was driven ashore and there seized and condemned by the American government, Lord Ellenborough held that there could be no recovery, as the subsequent total loss by condemnation deprived the insured of the right to recover for the prior loss by the perils of the sea.[97]

[90] Davidson v. Burnand, L. R. 4 C. P. 117; Good v. London &c. Ins. Co., L. R. 6 C. P. 563.

[91] Butler v. Wildman, 3 Barn. & Ald. 398.

[92] The Knights of St. Michael, L. R. (1898) Prob. Div. 30. The risk of loss by spontaneous combustion is "an inherent vice" in the goods, and not a peril of the sea. Providence Wash. Ins. Co. v. Adler, 65 Md. 162, 4 Atl. 121, 57 Am. Rep. 314. See § 4482 supra.

[93] Thames &c. Ins. Co. v. Hamilton, 12 App. Cas. 484, and overruling West India & Panama Telegraph Co. Ltd. v. Home &c. Ins. Co., L. R. 6 Q. B. Div. 51; Miller v. Calif. Ins. Co., 76 Cal. 145, 18 Pac. 155, 9 Am. St. 184. The G. R. Booth, 171 U. S. 450, 19 Sup. Ct. 9, 43 L. ed. 234. But compare, Citizens' Ins. Co. v. Glasgow, 9 Mo. 411. Such a loss may, of course, be within the terms of the policy, and yet not be what is commonly known as a peril of the sea. See Perin v. Protective Ins. Co., 11 Ohio 147, 38 Am. Dec. 728.

[94] O'Connor v. Merchants' Marine Ins. Co., 20 Nova Scotia 514, 16 Can. Sup. Ct. 331 (The insurance was against "perils of the sea.").

[95] The Xantho, L. R. 12 App. Cas. 503.

[96] Pink v. Fleming, 25 Q. B. D. 396, 59 L. J. Q. B. 559, 6 Asp. M. C. 554; Reischer v. Borwick, 9 Rep. 558; Thompson v. Hopper, 6 El. & Bl. 171; Lewis v. Ætna Ins. Co., 123 Fed. 157, affd. 129 Fed. 1006, 64 C. C. A. 210; Orient Mut. Ins. Co. v. Adams, 123 U. S. 67, 31 L. ed. 63, 8 Sup. Ct. 68; Cline v. Western Assur. Co., 101 Va. 496, 44 S. E. 700. See also, the remarks of Blackburn, J., in Dudgeon v. Pembroke, L. R. 9 Q. B. 581, 596. Also, Butler v. Wildman, 3 Barn. & Ald. 398; Magoun v. New England Marine Ins. Co., 1 Story (U. S.) 157, and cases collected in note to Gibson v. Delaware &c. Coal Co., 36 Am. St. 854.

[97] Livie v. Janson, 12 East 648 (The ship was injured, not destroyed, by the perils of the sea before capture.). See criticisms of this case in Brown

When a vessel was driven by a gale upon the shore uninjured, and there captured by the enemy, Lord Kenyon said that the case was too clear to admit of argument; that it was clearly a loss by capture, and that, had the ship been driven on any other coast but that of the enemy, she would have been perfectly safe.[98]

Where two causes of the loss occur, one at the risk of the insured, and the other insured against, or one insured against by A, and the other by B, if the damage caused by each peril can be discriminated, it must be borne proportionately. But if it cannot be distinguished, the party responsible for the predominating efficient cause, or that which sets in operation the other incidental to it, is treated as the cause of the loss.[99]

Lord Campbell held that where a total loss occurs from a risk not insured by the policy, the underwriters are not liable even for a partial unrepaired loss, because, under the circumstances, it was not prejudicial to the insured.[1]

Where the insurance was against loss "by collision" and "damage received in a collision with any object, including ice," it was held to cover the loss of a ship from an injury which with reasonable diligence could not be repaired in time to prevent the ship from sinking. The vessel struck a floating snag, which entered the engine room, and, among other things, broke the cover of the condenser, and thus left an opening of some twenty square inches in area. An attempt was made to repair the break and the ship was taken in tow by another vessel; but, notwithstanding all the efforts of the crew during several days, she finally sank. The plaintiff claimed to recover for the loss of the vessel. It was admitted that the ship was injured by the peril insured against, and the insurer admitted liability for the repair of the injured parts, but it was held that the collision was the proximate cause of the injury, and that the insurer was therefore liable for the entire loss.[2]

v. St. Nicholas Ins. Co., 61 N. Y. 332. See also, Ionides v. Universal &c. Ins. Co., 14 C. B. (N. S.) 259, 32 L. J. C. P. 170, 8 L. T. 705, 14 Eng. Rul. Cas. 271.

[98] Green v. Elmslie, 1 Peake 278.

[99] Howard Fire Ins. Co. v. Norwich & New York Transp. Co., 12 Wall. (U. S.) 194, 20 L. ed. 378. Where two independent accidental causes have operated, the last in point of time is the proximate cause. Cory v. Burr, 8 App. Cas. 393.

[1] Knight v. Faith, 15 Q. B. 649, 19 L. J. Q. B. 509, 14 Jur. 1114.

[2] Reischer v. Borwick (1894), 2 Q.

§ 4489. **Negligence—Misconduct.**—Where the proximate cause is the negligence of the insured or his agents, and not the risk insured against, or is the result of his wilful misconduct, in placing the ship in immediate contact with the peril insured against, the underwriter is not liable.[3] But the rule is otherwise where the loss is proximately caused by the disaster insured against, notwithstanding it may have resulted from negligence of the master or mariners.[4] In certain early cases it was held that there was no liability where the loss was due even to the remote negligence of the insured or his agents, but the rule is now well established that if the vessel, the master, officers, crew and equipment, are competent and sufficient at the commencement of the voyage, the insured has done all that he has contracted to do; he does not guarantee the faithfulness and vigilance of the master and crew, and he is not responsible for their negligence. The in-

B. Div. 548. Lord Lindley said: "I feel the difficulty of expressing in precise language the distinction between causes which co-operate in producing a given result. When they succeed each other at intervals which can be observed it is comparatively easy to distinguish them and to trace their respective effects; but under other circumstances it may be impossible to do so. It appears to me, however, that an injury to a ship may fairly be said to cause its loss if, before that injury is or can be repaired, the ship is lost by reason of the existence of that injury—i. e., under circumstances which, but for that injury, would not have affected her safety. It follows that if, as in this case, a policy is effected covering such an injury, it will in the circumstances supposed extend to the loss of the ship, or in the case supposed the injury will really be the cause of the loss—the causa causans and not merely the causa sine qua non." Lord Justice Lopes said: "The damage received in the collision was the breaking of the condenser, and it was the broken condenser which really caused the proximate loss. The tug was continuously in danger from the time the condenser was broken, and the broken condenser never ceased to be an imminent element of danger, though that danger was mitigated for a time by the insertion of a plug in the outside of the vessel. The cause of the damage to the condenser was the collision, and the consequences of the collision—that is, the broken condenser—never ceased to exist, but constantly remained the efficient and predominating peril to which the damage not sought to be recovered was attributable."

[3] Dudgeon v. Pembroke, L. R. 9 Q. B. 581, 596; Schultz v. Pacific Insurance Co., 14 Fla. 73; Nelson v. Suffolk Insurance Co., 8 Cush. (Mass.) 477, 54 Am. Dec. 770, and note (Injury to another ship caused by the negligence of the insured ship must be indemnified by the insurer.); Hazard v. New England Marine Ins. Co., 1 Sumn. (U. S.) 218, Fed. Cas. No. 6282, revd. 8 Pet. (U. S.) 557, 8 L. ed. 1043; Orient Mut. Ins. Co. v. Adams, 123 U. S. 67, 31 L. ed. 63, 8 Sup. Ct. 68. See also, Standard Marine Ins. Co. v. Nome Beach &c. Transp. Co., 133 Fed. 636, 67 C. C. A. 602, 1 L. R. A. (N. S.) 1095.

[4] Hutchins v. Ford, 82 Maine 363, 19 Atl. 832; General Mut. Ins. Co. v. Sherwood, 14 How. (U. S.) 351, 44 L. ed. 452. See 3 Elliott Ev., § 2446, and cases cited in following notes to this section. See also, Twedie Trading Co. v. Assurance Co., 179 Fed. 103, 102 C. C. A. 397.

surers are therefore liable for a loss occasioned by the conduct of the master and mariners in the practical navigation and management of the vessel after the commencement of the voyage, if the actual loss arises from one of the perils insured against, although the vessel may have been subjected to such peril in consequence of the negligence or carelessness of the master and crew.[5] The English and American rule, it is said, does not, however, apply to deviations.[6] In some modern policies there is a provision which relieves the underwriter from liability for losses caused by the want of ordinary care and skill in the navigation of the vessel.[7]

[5] Nome Beach &c. Co. v. Munich Assur. Co., 123 Fed. 820; but see 133 Fed. 636, 67 C. C. A. 602, 1 L. R. A. (N. S.) 1095; Trinder v. Thames &c. Mar. Ins. Co., 67 L. J. Q. B. 666, 2 Q. B. 114; Busk v. Royal Exch. Assur. Co., 2 B. & Ald. 73; Walker v. Maitland, 5 Barn. & Ald. 171; Smith v. Scott, 4 Taunt. 126; Thompson v. Hopper, 27 L. J. (N. S.) Q. B. 441, 6 El. & Bl. 171; Lewis v. Ætna Ins. Co., 123 Fed. 157, affd. 129 Fed. 1006, 64 C. C. A. 210 (stranding caused by negligence); Louisville Underwriters v. Pence, 93 Ky. 96, 14 Ky. L. 21, 19 S. W. 10, 40 Am. St. 176; Crescent Ins. Co. v. Vicksburg, Y. & S. R. Co., 69 Miss. 208, 13 So. 254, 30 Am. St. 537; Enterprise Ins. Co. v. Parisot, 35 Ohio St. 35, 35 Am. Rep. 589; American Ins. Co. v. Insley, 7 Pa. St. 223, 47 Am. Dec. 509; Orient Mut. Ins. Co. v. Adams, 123 U. S. 67, 31 L. ed. 63, 8 Sup. Ct. 68. "Nothing short, therefore, of dolus in its proper sense, will defeat the right of the assured to recover in respect to a loss of which but for such dolus the proximate cause would be a peril of the sea." Lord Justice Collins in Trinder v. Mercer &c Mar. Ins. Co., 67 L. J. Q. B. 666, 2 Q. B. 114. But under the French rule negligence may be a defense.

[6] Natchez Insurance Co. v. Stanton, 2 Smed. & M. (Miss.) 340, 41 Am. Dec. 592. Loss caused by the gross negligence of the master or crew is sometimes excepted by the terms of the policy. See Jones v. Western Assur. Co., 198 Pa. St. 206, 47 Atl. 948.

[7] See Rogers v. Ætna Insurance Co., 95 Fed. 103, 35 C. C. A. 396. "The collision occurred * * * and was caused by the gross negligence of Walch, who at that time was so intoxicated as to be incapable of performing his duties properly. There is no evidence that either the master or the pilot was incompetent or unskillful in their vocation, or were not in good repute, and none to impute any fault or remissness to the libelant in employing either of them. It is no defense to a contract of insurance that the loss occurred through the negligence of the assured, or of his servants, unless the contract expressly constitutes such negligence a defense. One of the principal objects which the assured has in view in effecting an insurance is protection against casualties accruing from these causes. Ang. Ins., § 125. The policy contains a warranty that the tug 'shall at all times be in charge of and commanded by a duly licensed pilot or captain.' It contains also the following: * * * 'warranted free from loss, damages or expense caused by or arising from so doing or from ignorance on the part of the master and pilot as to any port or place the steam tug may use, or from want of ordinary care or skill.' * * * But this warranty is found in a contract which has no other purpose than to indemnify the assured against the loss which he may sustain through the

Where the policy excepted perils consequent upon and arising from or caused by the incompetency of the master, or want of ordinary care or skill in navigating the said vessel, and it appeared that after the vessel sprung a leak, the master had her taken in tow, and attempted unsuccessfully to carry her to her port of destination, it was held proper to charge the jury that if an ordinarily prudent man would have deemed it necessary to repair her before proceeding, and her loss was occasioned by the omission to do so, the underwriter was relieved from liability, and, further, that expert testimony was admissible to show whether under the circumstances it was the exercise of good seamanship and prudence to attempt to take the vessel to her port.[8]

The negligent navigation to relieve the insurer from liability must, of course, have been the proximate cause of the loss.[9]

§ 4490. The sue and labor clause.—What is known as the sue and labor clause provides for the recovery of sums necessarily expended in preserving the subject-matter of the insurance from loss or damage for which the insurers would be liable under the policy. It thus comes into effect only through the operation of one or more of the perils insured against.[10] The clause provides that in case of disaster the insured may labor, travel and sue for the safeguarding and recovery of the property, and for the

improper navigation of his own vessel, and, as such a loss cannot arise in any other way or from any other cause than want of skill or care of those in charge, the contract would be of no value to him, and would be nugatory as to the insurance company, if the warranty is given the effect claimed for it. * * * Under no rule of construction can it be permitted to extend to defeat the whole end and aim of the contract. It must be given an interpretation most favorable to the assured. We construe it as though it read 'warranted free from loss arising from ignorance or want of ordinary skill or care on the part of the master or pilot as to any port or place the steam tug may use.'" See also, Egbert v. St. Paul Fire & Marine Ins. Co., 71 Fed. 739.

[8] Compare Wolff v. Merchants Insurance Co., 31 N. Bruns. 577; Union Insurance Co. v. Smith, 124 U. S. 405, 31 L. ed. 497, 8 Sup. Ct. 534.

[9] Gillespie v. British America &c. Co., 7 U. C. Q. B. 108; Richelieu &c. Navigation Co. v. Boston Marine Ins. Co., 136 U. S. 408, 34 L. ed. 398, 10 Sup. Ct. 934.

[10] Great Indian Peninsula R. Co. v. Saunders, 1 B. & S. 41, 30 L. J. Q. B. 218 (fodder furnished for live stock to keep them alive and thus prevent a loss which, under the terms of the policy, would have fallen upon the underwriters). The sue and labor clause has no application when the insurance is against the liability of the shipowner to the owners of a cargo of mules, and the shipowner incurs expense in attempting to save the ship and cargo from wreck. Cunard Steamship Co. v. Marten, 72 L. J. K. B. 754, L. R. (1903) 2 K. B. 511, 9 Asp. 452.

expense thereof the insurer is to contribute in the proportion which the amount insured by him bears to the whole property. It applies to cases in which the underwriter is saved from liability to loss, whether partial or total, and whether an abandonment does or probably may take place.[11] The liability imposed by the obligation is collateral to, and not a part of, the contract of insurance proper. It was held in the House of Lords that a claim for volunteer salvage was not recoverable under this clause, but could be recovered under an averment of loss by the perils which occasioned the salvage.[12] The object of the sue and labor clause is said to be the encouragement of the personal exertions of the assured and his agents for the preservation of the ship, by providing for the expenses attending such personal exertions, and perhaps for hiring additional labor when necessary.[13] It does not therefore, it seems, provide a remedy for a claim of salvage for labor performed by those who were not the agents of the assured, and whose award was determined under the general maritime law, as administered by a court of admiralty.[14]

Expenses incurred to repair losses caused by risks insured against are not recoverable under this clause.[15] And, as a general rule at least, the insured can recover only such expenses as were reasonably necessary. Thus, where the master after stranding the ship sent the freight overland by rail at a heavy expense when he might have retained it until the ship was repaired, and reshipped

[11] Kidston v. Empire Marine Ins. Co., L. R. 1 C. P. 535, affd. L. R. 2 C. P. 357, 14 Eng. Rul. Cas. 247. See the learned judgment of Mr. Justice Wiles in this case.

[12] Atchison v. Lohre, 4 App. Cas. 755, 49 L. J. Q. B. 123, 14 Eng. Rul. Cas. 448. But see Crouan v. Stanier, 73 L. J. K. B. 102, L. R. (1904) 1 K. B. 87, and Buzby v. Phœnix Ins. Co., 31 Fed. 422 (salvage on agents' expenses not recoverable). See Mr. Maclachlan's comment on this case in 2 Arnould Ins. 792, and appendix (6th ed.), 807. See also, note to Kidston v. Empire Marine Ins. Co., 14 Eng. Rul. Cas. 268; Dixon v. Sea Ins. Co., 49 L. J. Q. B. 408, 4 Asp. M. C. 327; Xenos v. Fox, L. R. 4 C. P. 665, 38 L. J. C. P. 351; Nicholson v. Chapman, 2 H. Bl. 254; Soelberg v. Western Assur. Co., 119 Fed. 23. The clause is not intended to afford an additional remedy for what was already sufficiently protected. Montgomery v. Indemnity &c. Assur. Co., 70 L. J. K. B. 45.

[13] See Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co., 179 U. S. 1, 45 L. ed. 49, 21 Sup. Ct. 1.

[14] See International Nav. Co. v. Atlantic Mut. Ins. Co., 100 Fed. 304, affd. 108 Fed. 987, 48 C. C. A. 181. In Western Assurance Co. v. Poole, 72 L. J. K. B. 201, Bigham, J., says that the words "salvage charges" are nevertheless often used in policies to describe those expenses which come within the scope of suing and laboring expenditures.

[15] Alexandre v. Sun Mut. Ins. Co., 51 N. Y. 253.

it at another place at a much less expense, he was allowed to recover only the lesser sum.[16] But it is held in a recent case that the insurer is liable under a sue and labor clause for the cost of moving a cargo overland, where the vessel, having been delayed by low water in a river until the formation of ice compelled laying it up for the winter, was moved with the consent of the underwriter to avoid the effect of the ice breaking up in the spring, and the goods, being perishable, could not otherwise have been preserved.[17]

§ 4491. Excluded risks and limitations upon liability.— Marine insurance is not for the purpose of protecting against what is known as ordinary wear and tear. It is asserted in Arnould, that a ship cannot navigate the ocean for any length of time, even under the most favorable circumstances, without suffering a certain degree of decay and diminution in value, which we speak of as wear and tear; for this, however considerable, the underwriter is never liable; he is only liable when the damage sustained is the result of some casualty or something which could not be foreseen as one of the necessary incidents of the adventure.[18]

[16] Lee v. Southern Ins. Co., L. R. 5 C. P. 397, 39 L. J. C. P. 218. See also, where the clause was held not to be applicable, Cunard Steamship Co. Ltd. v. Marten, 72 L. J. K. B. 754, L. R. (1903) 2 K. B. 511, 9 Asp. 452.

[17] St. Paul Fire & Marine Ins. Co. v. Pacific Cold Storage Co., 157 Fed. 625, 87 C. C. A. 14, 14 L. R. A. (N. S.) 1161n.

[18] 2 Arnould Mar. Ins. (6th ed.) 719, 3 Kent's Comm. (14th ed.) 300; Hunter v. Potts, 4 Camp. 203 (loss arising from rats eating holes in the bottom of the ship is not within the perils insured against in the common form of policy); Thames &c. Ins. Co. v. Hamilton, 12 App. Cas. 484. In the Xantho, 12 App. Cas. 503. 509, Lord Herschell said: "I think it clear that the term 'perils of the sea' does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril 'of' the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the wind and waves, which results in what may be described as wear and tear. There must be some casualty, something that could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against which must happen. It was contended that those losses only were losses by the perils of the sea, which were occasioned by extraordinary violence of the wind or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities, or by common understanding. It is beyond question, that if a vessel strikes upon a sunken rock in fair weather and sinks, this is a loss by perils of the sea. And a loss by foundering, owing to a vessel coming into collision with another vessel, even when the collision results

Another well-recognized exception is found in the rule that the underwriter is not liable for a loss arising solely from a defect inherent in the subject-matter, as where fruit becomes rotten, wine sour, or meat putrid.[19]

So there is no liability for leakage or breakage.[20] In the United States and on the Continent, a percentage is usually fixed and the underwriter is not liable for damage for a percentage of loss less than that so fixed, unless the ship is wrecked or stranded.[21] Nor is there a liability because of a loss caused by the bursting of wrappers resulting in the commingling of goods.[22] Nor where the insurance is upon living animals constituting the cargo is the insurer liable for losses caused by death due solely to natural causes.[23] But when the death is caused by violence, as by the agitation of the ship caused by a violent storm, it has been held that the loss is due to the perils of the sea.[24]

So there is an exception as to losses not proximately caused by the peril insured against,[25] and those in some instances, as already seen, caused proximately by the negligence as well as the wilful act of the insured or his agent.[26]

In addition to the risks which are excluded from the policy by reason of certain well-recognized implications, it is customary to exclude others by express provision.[27] Thus, in times of maritime

from the negligence of that other vessel, falls within the same category."

[19] Taylor v. Dunbar, L. R. 4 C. P. 206 (meat became putrid by delay of the voyage); Boyd v. Dubois, 3 Camp. 133; Pink v. Fleming, 25 Q. B. D. 396, 59 L. J. Q. B. 559.

[20] Crofts v. Marshall, 7 Car. & P. 597.

[21] Indemnity Mut. Assur. Co. of London v. United Oil Co., 88 Fed. 315 (construction of clause); Phetteplace v. British &c. Mar. Ins. Co., 23 R. I. 26, 49 Atl. 33.

[22] Spence v. Union Marine Ins. Co., L. R. 3 C. P. 427 (confusion of goods).

[23] Bailey v. South Carolina Ins. Co., 3 Brev. (S. Car.) 354, 1 Tread. Const. (S. Car.) 381.

[24] Lawrence v. Aberdein, 5 B. & Ald. 107, 14 Eng. Rul. Cas. 296; Gabay v. Lloyd, 3 B. & Cr. 793, distinguished in Taylor v. Dunbar, L. R. 4 C. P. 206, 38 L. J. C. P. 178. See also, Snowden v. Guion, 101 N. Y. 458, 5 N. E. 322; Coit v. Smith, 3 Johns. Cas. (N. Y.) 16. See also, Lockyer v. Offley, 1 Term Rep. 260.

[25] See § 4488 supra. See discussion of remote and proximate cause in Ionides v. Universal Mar. Ins. Assn. 14 C. B. (N. S.) 259, 32 L. J. C. P. 170.

[26] Thompson v. Hopper, 27 L. J. (N. S.) Q. B. 441, 6 El. & Bl. 171, § 4489 supra. Compare Greenock Steamship Co. v. Maritime Ins. Co., 72 L. J. K. B. 59, L. R. (1903) 1 K. B. 367, 9 Asp. 364. See as to barratry, O'Connor v. Merchant's Mar. Ins. Co., 20 Nova Scotia 514, 16 Can. Sup. Ct. 331.

[27] The phrase "external violence" in an exemption from liability for loss by the bursting of a boiler unless caused by "external violence" has

wars it has been usual to insert an express stipulation to the effect that the underwriter would not assume the risk of capture, seizure or confiscation at the ship's port of discharge.[28]

What is known as the common memorandum clause may be referred to in this connection, although it is, perhaps, more in the nature of a restriction upon the amount of the liability than upon the nature and character of the risk to be assumed.[29] This clause has been in general use in England since 1749, and is now a statutory form. It provides that upon the articles named the underwriters shall not be liable for sea damages unless there is a total loss, or unless the damage amounts to a certain percentage of the value of the goods. The common memorandum covers certain specified articles.[30]

All other goods, and also the ship and freight, are warranted free from average under three pounds per cent., unless general or the ship be stranded.[31] This means the stranding of the ship while the goods are on board of her.[32] It later became the common practice to add to the ordinary memorandum clause the words, "or the ship be stranded, sunk or burnt," and it was held that "burnt," in this connection, should be given its general signification as meaning something more than some slight damage from fire.[33] But after the decision just referred to, the words "on

been held to mean violence external to the vessel and not merely external to the boiler. Quackenboss v. Insurance Co. of North America, 95 Miss. 872, 50 So. 444; Citizens. Ins. Co. v. Glasgow, 9 Mo. 411. See also, for other cases of excepted risks, Huntington & A. B. S. Transp. Co. v. Western Assur. Co., 61 W. Va. 324, 57 S. E. 140.

[28] Dalgleish v. Brooke, 15 East 295; Mellish v. Staniforth, 3 Taunt. 499. As to the distinction between "port of discharge" and "port," see Jarman v. Coape, 2 Camp. 515; Devitt v. Prov. Wash. Ins. Co., 173 N. Y. 17, 65 N. E. 777.

[29] For history, purpose and meaning of this clause, see Washburn-Moen Mfg. Co. v. Reliance Marine Ins. Co., 179 U. S. 1, 45 L. ed. 49, 21 Sup. Ct. 1.

[30] Corn, fish, salt, fruit, flour and seed are warranted free from average unless general, or the ship be stranded. Sugar, tobacco, hemp, flax, hides and skins are warranted free from average unless five pounds per cent.

[31] Thames &c. Ins. Co. v. Pitts, 5 Rep. 168; Roux v. Salvador, 1 Bing. N. Cas. 526; Burnett v. Kensington, 7 Term Rep. 210, 1 Esp. 416, 4 R. R. 424; London Assur. v. Companhia De Moagens Do Barreiro, 167 U. S. 149, 42 L. ed. 113, 17 Sup. Ct. 785 (See this case for construction of this exception in case of stranding).

[32] The Alsace-Lorraine, 1 Rep. 632. In that event the insurer must pay all particular average losses, whether caused by the stranding or not. Burnett v. Kensington, 7 Term Rep. 210, 4 Rev. Rep. 424; Wells v. Hopwood, 3 Barn. & Ald. 20. See latter case for meaning of "stranded" in this connection.

[33] The Glenlivet, 63 L. J. P. 45, 69 L. T. 706, 6 Rep. 665, 7 Asp. M. C. 342, 395.

fire" came into use as a substitute for the word "burnt," and it is held in a very recent case that this change was made with a purpose and that the terms are not synonymous.[34]

The word "average," as here used, means partial damage to the subject of insurance by any part of the perils insured against. The words "warranted free from average unless general" mean that the insurer is free from liability for anything less than a total loss, unless it be in the nature of a general average; that is, a loss voluntarily incurred to prevent a total loss of the general adventure, for which the insurer is liable, whether it be great or small.[35]

[34] Pacific Creosoting Co. v. Thames &c. Ins. Co. Ltd., 184 Fed. 947, holding that the words "on fire" as used in the particular average clause were "indicative of a happening whereby the ship was endangered by actual fire burning some part of it, necessitating extraordinary efforts to prevent serious damage," and where there was a fire in the bulkhead it might be correctly found and said that the ship was on fire.

[35] 2 Arnould Mar. Ins. (6th ed.) 919, for meaning of the word "average;" Wilson v. Smith, 3 Burr. 1550, and see also, De Hart v. Compania Anonima De Seguros "Aurora," 72 L. J. K. B. 818, L. R. (1903) 2 K. B. 508, 9 Asp. 454. "Warranted free from particular average means that the insurer does not assume liability for a partial loss." Pacific Creosoting Co. v. Thames &c. Ins. Co., 184 Fed. 947.

CHAPTER CXXXIV.

MARINE INSURANCE—LOSS AND ADJUSTMENT.

§ 4495. The loss—Character of the loss.
4496. Actual total loss—The general rule.
4497. Constructive total loss—In general.
4498. Insurance against "Actual total loss only"—Memorandum articles "Free from average unless general."
4499. Entire or severable contract.
4500. Division of cargo—Transhipment.
4501. Abandonment—Definition.
4502. Right to abandon.
4503. Test of the right to abandon.
4504. Apprehension of peril.
§ 4505. Sale by master.
4506. Goods separately valued.
4507. Time of abandonment—Must be complete.
4508. Notice—Manner and character of.
4509. Basis of valuation for total loss.
4510. Acceptance of abandonment.
4511. Effect of abandonment.
4512. The master as the agent of the underwriters.
4513. Time when right determined—Erroneous information.
4514. General average and adjustment of loss.
4515. Adjustment of losses.

§ 4495. **The loss—Character of the loss.**—A loss may be either total or partial, and a total loss may be either actual or constructive. The distinction is very clearly drawn in an old case.[1] In the language of Lord Ellenborough, in another case,[2] "it is an established and familiar rule of insurance, that when the thing insured subsists in specie, and there is a chance of its recovery, there must be an abandonment. A party is not in any case obliged to abandon, neither will the want of an abandonment oust him of his claim for that which is in fact an average or total loss, as the case may be."

§ 4496. **Actual total loss—The general rule.**—An actual total loss may result either from the total destruction of the thing insured; the loss of the thing by sinking[3] or being broken up; any damage to the thing which renders it valueless to the owner for the

[1] Roux v. Salvador, 3 Bing. N. Cas. 266.
[2] Mellish v. Andrews, 15 East 13.
[3] In re The Blairmore, L. R. (1898) App. Cas. 593, 67 L. J. P. C. 96. See Crosby v. New York Mut. Ins. Co., 5 Bosw. (N. Y.) 369.

purposes for which he held it, as the wrecking of a ship, whereby, although the form of the ship is preserved, it is of no use for the purposes of navigation;[4] or, in general, any other event which entirely deprives the owner of the possession at the port of destination of the thing insured, as hostile capture,[5] seizure, confiscation or destruction of the cargo in specie by a sea risk before arrival at the port of destination.[6] An actual total loss may be presumed in a proper case from the continuous absence of the ship without being heard from for a sufficient length of time, and when there is an actual total loss the insured is not required to give notice of abandonment.[7]

§ 4497. **Constructive total loss—In general.**—Where the subject-matter of the insurance has been reduced to such a state of peril, or placed in such a position by the perils insured against, as to make its probable destruction or annihilation, though not inevitable, yet highly imminent, or its ultimate arrival under the terms of the policy, though not hopeless, yet exceedingly improbable, it may be treated as a constructive total loss, and the insured may abandon the property to the insurer and recover as for a total loss.[8]

§ 4498. **Insurance against "Actual Total Loss Only"—Memorandum articles "Free from Average Unless General."** —An insurance contract is sometimes by its terms limited to cases of actual total loss. Such a policy usually covers only the loss which necessarily results from the depriving of the insured at the port of destination of the entire thing insured.[9]

[4] Cambridge v. Anderton, 4 Dowl. & R. 203; Merchants' S. S. Co. v. Com. Mut. Ins. Co., 51 N. Y. Super. Ct. 444; Burt v. Brewers' &c. Ins. Co., 9 Hun (N. Y.) 383, affg. 78 N. Y. 400. See also, Progresso S. S. Co. v. St. Paul &c. Ins. Co., 146 Cal. 279, 79 Pac. 967.

[5] Abel v. Potts 3 Esp. 242; Monroe v. British &c. Ins. Co., 52 Fed. 777, 3 C. C. A. 280.

[6] Mellish v. Andrews, 15 East 13; Williams v. Cole, 16 Maine 207.

[7] As to burden of proof and evidence of loss generally, see 3 Elliott Ev., §§ 2439-2441.

[8] 2 Arnould Mar. Ins. (6th ed.) 953, et seq.; Rowland and Marwood's S. S. Co. v. Mar. Ins. Co., 6 Com. Cas. 160; Sunderland S. S. Co. v. North of England Iron Steamship Ins. Assn., 14 Rep. 196; Devitt v. Prov. Wash. Ins. Co., 173 N. Y. 17, 65 N. E. 777, affg. 61 App. Div. (N. Y.) 390, 70 N. Y. S. 654; Marcardier v. Chesapeake Ins. Co., 8 Cranch (U. S.) 39, 3 L. ed. 481.

[9] Cal. Civ. Code (1906), § 212. See Burt v. Brewers' &c. Ins. Co., 78 N. Y. 400.

When the insurance is in terms against "total loss only," the early cases and probable weight of authority are to the effect that the insured can recover only when there was an actual total loss. The more recent decisions are more favorable to the insured, and are to the effect that under a policy of this character there may be a constructive total loss.[10]

The condition against liability for a partial loss, or for any loss not total in a maritime shipment of goods, some of which are and some of which are not perishable, does not preclude the insured from recovering for a constructive total loss in respect to the latter.[11]

What are known as memorandum articles are insured "free from average unless general," or "warranted free from particular average," which means that the insurer is liable only when there is a total loss of the property. There is a conflict of authority as to whether there can be a recovery for a constructive total loss on memorandum articles. In the federal courts and some of the state courts it is denied, but elsewhere it is generally held that there can be such a recovery.

There has been much controversy over the meaning of the words "actual total loss." In an early case Lord Mansfield held that nothing short "of an absolute destruction of the goods by the wreck of the ship," could amount to a total loss on articles insured free from particular average, thus excluding a constructive total loss, and this strict rule was for a time accepted in the United States.[12] The early case referred to has, however, been overruled or at least modified in England, and the courts of the United States have adopted the more liberal doctrine of the later authorities. Complete physical destruction is therefore no longer regarded as necessary for a total loss.[13] But it is still held in Eng-

[10] Monroe v. British &c. Mar. Ins. Co., 52 Fed. 777, 3 C. C. A. 280; Devitt v. Providence Washington Ins. Co., 61 App. Div. (N. Y.) 390, 70 N. Y. S. 654, affd. 173 N. Y. 17, 65 N. E. 777; Insurance Co. of North America v. Canada Sugar Refining Co., 58 U. S. App. 22 (but this does not apply to insurance on profits).

[11] Barber Ins., § 131; 2 Parsons Mar. Ins. 111; Kettell v. Alliance Ins. Co., 10 Gray (Mass.) 144; Heebner v. Eagle Ins. Co., 10 Gray (Mass.) 131. See also, Adams v. Mackenzie, 13 C. B. (N. S.) 442.

[12] Cocking v. Fraser, 4 Doug. 295; Maggrath v. Church, 1 Caines (N. Y.) 196, 2 Am. Dec. 173, and note 179.

[13] 3 Kent's Comm. (14th ed.) 318. That the early English case cited in the preceding note is no longer the law in England, see Cologon v. London Assur. Co., 5 M. & S. 447; An-

land that a total destruction in specie is necessary, and that no amount of damage will justify the insured in claiming an actual total loss unless such damage involves a total destruction of the goods in specie. As this is construed, however, goods arriving in an unmerchantable condition are considered as not arriving in specie.[14] In the federal courts it is now settled law that there cannot be a total loss on memorandum articles unless they are specifically destroyed or at least their value extinguished by the loss of their identity.[15] Within these decisions nothing short of total extinction, either physical or in "value," amounts to an actual total loss.

In New York it is held that there may be a recovery for a total loss, although some of the memorandum articles are recovered in specie.[16] But where more than one-half of a cargo of

derson v. Wallis, 2 M. & S. 240, 3 Camp. 440; Asfar v. Blundell, 1 Q. B. 123; Adams v. Mackenzie, 32 L. J. C. P. 92; Cocking v. Fraser, 4 Doug. 295, was originally followed in the United States. See 3 Kent. Com. (14th ed.) 296. But the law is now in line with the later English cases. Wallerstein v. Columbian Ins. Co., 44 N. Y. 204, 4 Am. Rep. 664, and cases cited in note 14, infra.

[14] Asfar v. Blundell, 1 Q. B. 123. The ship, with a cargo of dates, was sunk for three days in the Thames. When received, the dates were saturated with water and sewage, and were unfit for human food. They were, however, always recognizable as dates, and were sold for purposes of distillation. It was held that the goods had not arrived in specie, as they were not in a condition to be used as dates.

[15] Biays v. Chesapeake Ins. Co., 7 Cranch (U. S.) 415, 3 L. ed. 389; Marcardier v. Chesapeake Ins. Co., 8 Cranch (U. S.) 39, 3 L. ed. 481; Marean v. United States Ins. Co., 3 Wash. (U. S.) 256; Morean v. United States Ins. Co., 1 Wheat. (U. S.) 219, 4 L. ed. 75; Hugg v. Augusta Ins. &c. Co., 7 How. (U. S.) 595, 12 L. ed. 834; Great Western Ins. Co. v. Fogarty, 19 Wall. (U. S.) 640, 22 L. ed. 216; Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co., 179 U. S. 1, 45 L. ed. 49, 21 Sup. Ct. 1; Robinson v. Commonwealth Ins. Co., 3 Sumn. (U. S.) 220, Fed. Cas. No. 11949. See also, Gould v. Louisiana Mut. Ins. Co., 20 La. Ann. 259; Williams v. Kennebec Mut. Ins. Co., 31 Maine 455; Willard v. Millers' & Mfgrs'. Ins. Co., 24 Mo. 561; Wadsworth v. Pacific Ins. Co., 4 Wend. (N. Y.) 33; De Peyster v. Sun Ins. Co., 19 N. Y. 272; Burt v. Brewers' &c. Ins. Co., 9 Hun (N. Y.) 383, affg. 78 N. Y. 400; Merchants' S. S. Co. v. Com. Mut. Ins. Co., 51 N. Y. Super. Ct. 444; Carr v. Security Ins. Co., 109 N. Y. 504, 17 N. E. 369; Waln v. Thompson, 9 Serg. & R. (Pa.) 115, 11 Am. Dec. 675; Canada Sugar Refining Co. v. Insurance Co., 175 U. S. 609, 44 L. ed. 292, 20 Sup. Ct. 239. Contra, seemingly, are Ketell v. Alliance Ins. Co., 10 Gray (Mass.) 144; Mayo v. India Mut. Ins. Co., 152 Mass. 172, 25 N. E. 80, 9 L. R. A. 831, 23 Am. St. 814.

[16] In the recent case of Devitt v. Providence Washington Ins. Co., 61 App. Div. (N. Y.) 390, 70 N. Y. S. 654, affd. 173 N. Y. 17, 65 N. E. 777, the policy read "free of partial loss," and "fruit and vegetables, and other articles perishable in their own nature, are free of particular average." These clauses were held to have the same meaning, that the underwriters were liable only for a total loss. But "a total loss" was held to mean a constructive total loss. The original

corn was thrown overboard and lost, and the remainder was saved in a damaged condition and sold for about one-fourth of the market value of sound corn, it was held not a total loss because some of the corn was saved in a condition in which it was of some value.[17] And another case where the insurance was upon a cargo of four hundred tons of jerked beef, and part of the cargo was thrown overboard, and part of the remainder was so badly damaged that the port authorities at Nassau refused to allow more than one hundred and fifty tons of it to be landed, and this was wet and heated and in no condition to be reshipped, in answer to a question certified to the Supreme Court, it was said: "If the jury find that the jerked beef was a perishable article within the meaning of the policy, the defendant is not liable as for a total loss of freight, unless it appears that there was a destruction in specie of the entire cargo, so that it had lost its original character at Nassau, the port of distress; or that a total destruction would have been inevitable from the damage received, if it had been reshipped before it could have arrived at Matanzas, the port of destination."[18]

value of the cargo was $3,811, and, at a total expense of $1,983.88, the underwriter succeeded in recovering in specie a portion of the cargo, which sold for the gross sum of $960.25. The plaintiff was allowed to recover as for a total loss.

[17] Marean v. United States Ins. Co., 1 Wheat. (U. S.) 219, 4 L. ed. 75, affg. 3 Wash. (U. S.) 256, Fed. Cas. No. 9064. A plaintiff was insured upon hides, memorandum articles, the whole number of which was 14,565, and of these 798 were a total loss by the sinking of a lighter, and 2,491 of those sunk were fished up in a damaged condition and sold, as well as 800 hides insured as part of a much larger number of the same kind as those lost. It was held not a total loss of the 798. Biays v. Chesapeake Ins. Co., 7 Cranch (U. S.) 415, 3 L. ed. 389.

[18] Hugg v. Augusta Ins. &c. Co., 7 How. (U. S.) 595, 12 L. ed. 834. See comments on this case in Great Western Ins. Co. v. Fogarty, 19 Wall. (U. S.) 640, 22 L. ed. 216, where the policy was upon machinery "at and from New York to Havana, free from particular average," and the machinery consisted of the various parts necessary for a complete sugar packing machine, described as "eight pieces and eight boxes, composing one sugar packer and three trucks." The ship was wrecked and abandoned to the underwriters, and their agents took possession, and after a month's work raised up a number of pieces composing the machinery, which they tendered to the insured with a claim that there was not a total loss. The trial court instructed the jury that, "The meaning of the term 'free from particular average' used in the policy was, that the defendants should be liable only for a total loss of the subject insured; that the subject insured was not machines but machinery, by which is generally understood the several parts or portions of machines adapted and fitted to be put together so as to constitute a machine," which was approved on appeal, where the court said: "If parts of them were absolutely lost, and every piece recovered had lost its

Where a carriage was insured and all was lost but the wheels, the court held that there was a total loss of the thing insured.[19]

§ 4499. Entire or severable contract.—Where articles are insured, "warranted free from all average," it is sometimes necessary to determine whether the contract is entire or severable, in order to prevent the doctrine that there can be no recovery where any part of the subject of insurance is recovered in specie, from destroying the very purpose for which the insurance is effected. Carried to its extreme by strict construction it would lead to rather absurd results. Thus, a policy upon the personal effects of the master, "free from all average," would be rendered ineffectual if the unfortunate master escaped from the wreck with his breeches on, although leaving all the rest of his property behind. To avoid such a result it is held that such a policy should be applied distributively to the various articles, and that the underwriter is liable for articles which are totally lost, although a few articles of wearing apparel are saved.[20] Upon the same principle of construction a policy against total loss for a gross amount "on goods" of an emigrant, which consisted of a number of cases and packages of miscellaneous articles, was held to cover the articles totally lost in a wreck, although a case of circular saws and a case of window glass were saved uninjured.[21]

§ 4500. Division of cargo—Transhipment.—Where goods shipped under such a policy are necessarily transhipped at an intermediate port and divided between two vessels, one of

adaptability to be used as part of the machine; had lost it so entirely that it would cost as much to buy a new piece just like it, as to repair or adapt that one to the purpose, then there was a total loss of the machinery. If no piece recovered was of any use, or could be applied to any use connected with the machine of which it was a part, without more expense on it than its original cost, then there was no part of the machinery saved."

[19] Judah v. Randall, 2 Caines Cas. (N. Y.) 324. "In the case of Wallerstein v. Columbian Ins. Co., 44 N. Y. 204, the whole doctrine is ably reviewed with a very full reference to previous decisions, and it is there shown that there is far from unanimity in the language in which the rule is expressed; and the extreme doctrine of an absolute extinction or destruction of the thing insured is not the true doctrine, or, at least, is not applicable in all cases as a criterion of a total loss." Mr. Justice Miller in Great Western Ins. Co. v. Fogarty, 19 Wall. (U. S.) 640, 22 L. ed. 216.

[20] Duff v. Mackenzie, 3 C. B. (N. S.) 16; Canton Ins. Office v. Woodside, 90 Fed. 301, 33 C. C. A. 63.

[21] Wilkinson v. Hyde, 3 C. B. (N. S.) 30.

which is thereafter wrecked with its cargo, and the other arrives safely at its port of destination, the insurers may be liable for the loss although they would not have been liable had the goods remained on the original ship and some portion thereof lost. "A policy upon goods in a particular ship," said Mr. Justice Gray,[22] "covers them in another ship, if transhipped by necessity, or under a stipulation in the policy allowing transhipment. * * * After such transhipment the cargoes of the two ships became subject to different perils of separate voyages, to distinct liens for freight, to independent contributions in case of jettison. The object of limiting an insurance to total loss is to exclude a claim for a mere partial loss of that subject which is liable to the perils that cause the injury; not to exempt the insurers from liability when those perils destroy the whole subject which is within their operation, because another subject, insured in the same policy indeed, but undergoing different risks, has not also been destroyed. An insurance upon two ships, or the cargoes of two ships, as an indivisible subject-matter, would be a novelty. There is no more reason for inferring an intention in the parties to treat these goods as one subject of insurance after they had been necessarily separated into two bottoms, than if they had been originally described in the policy as partly in one ship and partly in another."[23]

§ 4501. **Abandonment—Definition.**—An abandonment is the act by which, after a constructive total loss, the insured declares to the insurer that he relinquishes to him his interest in the thing insured.[24] Or, in other words, it is the yielding or surren-

[22] Pierce v. Columbia Ins. Co., 14 Allen (Mass.) 320. That a jettison of cargo to save the ship is not an absolute total loss if a part of the goods are saved, see Monroe v. British &c. Ins. Co., 52 Fed. 777, 3 C. C. A. 280.

[23] See Plantamour v. Staples, 3 Dougl. 1; Macey v. Mutual Marine Ins. Co., 12 Gray (Mass.) 497.

[24] Cal. Civ. Code (1906), § 2716; 2 Arnould Mar. Ins. (6th ed.) 953. No notice of abandonment is necessary when there is an actual total loss, that is, when there is nothing left to abandon. Rankin v. Potter, L. R. 6 H. L. 83. As to the distinction between abandonment and notice of abandonment, see language of Brett, L. J., in Kaltenbach v. Mackenzie, L. R. 3 C. P. Div. 467. The insured need not abandon unless he chooses to do so. The collection from the insurer of the full amount for which the vessel was insured on account of injury by a collision does not import an abandonment of the vessel to the underwriters when she was undervalued and the insured refused to abandon. Abandonment must be

dering to the insurer by the insured of his interest in the property covered by the policy.[25]

§ 4502. Right to abandon.—In the United States the insured may abandon the thing insured or any particular portion thereof separately valued by the policy, or otherwise separately insured, and recover for the total loss thereof when the cause of the loss is the peril insured against, (1) if more than half thereof in value is actually lost or would have been expended to recover it from the peril; (2) if it is injured to such an extent as to reduce its value to more than one-half; (3) if the thing insured, being a ship, the contemplated voyage cannot be lawfully performed without incurring expense to the insured of more than one-half of the value of the thing abandoned, or without incurring a risk which a prudent man would not take under the circumstances; or (4) if the thing insured being the cargo or freightage, the voyage cannot be performed, nor another ship procured by the master within a reasonable time and with reasonable diligence to forward the cargo without incurring like expenses or risk.[26] But freight cannot well be abandoned unless the ship is also abandoned.

The English rule, however, does not permit abandonment unless the cost of repairs would be greater than the value of the ship when repaired.[27]

the voluntary act of the insured. In re The St. John, 101 Fed. 469, and cases there cited.

[25] Merchants &c. Ins. Co. v. Duffield, 2 Handy (Ohio) 122, 12 Ohio Dec. 361, affd. 6 Ohio St. 200, 67 Am. Dec. 339. See also, Anderson's Law Dict. Tit. "Abandon"; Chesapeake Ins. Co. v. Stark, 6 Cranch (U. S.) 268, 3 L. ed. 220.

[26] Cal. Civ. Code (1906), § 2717. See Washburn & Moen Co. v. Reliance Mar. Ins. Co., 179 U. S. 1, 45 L. ed. 49, 21 Sup. Ct. 1; Marcordier v. Chesapeake Ins. Co., 8 Cranch (U. S.) 39, 3 L. ed. 481; Patapsco Ins. Co. v. Southgate, 5 Pet. (U. S.) 604, 8 L. ed. 243; Bradlie v. Maryland Ins. Co., 12 Pet. (U. S.) 378, 9 L. ed. 1123; Orient Ins. Co. v. Adams, 123 U. S. 67, 31 L. ed. 63, 8 Sup. Ct. 68. See also, Soelberg v. Western Assur. Co., 119 Fed. 23, 55 C. C. A. 601; Louisville Underwriters v. Pence, 93 Ky. 96, 14 Ky. L. 21, 19 S. W. 10, 40 Am. St. 176; Wallerstein v. Columbian Ins. Co., 44 N. Y. 204, 4 Am. Rep. 664. Also, 3 Elliott Ev., § 2441. And see as to construction of provision against abandonment for constructive loss, unless cost of repairs required by the disaster exclusive of cost of rescue, etc., is equivalent to 75 per cent. of agreed value, Searles v. Western Assur. Co., 88 Miss. 260, 40 So. 866, 117 Am. St. 741.

[27] Angel v. Merchants' Mar. Ins. Co., L. R. (1903) 1 K. B. 811, 72 L. J. K. B. 498. See also, Grainger v. Martin, 2 Best & S. 456; Moss v. Smith, 9 Man. G. & S. 94; 3 Elliott Ev., § 2441. As to notice of abandonment, see Mansell v. Hoade, 20

An abandonment cannot be made after the voyage is completed even though the vessel arrives in its port of destination in a damaged condition, so that it will cost more than fifty per cent. of her value to repair.[28]

§ 4503. Test of the right to abandon.—There is some conflict of authority as to the circumstances under which the insured is entitled to abandon the insured property. Under the rule that seems to obtain in Maine and Massachusetts imminent danger of a total loss, however critical the condition, does not give the right to abandonment.[29] But the weight of authority is to the effect that there may be a total loss, although the subject-matter of the insurance continues to exist physically, as when the ship is intact but at the bottom of the sea.[30] The test of the right to abandon within these authorities is not the certainty, but "the high probability of a total loss." As stated by Chancellor Kent,[31] "The insured is to act, not upon certainties, but upon probabilities; and if the facts present a case of extreme hazard, and of probable expense, exceeding half the value of the ship, the insured may

T. L. 150. The departure in the United States from the English rule began with Gardiner v. Smith, 1 Johns. Cas. (N. Y.) 141. In Marcardier v. Chesapeake Ins. Co., 8 Cranch (U. S.) 39, 3 L. ed. 481, Mr. Justice Story derives the one half rule from Le Guidon, a treatise published in Rouen in 1556. See statement of the rule in Peele v. Merchants' Ins. Co., 3 Mason (U. S.) 27, Fed. Cas. No. 10905. As to the meaning of "repaired value," see North Atlantic S. S. Co. v. Burr, 20 T. L. 266, 9 Coml. Cas. 164.

[28] Pezant v. National Ins. Co., 15 Wend. (N. Y.) 453; Burt v. Brewers' &c. Ins. Co., 78 N. Y. 400. That abandonment of the injured cargo must be made before the end of the voyage, see Forbes v. Manufacturers' Ins. Co., 1 Gray (Mass.) 371; Seton v. Delaware Ins. Co., 2 Wash. (U. S.) 175. See also, Murray v. Hatch, 6 Mass. 465; Carr v. Security Ins. Co., 109 N. Y. 504, 17 N. E. 369.

[29] Dunning v. Merchants' Mut. Marine Ins. Co., 57 Maine 108; Wood v. Lincoln & Kennebeck Ins. Co., 6 Mass. 479, 4 Am. Dec. 163; Peale v. Suffolk Ins. Co., 7 Pick. (Mass.) 254; Hall v. Franklin Ins. Co., 9 Pick. (Mass.) 466; Deblois v. Ocean Insurance Co., 16 Pick. (Mass.) 303, 28 Am. Rep. 245; Commonwealth Ins. Co. v. Chase, 20 Pick. (Mass.) 142. See Orrok v. Commonwealth Ins. Co., 21 Pick. (Mass.) 456, 32 Am. Dec. 271.

[30] See In re The Blairmore, L. R. (1898) App. Cas. 593, 67 L. J. P. C. 96. The ship went to the bottom, and the insured gave notice of abandonment, which the insurers refused. The underwriters then raised and repaired the ship and claimed to have converted the total into a partial loss, but the owners were allowed to recover for a total loss.

[31] 3 Kent's Com. (14th ed.) 321, quoted in Louisville Underwriters v. Pence, 93 Ky. 96, 14 Ky. L. 21, 19 S. W. 10, 40 Am. St. 176; Copelin v. Phœnix Ins. Co., 46 Mo. 211, 2 Am. Rep. 504; Ruckman v. Merchants' Ins. Co., 12 N. Y. Super. Ct. 342; Peele v. Merchants' Ins. Co., 3 Mason (U. S.) 27, Fed. Cas. No. 10905; Bradlie v. Maryland Ins. Co., 12 Pet.

abandon, though it would happen that she was afterward recovered at a less expense." Hence, "The right to abandon exists when the ship, for all useful purposes of the voyage, is gone from the control of the owner; as in the cases of submersion, or shipwreck, or capture, and it is uncertain, or the time unreasonably distant, when it will be restored in a state to resume the voyage; or when the risk and expense of restoring the vessel are disproportionated to the expected benefit and object of the voyage."[32]

§ 4504. Apprehension of peril.—The authorities are also conflicting upon the question of whether mere apprehension of capture, if the ship attempts to enter the port of destination which has been blockaded or declared hostile, will justify abandonment. In Massachusetts it is held that no right to abandon exists under such circumstances,[33] and this is in line with the leading English authorities which hold that an interdiction of commerce with the port of destination by means of a blockade or an embargo, or the possession of the port by the enemy, is not a peril within the policy.[34] The prevailing rule in the United States, however, is that the insured may abandon under such circumstances.[35] However this may be, there is, as said by Chancellor Kent,[36] "no doubt about the general principle, that if the voyage be relinquished merely through fear of capture, the loss is not covered by the policy. The apprehension of capture or any other peril in transitu is no ground for abandonment."

(U. S.) 378, 9 L. ed. 1123; In re The Brig Sarah, 2 Sumn. (U. S.) 206, 215. "To establish such a loss," under the English law, said Lord Watson, "it must be shewn that a shipowner of ordinary prudence and uninsured would not have gone to the expense of raising and repairing the vessel, because her market-value when raised and repaired would probably be less than the cost of restoration."

[32] In re The Blairmore, 67 L. J. P. C. 96.

[33] Richardson v. Maine &c. Ins. Co., 6 Mass. 102, 4 Am. Dec. 92; Cook v. Essex &c. Ins. Co., 6 Mass. 122; Tucker v. United Marine & Fire Ins. Co., 12 Mass. 288.

[34] Hadkinson v. Robinson, 3 Bos. & P. 388.

[35] 3 Kent's Comm. (14th ed.) 293, 1 Phillips Ins., § 1115; Craig v. United Ins. Co., 6 Johns. (N. Y.) 226, 5 Am. Dec. 222; Saltus v. United States Ins. Co., 15 Johns. (N. Y.) 523; Thompson v. Read, 12 Serg. & R. (Pa.) 440; Savage v. Pleasants, 5 Binn. (Pa.) 403, 6 Am. Dec. 424; Lorent v. South Carolina Ins. Co., 1 Nott & McC. (S. Car.) 505; Olivera v. Union &c. Ins. Co., 3 Wheat. (U. S.) 183, 4 L. ed. 365; King v. Delaware Ins. Co., 2 Wash. (U. S.) 300, Fed. Cas. No. 7788, affd. 6 Cranch (U. S.) 71, 3 L. ed. 155.

[36] 3 Kent's Comm. (14th ed.) 293.

§ 4505. Sale by master.—Where the master is unable to raise funds necessary to repair the ship, and his inability is not caused by the default or negligence of the insured, he may sell the ship and abandon it to the underwriters.[37] So, where the ship is in a position of extreme peril, the proper protection of the interests of all concerned may make it the duty of the master to effect a sale. If possible, it is his duty to consult the owners, but when this is impossible, the master may make the sale upon his own responsibility.[38] The master is justified in making such a sale only under circumstances of peril, after full consideration of the circumstances, a careful examination of the condition of the ship, and after having first made every effort in his power with the means then at his disposal to extricate the ship from her peril, or to raise funds for her repairs.[39] So carefully is this power guarded that it has been said, that the facts and circumstances must exclude every rational theory that the interests of those he represents would be subserved in any other way than by the sale; or in other words to refrain from selling, to one of ordinary maritime experience and intelligence as the shipmaster, must seem to be a violation of his manifest moral duty.[40]

Under the conditions, of course, the master cannot purchase on his own account or for that of his owners without waiving the abandonment.[41] Where the ship is thus sold, the title to the proceeds of the sale passes at once to the insurers, and therefore, according to the great weight of authority, no abandonment is necessary in any other sense.[42]

[37] Ruckman v. Merchants' &c. Ins. Co., 12 N. Y. Super. Ct. 342; American Ins. Co. v. Ogden, 20 Wend. (N. Y.) 287, 302, revg. 15 Wend. (N. Y.) 532. See also, 2 Phillip Ins., § 1537; Greene v. Pacific Mut. Ins. Co., 9 Allen (Mass.) 217.

[38] 2 Phillips Ins., §§ 1577, 1578; Barber Ins., § 133; 2 Parsons Mar. Ins., § 146; Hunter v. Parker, 7 M. & W. 322; Acatos v. Burns, L. R. 3 Exch. Div. 282 (right to sell goods); Prince v. Ocean Insurance Co., 40 Maine 481, 63 Am. Dec. 676; Gordon v. Massachusetts Fire &c. Ins. Co., 2 Pick. (Mass.) 249; In re The Schooner Tilton, 5 Mason (U. S.) 465, Fed. Cas. No. 14054.

[39] 1 Arnould Ins. (6th ed.) 353; Cobequid Marine Ins. Co. v. Barteaux, L. R. 6 P. C. 319.

[40] Stephenson v. Piscataqua Fire &c. Ins. Co., 54 Maine 55. The authority of a master to sell a vessel or cargo in case of marine disaster rests exclusively upon the ground of necessity. In kind, however, the necessity is not a legal or physical necessity, but a moral one. As sometimes stated, it must be an urgent necessity. See O'Leary v. Pelican Insurance Co., 29 N. Bruns. 510.

[41] Ogden v. New York Fire Ins. Co., 10 Johns. (N. Y.) 177, affd. 12 Johns. (N. Y.) 25.

[42] Farnsworth v. Hyde, 18 C. B.

§ 4506. Goods separately valued. — Phillips says that, "Where divers kinds of articles of the same cargo are indiscriminately insured in the same policy, and against the same risks, a separate abandonment of any of them cannot be made, though they are separately valued."[43] But the rule recognized in the California Code seems to be established by the weight of authority, and is to the effect that where any part of the cargo is separately valued although covered by one policy and a gross premium, there may be an abandonment of the part that is separately insured.[44] Thus, where the insurance covered sugar, maize and logwood, and the quantity of each was separately stated and valued, and more than one-half the sugar was damaged by the perils of the sea, the right to abandon the whole of the sugar was sustained.[45]

§ 4507. Time of abandonment—Must be complete.—Abandonment must be made within a reasonable time after information of the loss, after commencement of the voyage, and before the party abandoning has information of its completion. The reasonableness of the time must be determined by the circumstances of the case.[46] After having taken a reasonable time to ascertain the facts,[47] the insured must promptly elect to abandon or not to abandon, and if he elects to abandon, he must give reasonably prompt notice thereof to the underwriter.[48] So, an abandonment, which has for its object the transfer of the title to

(N. S.) 835; Prince v. Ocean Ins. Co., 40 Maine 481, 63 Am. Dec. 676; In re The Brig Sarah, 2 Sumn. (U. S.) 206.

[43] Phillips Ins., § 1661. See Newlin v. Insurance Co. of North America, 20 Pa. St. 312; Hernandez v. Sun Mut. Ins. Co., 6 Blatchf. (U. S.) 317.

[44] 3 Kent's Comm. (14th ed.) 329; Emerigon Ins., ch. 17, § 8; Ocean Ins. Co. v. Carrington, 3 Conn. 357; Kettell v. Alliance Ins. Co., 10 Gray (Mass.) 144; Silloway v. Neptune Ins. Co., 12 Gray (Mass.) 73; Humphreys v. Union Ins. Co., 3 Mason (U. S.) 429, Fed. Cas. No. 6871. See opinion of Jervis, C. J., in Ralli v. Janson, 6 El. & Bl. 422. As to when there is such separate insurance, see Schumitsch v. American Ins. Co., 48 Wis. 26, 3 N. W. 595, 9 Ins. L. J. 60.

[45] Deidericks v. Commercial Ins. Co., 10 Johns. (N. Y.) 234.

[46] Hunt v. Royal Exch. Assurance Co., 5 M. & S. 47 (delay of five days held unreasonable); Bell v. Beveridge, 4 Dall. (Pa.) 272 (delay of five months under the circumstances unreasonable).

[47] Browning v. Providential Ins. Co., L. R. 5 P. C. 263, 28 L. T. 835, 2 Asp. M. C. 35.

[48] Kleinwort v. Cassa Marrittima of Genoa, L. R. 2 App. Cas. 156; Gernon v. Royal Exch. Assur. Co., 6 Taunt. 383; Maryland Ins. Co. v. Ruden's Admr., 6 Cranch. (U. S.) 338, 3 L. ed. 242. See also, Independent Transp. Co. v. Canton Ins. Office, 173 Fed. 564.

the property to the underwriter, must be positive, complete and unconditional.[49]

§ 4508. Notice—Manner and character of.—An abandonment, unless otherwise provided for in the policy, is made by giving notice thereof to the underwriter. Such a notice is necessary unless waived expressly or by the acceptance of an actual abandonment, and is an offer made by the insured to the underwriters to vest the property in the underwriters, so that they may deal with it as their own.[50] The notice must be explicit and must specify the cause of the abandonment although it may be sufficient if it shows that there is probable cause, and need not be accompanied by proofs of interest or loss.[51] It is held in this country that the notice must state the cause and the grounds upon which the abandonment is made, and that the assured can avail himself of no other grounds than those stated in the notice.[52] Lord Ellenborough once intimated that the word "abandonment" must be

[49] Pierce v. Ocean Ins. Co., 18 Pick. (Mass.) 83, 29 Am. Dec. 567; Higginson v. Dall, 13 Mass. 96. See also, Emerigon Ins., ch. 17, § 6; Boseley v. Chesapeake Ins. Co., 3 Gill & J. (Md.) 450, 22 Am. Dec. 337, and note.

[50] Western Assur. Co. v. Poole, 72 L. J. K. B. 195; Gomila v. Hibernia Ins. Co., 40 La. Ann. 553, 4 So. 590; Boseley v. Chesapeake Ins. Co., 3 Gill & J. (Md.) 450, 22 Am. Dec. 337; New Orleans Ins. Co. v. Piaggio, 16 Wall. (U. S.) 378, 21 L. ed. 358. See also, Gallagher v. Taylor, 5 Can. Sup. Ct. 368 (unless the circumstances are such as to render the notice of no avail); Roux v. Salvador, 3 Bing. N. Cas. 266. By whom given, Hunt v. Royal Exch. Assur. Co., 5 M. & S. 47 (one of several parties jointly interested); Jardine v. Leathley, 3 B. & S. 700. As to waiver by denial of liability, see De Farconnet v. Western Ins. Co., 110 Fed. 405. When the policy contains a provision, "there can be no abandonment of the subject insured," the assured is not bound to give notice of abandonment in order to convert a constructive total loss into an actual total loss. "The case must be considered without reference to such notice, or as if no notice were essential to convert a constructive total loss into actual total loss. In other words, it was the intention of the parties to eliminate the necessity of notice of abandonment in all cases of loss or damage." Devitt v. Providence Washington Ins. Co., 61 App. Div. (N. Y.) 390, 70 N. Y. S. 654. See also, McLain v. British &c. Ins. Co., 16 Misc. (N. Y.) 336, 38 N. Y. S. 77.

[51] See, Cal. Civ. Code (1906), § 2721. Bosley v. Chesapeake Ins. Co., 3 Gill & J. (Md.) 450, 22 Am. Dec. 337; Parmeter v. Todhunter, 1 Campb. 541.

[52] Pierce v. Ocean Ins. Co., 18 Pick. (Mass.) 83, 29 Am. Dec. 567; Suydam v. Marine Ins. Co., 1 Johns. (N. Y.) 181, 3 Am. Dec. 307. See also, 2 Phillips Ins., § 1684. But for English doctrine see 2 Arnould Marine Ins. (6th ed.) 959, note. For notice held sufficient in form and substance, though not in time, see Independent Transp. Co. v. Canton Ins. Office, 173 Fed. 564.

used in the notice, but it is now settled that this is not necessary.[53] Any expression which informs the underwriter that it is the intention of the assured to give up to him the property insured on the ground of its having been a total loss, is generally sufficient,[54] at least if it leaves no reasonable doubt of the intention of the insured to abandon.[55] Cases in which such notices were held sufficient are cited below.[56]

The notice may, of course, be waived by the underwriter, and actual abandonment, if accepted by the underwriter, renders notice unnecessary.[57] Notice must be given within a reasonable time, but the insured is entitled to a reasonable time for the purpose of making an investigation.[58]

§ 4509. Basis of valuation for total loss.—There is some uncertainty or difference of opinion as to the basis upon which the valuation should be made in determining the extent of a loss which will justify an abandonment. In England the insured can abandon only when the cost of the repairs would amount to more than the ship would be worth when repaired,[59] and the value of the ship to the owner when repaired is the general test in valued, as well as in open, policies.[60] In the United States the calculation of fifty per cent. of the loss is to be made upon the value of the ship at the time and place of the accident.[61] The English authorities

[53] See Parmeter v. Todhunter, 1 Camp. 541.

[54] Currie v. Bombay Native Ins. Co., L. R. 3 P. C. 72, 39 L. J. P. C. 1; Thwing v. Washington Ins. Co., 10 Gray (Mass.) 443 (also holding that it need not be in writing).

[55] Patapsco Ins. Co. v. Southgate, 5 Pet. (U. S.) 604, 8 L. ed. 243.

[56] Currie v. Bombay Native Ins. Co., L. R. 3 P. C. 72, 39 L. J. P. C. 1; King v. Walker, 3 H. & C. 209, 33 L. J. Exch. 325; Thelluson v. Fletcher, 1 Esp. 73. In McConchie v. Sun Mut. Ins. Co., 26 N. Y. 477, it is said that in the United States the notice must state or clearly imply that the loss exceeds half the value.

[57] Canada Sugar Ref. Co. v. Insurance Co., 175 U. S. 609, 44 L. ed. 292, 20 Sup. Ct. 239. So, on the other hand, the abandonment may be waived by the assured. Louisville Underwriters v. Pence (Ky.), 19 S. W. 10; Martin v. Salem Marine Ins. Co., 2 Mass. 420.

[58] King v. Walker, 3 H. & C. 209, 33 L. J. Exch. 325; Currie v. Bombay Native Ins. Co., 39 L. J. P. C. 1 L. R. 3 P. C. 72; Potter v. Campbell, 16 W. R. 401; King v. Walker, 3 H. & C. 209, 33 L. J. Exch. 325; Harvey v. Detroit Fire &c. Ins. Co., 120 Mich. 601, 79 N. W. 898. See also, Mitchell v. Edie, 1 T. R. 608. Four months' delay unexcused, has been held unreasonable. Independent Transp. Co. v. Canton Ins. Office, 173 Fed. 564.

[59] Irving v. Manning, 1 H. L. 287.

[60] Irving v. Manning, 1 H. L. 287. See, Grainger v. Martin, 2 B. & S. 456, 4 B. & S. 9.

[61] Soelberg v. Western Assur. Co., 119 Fed. 23, 55 C. C. A. 601 (note terms of policy); Patapsco Ins. Co.

are to the effect that the value is to be determined according to the rule above stated in open as well as time policies, and this rule was approved by Mr. Justice Story.[62] But in Massachusetts and New York the valuation of the vessel as stated in the policy is to be taken as conclusive for this purpose.[63] This rule is sometimes incorporated in the policy.[64] The courts of Massachusetts are at variance with the general line of authorities on the question of whether a deduction of one-third off for old is to be made in determining the amount of damages for the purpose of abandonment, holding that the deduction must be made.[65] But the contrary is held by the Supreme Court of the United States, in a case where it is said that the rule does not apply to cases of a technical total loss.[66]

§ 4510. Acceptance of abandonment.—The right of the insured to abandon under certain circumstances is determined by the facts as they exist when the notice is given,[67] and is not affected by the refusal of the insurer to accept the abandonment. If the insurer in fact accepts the abandonment, it is conclusive upon the parties and admits the loss and the propriety and sufficiency of the abandonment,[68] and in this country no subsequent

v. Southgate, 5 Pet. (U. S.) 604, 8 L. ed. 243; Bradlie v. Maryland Ins. Co., 12 Pet. (U. S.) 378, 9 L. ed. 1123; Peele v. Merchants' Ins. Co., 3 Mason (U. S.) 27, Fed. Cas. No. 10905. Compare Peninsular & O. S. S. Co. v. Atlantic Mut. Ins. Co., 185 Fed. 172; Leary v. Murray, 178 Murray, 178 Fed. 209, 101 C. C. A. 529.

[62] Peele v. Merchants' Ins. Co., 3 Mason (U. S.) 27, Fed. Cas. No. 10905.

[63] Deblois v. Ocean Ins. Co., 16 Pick. (Mass.) 303, 28 Am. Rep. 245; Hall v. Ocean Ins. Co., 21 Pick. (Mass.) 472; Orock v. Commonwealth Ins. Co., 21 Pick. (Mass.) 456; Allen v. Commercial Ins. Co., 1 Gray (Mass.) 154; American Ins. Co. v. Ogden, 20 Wend. (N. Y.) 287.

[64] Soelberg v. Western Assur. Co., 119 Fed. 23, 55 C. C. A. 601; Harvey v. Detroit Fire & Marine Ins. Co., 120 Mich. 601, 79 N. W. 898.

[65] Sewall v. United States Ins. Co., 11 Pick. (Mass.) 90; Winn v. Columbia Ins. Co., 12 Pick. (Mass.) 279; Deblois v. Ocean Ins. Co., 16 Pick. (Mass.) 303, 28 Am. Dec. 245; Allen v. Commercial Ins. Co., 1 Gray (Mass.) 154.

[66] Bradlie v. Maryland Ins. Co., 12 Pet. (U. S.) 378, 9 L. ed. 1123. Chancellor Kent says (3 Comm., p. 331), that "the half value which authorizes an abandonment is half the sum which the ship, if repaired, would be worth without any such deduction," citing Center v. American Ins. Co., 7 Cowan (N. Y.) 564, 4 Wend. 45. See Phillip's Ins., § 1536.

[67] Dickey v. American Ins. Co., 3 Wend. (N. Y.) 658, 20 Am. Dec. 763; Orient Mut. Ins. Co. v. Adams, 123 U. S. 67, 31 L. ed. 63, 8 Sup. Ct. 68.

[68] Reynolds v. Ocean Ins. Co., 22 Pick. (Mass.) 191, 33 Am. Dec. 727; New Orleans Ins. Association v. Paggio, 16 Wall. (U. S.) 378, 21 L. ed. 358; Phœnix Ins. Co. v. Copelin, 9 Wall. (U. S.) 461, 19 L. ed. 739.

developments can affect the right of the insured to recover.[69] This acceptance may be express or by implication, as by acts and conduct inconsistent with any other intention.[70] Mere silence on the part of the underwriter will not preclude him from contesting the abandonment.[71] By the weight of authority, however, elsewhere than in Massachusetts,[72] when the underwriter takes possession of a vessel after abandonment, he accepts the abandonment, and after repairing the ship cannot tender her back to the insured in fulfilment of his contract.[73] On the other hand, the insured may waive his right to abandon, expressly or by acts prior to its acceptance, which are inconsistent with a recognition of the fact that there has been a complete transfer of his property and interests to the underwriter.[74] But acts of the master after abandonment not inconsistent with his possession as agent of the underwriters do not affect the legality of the abandonment.[75] Marine insurance policies often contain a provision to the effect that the acts of either party, after the accident, done with a view

[69] Northwestern Transp. Co. v. Continental Ins. Co., 24 Fed. 171; Wood v. Lincoln & Kennebec Ins. Co., 6 Mass. 479, 4 Am. Dec. 163; Dickey v. American Ins. Co., 3 Wend. (N. Y.) 658, 20 Am. Dec. 763.

[70] Hudson v. Harrison, 3 Br. & B. 97; Copelin v. Insurance Co., 9 Wall. (U. S.) 461, 19 L. ed. 739. See also, Richelieu &c. Nav. Co. v. Boston &c. Ins. Co., 136 U. S. 408, 10 Sup. Ct. 934; Shepherd v. Henderson, 7 App. Cas. 49.

[71] Badger v. Ocean Ins. Co., 23 Pick. (Mass.) 347; Peele v. Merchants' Ins. Co., 3 Mason (U. S.) 27, Fed. Cas. No. 10905; Washburn &c. Co. v. Reliance Ins. Co., 179 U. S. 1, 45 L. ed. 49, 21 Sup. Ct. 1.

[72] See Wood v. Lincoln & Kennebec Ins. Co., 6 Mass. 479, 4 Am. Dec. 163; C. J. Deblois v. Ocean Ins. Co., 16 Pick. (Mass.) 303; Reynolds v. Ocean Ins. Co., 22 Pick. (Mass.) 191, 1 Metc. (Mass.) 160, 33 Am. Dec. 727.

[73] The Blairmore, 67 L. J. P. C. 96 L. R. (1898) App. Cas. 593. See also, 2 Parsons' Mar. Ins. 177; 2 Phillips Ins., §§ 1559, 1706; Wood v. Lincoln & Kennebec Ins. Co., 6 Mass. 479, 4 Am. Dec. 163; 2 Hare & Wallace American Leading Cas. (5th ed.) 379; Barber Ins., 372; Fulton Ins. Co. v. Goodman, 32 Ala. 108; Ruckman v. Merchants' Ins. Co., 12 N. Y. Sup. Ct. 342. See also, Peele v. Merchants' Ins. Co., 3 Mason (U. S.) 27, Fed Cas. No. 10905, and criticism of Massachusetts cases by Justice Eustis in Gloucester Ins. Co. v. Younger, 2 Curt. (U. S.) 322, 1 Sprague (U. S.) 236, Fed. Cas. No. 5487.

[74] Ogden v. New York Fire Ins. Co., 12 Johns. (N. Y.) 25; Abbott v. Sebor, 3 Johns. Cas. (N. Y.) 39, 2 Am. Dec. 139 (purchased by the owner); Dickey v. American Ins. Co., 3 Wend. (N. Y.) 658, 20 Am. Dec. 763 (repair of ship); Saurez v. Sun Mut. Ins. Co., 2 Sandf. (N. Y.) 482 (partial and temporary repairs only); Canada Sugar Refining Co. v. Insurance Co., 175 U. S. 619, 44 L. ed. 292, 20 Sup. Ct. 239; Columbia Ins. Co. v. Catlett, 12 Wheat. (U. S.) 383, 6 L. ed. 234.

[75] Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co., 106 Fed. 116 (insurer transhipping saved portion of cargo); Columbian Ins. Co. v. Ashby, 4 Pet. (U. S.) 139, 7 L. ed. 809.

to saving property, will not be considered a waiver, or an acceptance of the abandonment.[76]

§ 4511. **Effect of abandonment.**—After abandonment and notice, the title to the property passes to the underwriters, and they become the owners from the date of the casualty.[77] Therefore the giving of proper notice in a case justifying abandonment or the acceptance of the abandonment after notice effects a complete transfer of the interest of the insured in the property, although it may not have been insured for its full value.[78] Where the policy provides that an abandonment for a total loss should not be effectual unless it was sufficient to convey to the insurance company an unencumbered and perfect title to "the subject abandoned," and several companies have policies on the vessel, it seems that it is only necessary to convey to any one company a proportionate part.[79] The party to whom an abandonment is made becomes thereafter entitled to all claims for general average

[76] Soelberg v. Western Assur. Co., 119 Fed. 23, 55 C. C. A. 601 (under the sue and labor clause); Gloucester Ins. Co. v. Younger, 2 Curt. (U. S.) 322, 1 Sprague (U. S.) 236, Fed. Cas. No. 5487.

[77] Thompson v. Rowcroft, 4 East 34 (the valuation fixed by the policy is conclusive); Randal v. Cockran, 1 Ves. Sen. 98; Leatham v. Terry, 3 Bos. & P. 479; Sun Mut. Ins. Co. v. Hall, 104 Mass. 507; Comegys v. Vasse, 1 Pet. (U. S.) 193, 7 L. ed. 108. See also, The St. John, 101 Fed. 469. "If a party chooses to have his vessel or his goods, as the case may be, taken at a fixed value, instead of leaving the contract, as in an ordinary policy, simply one of indemnity to the extent of the real value, and if thereby any benefit accrues to the underwriters, the underwriters must be entitled to it." North of England Iron Steamship Ins. Assn. v. Armstrong, L. R. 5 Q. B. 244; Mason v. Marine Ins. Co., 110 Fed. 452, 44 C. C. A. 106, 54 L. R. A. 700, citing numerous cases. See § 4513. The Potomac, 105 U. S. 630, 26 L. ed. 1194.

[78] Mason v. Marine Ins. Co., 110 Fed. 452, 49 C. C. A. 106, 54 L. R. A. 700. See note, 87 infra.

[79] Harvey v. Detroit Fire & Marine Ins. Co., 120 Mich. 601, 79 N. W. 898. The court said: "Counsel argue, 'The insurance covered the whole body of the schooner, and the abandonment should be co-extensive with the subject insured,' citing The Mary Perew, 15 Blatchf. (U. S.) 58, Fed. Cas. No. 9207; The Manitoba, 30 Fed. 129. The authorities are not free from conflict. * * * It was the opinion of the trial judge that: 'The provision in the policy requires that the abandonment shall be evidenced by a written transfer, which shall convey to and vest in the insurance company an unincumbered and perfect title to the subject abandoned. The "subject abandoned," in my judgment, means that part of the policy covered by the policy of insurance.' The conclusion is justified by 2 Phillips Ins., §§ 226, 1490; 2 Arnould Ins., 953, 956, 979; Rice v. Cobb, 9 Cush. (Mass.) 302; Phillips v. St. L. Insurance Co., 11 La. Ann. 459; Cincinnati Ins. Co. v. Duffield, 6 Ohio St. 200. See, Insurance Co. of North America v. Johnson, 70 Fed. 794, 17 C. C. A. 416; The Potomac, 105 U. S. 630, 26 L. ed. 1194."

and contribution,[80] or damages,[81] or other indemnity which the insured then had including prospective earnings of freight.[82] Freight already earned at the time of the disaster goes to the owner of the ship, or to the insurers of the freight, if it is insured. Where the freight is still pending, the English doctrine is that upon abandonment the whole freight goes to the abandonee, on the theory that the right is immature at the time of the abandonment and therefore not detachable from the ship, but many American courts have adopted what seems to be a more equitable rule, and award pending freight where it has been finally matured by the underwriter, to him and the owner of the vessel pro rata itineris, which each has accomplished. Thus by a device of equity the freight is divided at the date of the disaster.[83] Under an ordinary policy, the right of the insurer, who has paid a total loss, to recover against third parties who caused the loss is limited to the amount paid the insured. But where the policy is valued the value thus determined is conclusive as between the parties, and upon abandonment the underwriters succeed to the insured's claim for damages against the party whose tortious act occasioned the injury to the full extent of the claim of the insured, even though it exceeds in amount the insurance paid.[84] The underwriters, however, are entitled to no greater rights than were possessed by the insured, and if the insured has by a special contract waived or limited his right to claim damages from the party

[80] Sturgess v. Cary, 2 Curtis (U. S.) 59. See The St. John, 101 Fed. 469. The right of subrogation does not, however, depend upon abandonment.

[81] Mason v. Marine Ins. Co., 110 Fed. 452, 49 C. C. A. 106, 54 L. R. A. 700; Atlantic Ins. Co. v. Storrow, 5 Paige (N. Y.) 285.

[82] Burnand v. Rodocanachi, L. R. 7 App. Cas. 333. The underwriter on the ship becomes entitled to freight earned where the ship completes her voyage after the abandonment. See, The Red Sea, L. R. (1896) Prob. 20; Case v. Davidson, 5 M. & S. 79, 1 Eng. Rul. Cas. 141; Stewart v. Greenock Marine Ins. Co., 2 H. L. Cas. 159 (but not to the freight paid in advance).

[83] Mason v. Marine Ins. Co., 110 Fed. 452, 44 C. C. A. 106, 54 L. R. A. 700.

[84] North of England Iron Steamship Ins. Assn. v. Armstrong, L. R. 5 Q. B. 244; Comegys v. Vasse, 1 Pet. (U. S.) 193, 7 L. ed. 108; Phœnix Ins. Co. v. Erie Transp. Co., 117 U. S. 312, 29 L. ed. 873, 6 Sup. Ct. 750, 1175. See also, The Livingstone, 122 Fed. 278, revd. 130 Fed. 746, 65 C. C. A. 610, and cases there cited. This case was reversed by the Circuit Court of Appeals (130 Fed. 746), but the rule there established is against the weight of authority and does not seem satisfactory in principle. It is directly in conflict with the English rule as settled by the case of North of England Assn. v. Armstrong, L. R. 5 Q. B. 244.

whose negligence caused the loss, the underwriter is bound by the contract, even though he had no notice of its existence when the insurance was effected.[85] The concealment of the fact that such a contract is in existence may excuse the insurer from the payment of the loss, but if payment is voluntarily made, the insurer is without remedy.[86] But where the right to compensation from a third party passes by abandonment to the insurer, any compromise or settlement made after notice to the third party of the rights of the insurer is void.[87] The underwriter takes the property subject to all valid liens then existing against it.[88]

§ 4512. The master as the agent of the underwriters.— Upon the abandonment of the property, the master becomes the agent of the underwriters, and from that time all acts which are done in good faith by the master and others who were the agents of the insured before the loss are at the risk and for the benefit of the underwriters. The abandonment relates back to the time of the loss,[89] and the underwriters are liable for the bona fide acts of the master during the intermediate period.[90] "By the general law maritime," says Arnould,[91] "as recognized alike in this country and foreign states, the assured is bound, under circumstances authorizing an abandonment, to do his utmost to avert total loss, so as to lighten by the salvage, as far as possible, the burden which is to fall on the underwriters. In so doing he is

[85] Mercantile Mut. Ins. Co. v. Calebs, 20 N. Y. 173.

[86] See Insurance .Co. v. The "C. D., Jr.," I Woods (U. S.) 72.

[87] Home Ins. Co. v. Western Transp. Co., 33 How. Pr. (N. Y.) 102, 27 N. Y. Super. Ct. 257, affd. 51 N. Y. 93. As to the right of action and in whose name it must be brought, see Clark v. Washington Insurance Co., 100 Mass. 509, 1 Am. Rep. 135; Mercantile Marine Ins. Co. v. Clark, 118 Mass. 288. See also, The Frank G. Fowler, 8 Fed. 360; Swarthout v. C. & N. W. R. Co., 49 Wis. 625, 6 N. W. 314 (Where there are several insurers all must join in one action against the wrongdoer.).

[88] Gordon v. Mass. &c. Ins. Co., 2 Pick. (Mass.) 249; Allen v. Commercial Ins. Co., 1 Gray (Mass.) 154 (doubted whether there could be a valid abandonment without having first discharged liens).

[89] Gilchrist v. Chicago Ins. Co., 104 Fed. 566, 44 C. C. A. 43. That the transfer is retroactive and operates from the moment of the casualty which gives the right to abandon, see Coolidge v. Gloucester Marine Ins. Co., 15 Mass. 341. This is the rule under the English authorities. 2 Arnould Mar. Ins. (6th ed). 983.

[90] Gilchrist v. Chicago Ins. Co., 104 Fed. 566, 44 C. C. A. 43; Wallace v. Thames & Mersey Ins. Co., 22 Fed. 66; Dederer v. Delaware Ins. Co., 2 Wash. (U. S.) 61, Fed. Cas. No. 3733; The Sarah Ann, 2 Sumn. (U. S.) 206, Fed. Cas. No. 12342.

[91] 2 Arnould Mar. Ins. (6th ed.) 982.

considered to be the agent of the underwriters, and the exertions he makes in such capacity do not at all prejudice his right to insist on his abandonment. * * * Immediately, therefore, that the emergency arises, and before notice of abandonment has been given, the master is bound to take every necessary measure for the defense, safeguard, and recovery of the thing insured; in so doing he acts as the agent for both parties, or, more accurately speaking, as the agent of the party who may eventually turn out to be interested in the salvage, and, as such, derive benefit from his exertions.[92] If no abandonment be made, or if abandonment is not justified by the circumstances, that party is, of course, the assured himself; and it is to him the master must look for all the expenses bona fide incurred in the agency. In case, however, of an abandonment which is either accepted or ultimately effectual, the underwriter is owner of the property from the moment of the casualty,[93] and, therefore, the master, by operation of law, is his agent in so acting."[94]

If the master in good faith repurchases the ship after condemnation and before notice of abandonment, on account of his owner, the owners are bound by his act.[95] If the repurchase is after notice of abandonment and acceptance, the purchase is for

[92] 3 Kent's Comm. (14th ed.) 331.

[93] Miller v. Woodfall, 8 El. & Bl. 493, 27 L. J. Q. B. 120.

[94] That the agency of the master is transferred simultaneously with the transfer of the property, see Columbian Ins. Co. v. Ashby, 4 Pet. (U. S.) 139, 7 L. ed. 809. See also, Phillips v. St. Louis &c. Co., 11 La. Ann. 459; Smith v. Manufacturers' Ins. Co., 7 Metc. (Mass.) 448; Bryant v. Commonwealth Ins. Co., 6 Pick. (Mass.) 131; Gardere v. Columbian Ins. Co., 7 Johns. (N. Y.) 514; Delaware Ins. Co. v. Winters, 38 Pa. St. 176. The relation of the master to the parties to a contract of insurance is stated by Chancellor Walworth in a case where it appeared that, after the vessel had received injuries which justified an abandonment, the master so notified the insured, who thereupon served notice of abandonment upon the underwriters. In the meantime, however, the master had repaired the ship, and at the time when the notice of abandonment was given to the underwriters, the vessel was proceeding on her voyage in safety. The insured claimed the right to recover for a total loss, and in the course of the opinion it was said: "While the result is doubtful, the master is not the exclusive agent of either party; but when the rights of the parties are fixed, the result ascertains whether he was the agent of the underwriters or of the insured. If the vessel is abandoned while the loss continues total, all the intermediate acts of the master are the acts of the underwriters; but if the property be restored before abandonment, the right to abandon is gone, and the acts of the master will be considered the acts of the insured." Dickey v. American Ins. Co., 3 Wend. (N. Y.) 658, 20 Am. Dec. 763.

[95] McMasters v. Shoolbred, 1 Esp. 237..

the benefit of the underwriters and at their option, and they may take or refuse to accept the benefit of the same.[96]

§ 4513. Time when right is determined—Erroneous information.—In England the right to recover for a total loss on abandonment depends upon the condition of affairs at the time the action is brought. Hence, although the conditions were such when the notice was given as to justify abandonment, the insured cannot insist on the notice and recover for a total loss if the property is restored before the action is commenced.[97] But in the United States and in the countries of continental Europe[98] the right to abandon is generally controlled by the facts as they existed when the abandonment was made. Thus, where a whaling ship being jammed in the ice in the Arctic ocean in a perilous position, was abandoned by the officers and crew, and ten days after they had left the ship she was rescued by another whaler and taken to San Francisco for the salvage, but before the ship had arrived there she had been abandoned by the owners, and it was claimed that the loss was not total when the abandonment was in fact made, it was held that the abandonment related back, and the court said:[99] "If the ship herself is once totally lost by a peril insured against, and the master, using due diligence, is unable to regain possession of her in such a condition and under such circumstances as to enable her to pursue the voyage for which she was insured, the right to abandon and to recover for a constructive total loss, still remains, without regard to the question whether at some future time, over which the master has no control, he might be able to regain possession of her on payment of salvage, and without regard to the proportion between the amount of the salvage and the value of the vessel."

[96] Columbian Ins. Co. v. Ashby, 4 Pet. (U. S.) 139, 7 L. ed. 809.

[97] See Bainbridge v. Nielson, 10 East 329; Hamilton v. Mendez, 2 Burr. 1198; Maryland Ins. Co. v. Bathurst, 5 Gill & J. (Md.) 161.

[98] Emerigon (Meredith's ed.), ch. 17, §§ 4 and 6; 2 Phillips Ins., § 1705.

[99] Snow v. Union Mut. Marine Ins. Co., 119 Mass. 592, 20 Am. Rep. 349. See also, as to the criteria of time, Greene v. Pacific Mut. Ins. Co., 9 Allen (Mass.) 217; Dickey v. American Ins. Co., 3 Wend. (N. Y.) 658, 20 Am. Dec. 763; Marshall v. Delaware Ins. Co., 4 Cranch (U. S.) 202, 2 L. ed. 596; Olivera v. Union Ins. Co., 3 Wheat. (U. S.) 183, 4 L. ed. 365. But see, California Code, § 136, and Orient Mut. Ins. Co. v. Adams, 123 U. S. 67, 31 L. ed. 63, 8 Sup. Ct. 68.

§ 4514. General average and adjustment of loss.—Among the risks which the underwriter assumes in a marine policy is the liability of the insured property to be called upon to contribute to a general average loss. The subject of general average belongs to the law of shipping or carriage by sea, and touches marine insurance only incidentally. A very brief consideration of it here is all that will therefore be attempted. In the first English case in which it is carefully considered, although the custom or doctrine of general average had long been established in practice, the court said: "All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo come within general average, and must be borne proportionately by all who are interested."[1] The right to contribution rests upon a different principle from the right to indemnity under the contract of insurance. But when the right to contribution is once determined by the law which governs the same, the underwriter, unless he has protected himself by a restrictive provision in the policy, ordinarily becomes liable therefor as for a loss caused by one of the risks of the sea against which he agrees to indemnify the insured.[2] General average contributions may arise from the sacrifice of the cargo, parts of the ship or from certain extraordinary expenses incurred in the rescue of the ship which has met with some disaster, in bearing up to port in order to repair ship, or otherwise avoid a danger that threatens the ship or cargo while at sea.[3] The most common form of sacrifice in the cargo is by throwing it overboard for the purpose of lightening the ship, which is known as jettison.[4] A sacrifice of this character is a

[1] Birkley v. Presgrove, 1 East 220. See also, Svensden v. Wallace, L. R. 13 Q. B. D. 69. See definition of Blackburn, J., in Kemp v. Halliday, 6 B. & S. 723; and in Anderson v. Ocean Steamship Co., 10 App. Cas. 107; Hallett v. Wigram, 9 C. B. 580; and see, McAndrews v. Thatcher, 3 Wall. (U. S.) 347, 18 L. ed. 155; Hobson v. Lord, 92 U. S. 397, 23 L. ed. 613; The Star of Hope, 9 Wall. (U. S.) 203, 19 L. ed. 638; Fowler v. Rathbone, 12 Wall. (U. S.) 102, 20 L. ed. 281. Compare also, Burton v. English, 12 Q. B. D. 218. See also, Abbott on Shipping, (7th ed.), 476; Wright v. Marwood, 7 Q. B. D. 62; and see notes to Pacific Mail &c. Co. v. New York &c. R. Co., 74 Fed. 564, 20 C. C. A. 349, and The Santa Ana, 154 Fed. 800, 84 C. C. A. 312.

[2] See generally, British &c. Marine Ins. Co. v. Maldonado & Co., 182 Fed. 744, 106 C. C. A. 122; Peninsular &c. Co. v. Atlantic Mut. Ins. Co., 185 Fed. 172.

[3] See Atwood v. Sellar, 4 Q. B. D. 342, affd. 5 Q. B. D. 286, 14 Eng. Rul. Cas. 386; Svensden v. Wallace, 11 Q. B. Div. 616, 10 App. Cas. 404.

[4] As to jettison, see Mouse's Case,

general average except as to goods carried on deck, and as to such goods the rule is, that if they are thrown overboard, the loss is not made good by general average, although if saved they must contribute like other parts of the cargo; but this rule is subject to the exception that where there is a custom of trade in a particular voyage to carry goods on deck, they will usually be subject to general average in the same manner as other goods.[5] An insured who pays a loss caused by the throwing overboard of part of the property exposed to the peril, whether it be of the cargo or of the ship's furniture or tackle, is subrogated to the insurer's claim of general average against the property thus saved from destruction.[6] There is a conflict of authority as to whether a cargo saved by the voluntary stranding of the ship shall contribute to a general average loss. It would seem that as a matter of justice there should be such liability, and such appears to be the rule in this country,[7] but according to the custom of Lloyds and the practice under the York-Antwerp rules, it seems that the voluntary stranding of the ship is not a ground for general average by the cargo thus saved.[8]

§ 4515. Adjustment of losses.—The adjustment of a general average loss is made at the end of the voyage, and in the absence of a special contract, is made in accordance with the rules

12 Coke 63; The Gratitudine, 3 C. Rob. 240, 261; Price v. Noble, 4 Taunt. 123; Butler v. Wildman, 3 Barn. & Ald. 398. As to expenses, repairs and provisions for crew, see Abiathar Padelford v. Boardman, 4 Mass. 548; Barker v. Phœnix Ins. Co., 8 Johns. (N. Y.) 307, 5 Am. Dec. 339. See also, Hazleton v. Manhattan Ins. Co., 12 Fed. 159.

[5] Harris v. Moody, 30 N. Y. 266, 86 Am. Dec. 375; Merchants' &c. Ins. Co. v. Shillito, 15 Ohio St. 559, 86 Am. Dec. 491. See also, Apollinaris Co. v. Nord Deutsche Ins. Co., 73 L. J. K. B. 62; Gold v. Oliver, 4 Bing. N. Cas. 134; Milward v. Hibbert, 3 Q. B. 120; Wright v. Marwood, 7 Q. B. Div. 62; Burton v. English, 12 Q. B. Div. 218. See Taunton Copper Co. v. Merchants' Ins.Co., 39 Mass. 108.

[6] Hazleton v. Manhattan Ins. Co., 12 Fed. 159. See also, Federal Ins. Co. v. Detroit F. &c. Ins. Co., 202 Fed. 648.

[7] Bradhurst v. Columbian Ins. Co., 9 Johns. (N. Y.) 9; The Star of Hope, 9 Wall. (U. S.) 203, 19 L. ed. 638; Barnard v. Adams, 10 How. (U. S.) 270, 13 L. ed. 417; Columbian Ins. Co. v. Ashby, 13 Pet. (U. S.) 331, 10 L. ed. 186. See 3 Kent's Comm. (14th ed.) 239, note.

[8] The reasoning seems to be that there can be no contribution unless the property lost is given for the safety of all, and that it cannot be said that the master, when he voluntarily runs the ship aground, intends to give her for the benefit of the cargo. It is said that the ship is not stranded for the purpose of destruction, but in the hope of saving her from imminent perils. Abbott on Shipping (7th ed.) 490, and Arnould

in effect at that port.[9] In order to obviate the difficulties arising from divers rules, marine policies now generally provide that such losses shall be adjusted according to the rules adopted by the Association for the Reform and Codification of the Law of Nations, commonly known as the York-Antwerp Rules.[10] In England it seems that if the ship or cargo is insured so that the insurer undertakes to indemnify for loss by general average contribution within a certain valuation and the policy valuation is less than its contributory value the underwriter pays as indemnity for loss in general average in the proportion that the amount insured in the policy bears to the contributory value; while if the policy valuation of the ship or cargo is more than the contributory value, the underwriter pays in the proportion that the amount insured bears to the policy valuation.[11] But in a recent case the prevailing rule in this country, called the New York or American rule, was held to be that the contract of marine insurance is a contract of full indemnity against loss and includes loss on account of general average contribution if the total loss of the insured is within the limit of the insured valuation.[12]

Mar. Ins. (6th ed.) 870, favor the American rule. As to whether the ultimate loss of the ship should make any difference, see Lowndes' General Average (4th ed.) 141; Carver Carriage by Sea, § 387.

[9] See British &c. Marine. Ins. Co. v. Maldonado & Co., 182 Fed. 744, 106 C. C. A. 122, stating that the general average may be settled in a foreign port, and when it is so settled and the insured is obliged to pay his proportion there he may recover the amount so paid from the insurer, though such general average may have been settled differently abroad from what it would have been in the home port.

[10] For these rules, see Elliott Ins., § 511.

[11] Steamship Balmoral Co. v. Marten, L. R. (1902), A. C. 511, English Marine Act, 1906, § 73, ch. 41, p. 233.

[12] British &c. Marine Ins. Co. v. Maldonado & Co., 182 Fed. 744, 106 C. C. A. 122 (also holding the rule applicable to ship and cargo alike). Compare International Nav. Co. v. Atlantic Mut. Ins. Co., 100 Fed. 304, 108 Fed. 987.

TITLE ELEVEN

LEASES.

CHAPTER CXXXV.

THE INSTRUMENT OF DEMISE.

§ 4525. Leases—Defined and distinguished from other contractual relations.
4526. Distinguished from license.
4527. Formal parts.
4528. Date of instrument.
4529. Reservation and exceptions.
4530. Consideration.
4531. Duration of term.
4532. Description of premises.
4533. Construction.
4534. Reformation.
4535. Execution—Signing.
4536. Execution — Acknowledging and witnessing.
4537. Execution—sealing.
4538. Delivery and acceptance.
§ 4539. Recording.
4540. Parties in general.
4541. Parties—Leases by and to married women.
4542. Right of husband to lease wife's real estate.
4543. Parties—Guardians.
4544. Parties—Power of trustees.
4545. Parties—Infants as lessors and lessees.
4546. Parties—Executors and administrators.
4547. Illegal leases.
4548. Leases obtained by fraud.
4549. Collateral parol agreement.
4550. Agreement to lease.
4551. Statute of frauds.

§ 4525. Leases—Defined and distinguished from other contractual relations.—A lease may be defined to be a contract for the possession and profits of lands and tenements on the one side and a recompense of rent or other income on the other.[1] By such contract, express or implied, a tenancy is created whereby one person permits another to occupy lands actually or constructively, and without such a contract there can be no relation of landlord and tenant.[2] On the other hand, contractual relations may exist between persons with regard to the occupation of land which impose duties and restrictions similar to those of tenancy, and yet there will not be a tenancy. Thus, an agent using and controlling the land of his principal would not ordi-

[1] Cary Hardware Co. v. McCarty, 10 Colo. App. 200, 50 Pac. 744; Branch v. Doane, 17 Conn. 402; Sawyer v. Hanson, 24 Maine 542; Bruckman v. Hargadine-McKittrick Dry Goods Co., 91 Mo. App. 454; Bentley v. Adams, 92 Wis. 386, 66 N. W. 505. The lease grants to and vests in the lessee a present interest and estate in the land for the term designated, and for the purposes specified. Chandler v. Hart, (Cal.) 119 Pac. 516.

[2] Rogers v. Coy, 164 Mass. 391, 41 N. E. 652; Kirchgassner v. Rodick, 170 Mass. 543, 49 N. E. 1015.

narily become a tenant.[3] Contracts for the cultivation of land upon shares, contracts for lodgings, contracts for employment, and license to do certain acts upon land of another may all be made without establishing the technical relation of landlord and tenant. Some agreement between the parties for a tenancy, whether it be made expressly in words, or arises from their acts and conduct in relation to the land and the absence of express agreement, is essential to create the relation.[4] Whether an instrument is a contract of lease or merely an agreement to execute a contract of lease depends upon the parties' intentions which will be gathered from all the terms of the instrument considered in the light of surrounding circumstances.[5] Where a contract of sale is made between the vendor and purchaser of land and the instrument contains a provision that, upon the performance or nonperformance of conditions of payment named in the contract, it has been held that either party may treat the transaction either as a purchase and sale contract, or a lease, and if the election is made to treat it as a tenancy, the relation of landlord and tenant relates back to the inception of the contract.[6]

§ 4526. **Distinguished from license.**—A license in the sense we are here using it is an authority to do an act or a series of acts on the land of another without possessing an estate therein, such as a license to hunt in another's land or cut down a certain number of trees.[7] But the distinguishing characteristic of such

[3] Hopkins v. Ratliff, 115 Ind. 213, 17 N. E. 288. Contra, Ward v. Small's Admr., 90 Ky. 198, 12 Ky. L. 58, 13 S. W. 1070. The use of technical words of demise in an instrument and the fact that it is denominated a lease does not make it a lease, if it in fact appears to be something else. Whiteside v. Oasis Club, 162 Mo. App. 502, 142 S. W. 752.

[4] Tucker v. Adams, 52 Ala. 254; Paige v. Atkins, 112 Cal. 401, 44 Pac. 666; Littleton v. Wynn, 31 Ga. 583; Hill v. Coal Valley Min. Co., 103 Ill. App. 41; Moore v. Calvert, 6 Bush. (Ky.) 356; Rogers v. Coy, 164 Mass. 391, 41 N. E. 652; Swift v. New Durham Lumber Co., 64 N. H. 53, 5 Atl. 903; Twiss v. Boehmer, 39 Ore. 359, 65 Pac. 18; Moore v. Harvey, 50 Vt. 297; J. B. Alfree Mfg. Co. v. Henry, 96 Wis. 327, 71 N. W. 370.

[5] Schultz v. Hastings Lodge No. 50, I. O. O. F., 90 Nebr. 454, 133 N. W. 846. See also, Griffin v. Knisely, 75 Ill. 411; Martin v. Davis, 96 Iowa 718, 65 N. W. 1001.

[6] Murphy v. Myar, 95 Ark. 32, 128 S. W. 359; Ish v. Morgan, 48 Ark. 413, 3 S. W. 440.

[7] Wynn v. Garland, 19 Ark. 23, 68 Am. Dec. 190; Cary Hardware Co. v. McCarty, 10 Colo. App. 200, 50 Pac. 744; Consolidated Coal Co. v. Peers, 150 Ill. 344, 37 N. E. 937; Cook v. Stearns, 11 Mass. 533; Stin-

a license is, that it may always be made by parol, and that it is in its nature necessarily revocable;[8] at least while it remains executory, it is revocable at the pleasure of the licensor, and is indivisible and nonassignable.[9] An executory license confers such rights that from their very nature it must be revocable at the pleasure of the licensor,[10] and is held to be revoked by the death of either party to the original agreement,[11] or a conveyance of the premises operates as a revocation of the license given to a third person by the grantor.[12] Mr. Justice Cooley, in discussing this subject, said: "Where something beyond a mere temporary use of land is promised; where the promise apparently is not founded on personal confidence, but has reference to the ownership and occupancy of other lands, and is made to facilitate the use of those lands in a particular manner and for an indefinite period," the interest is an easement or a leasehold and not a mere license.[13] Whether a contract be a lease or a license will be determined, not by what the parties to it may choose to call it nor from the language, but from the legal effect of its provisions. A permissive occupation under the contract conferring a legal possession is indispensable to the creation of a tenancy.[14] But a tenancy does not necessarily imply a right to complete an exclusive possession.[15]

son v. Hardy, 27 Ore. 584, 41 Pac. 116; Morgan v. United States, 14 Ct. Cl. (U. S.) 319.

[8] Wynn v. Garland, 19 Ark. 23, 68 Am. Dec. 190; Cook v. Stearns, 11 Mass. 533.

[9] Holladay v. Chicago Arc Light &c. Co., 55 Ill. App. 463; Stinson v. Hardy, 27 Ore. 584, 41 Pac. 116.

[10] Wynn v. Garland, 19 Ark. 23, 68 Am. Dec. 190; Potter v. Mercer, 53 Cal. 67; Jackson & Sharp v. Philadelphia, Wilmington & Baltimore R. Co., 4 Del. Ch. 180; Wilmington Water-Power Co. v. Evans, 166 Ill. 548, 46 N. E. 1083; Lake Erie & W. R. Co. v. Kennedy, 132 Ind. 274, 31 N. E. 943; Drake v. Wells, 11 Allen (Mass.) 141; Crosdale v. Lanigan, 129 N. Y. 604, 29 N. E. 824, 26 Am. St. 551.

[11] Carleton v. Redington, 21 N. H. 291; Cowles v. Kidder, 24 N. H. 364, 57 Am. Dec. 287.

[12] People v. Goodwin, 5 N. Y. 568; Whitaker v. Cawthorne, 14 N. Car. 389.

[13] Morrill v. Mackman, 24 Mich. 279, 9 Am. Rep. 124. See also, New York, C. & St. L. R. Co. v. Randall, 102 Ind. 453, 26 N. E. 122.

[14] Central Mills v. Hart, 124 Mass. 123; Kirchgassner v. Rodick, 170 Mass. 543, 49 N. E. 1015.

[15] Morrill v. Mackman, 24 Mich. 279, 9 Am. Rep. 124. A contract whereby a hotel company agrees to lease to another privilege of carriage service for the hotel and whereby such other agrees to pay a certain sum therefor is held to be a license and not a lease. Lynch v. Murphy Hotel Co., 130 App. Div. (N. Y.) 691, 115 N. Y. S. 465. So, also, it has been held that a contract to place signs on the buildings of another is not a lease but a license. May v. Breunig, 120 N. Y. S. 98. See also,

§ 4527. Formal parts.—No particular form or words are necessary to create a lease;[16] and it is not necessary that the word "lease" be used.[17] Any written instrument expressing the agreement of the parties, signed by one and accepted and acted on by the other, will be obligatory upon both.[18] Whatever words are sufficient to explain the intent of the parties that the one shall divest himself of the property and the other come into it for a definite time, whether they run in the form of a license, covenant, or agreement, will be construed as a lease as well as if the most pertinent words were used.[19] Thus an instrument in the form of a receipt acknowledging the payment of money as rent for a house has been held to be a lease.[20] Though no formal words are requisite to a lease at common law, the usual words of operation in it are "demise, grant and to farm let."[21]

§ 4528. Date of instrument.—It is not necessary to the validity of a lease that it should contain a statement of the date when it was executed. The instrument does not take effect from its date but from its delivery, and while the presumption is that it was delivered on the day of its date, it is competent to show by parol evidence that the date inserted in the deed was not the date of its delivery.[22] In case no other time be indicated

as to executory agreement for lease, note in Ann. Cas. 1912C, 1050, and as to stipulation in contract of sale giving parties on default a right to treat it as a lease, note in Ann. Cas. 1912A 576, and as to proposal for lease and option to renew, see Locomobile Co. v. Bergdoll, 192 Fed. 447.

[16] Alcorn v. Morgan, 77 Ind. 184; Maverick v. Lewis, 3 McCord (S. Car.) 211; Upper Appomattox Co. v. Hamilton, 83 Va. 319, 2 S. E. 195. See also, Folden v. State, 13 Nebr. 328, 14 N. W. 412; Weaver v. Wood, 9 Pa. St. 220.

[17] West Chicago St. R. Co. v. Morrison, Adams & Allen, Co., 160 Ill. 288, 43 N. E. 393; Bussman v. Ganster, 72 Pa. St. 285; Moore v. Miller, 8 Pa. St. 272. In Hancock County v. Imperial Naval Stores Co., 93 Miss. 822, 47 So. 177, 17 L. R. A. (N. S.) 693n, 136 Am. St. 561, it is held that the words "agreed to let" mean the same as "let" unless there is something in the instrument to show that a present demise could not have been in contemplation of the parties. See also, Pacific Improvement Co. v. Jones (Cal.), 128 Pac. 404.

[18] Alcorn v. Morgan, 77 Ind. 184.

[19] Munson v. Wray, 7 Blackf. (Ind.) 403; Watson v. O'Hern, 6 Watts (Pa.) 362; State v. Page, 1 Speers (S. Car.) 408, 40 Am. Dec. 608; Upper Appomattox Co. v. Hamilton, 83 Va. 319, 2 S. E. 195. See also, Branch v. Doane, 17 Conn 402; Moshier v. Reding, 12 Maine 478; Boone v. Stover, 66 Mo. 430; Horner v. Leeds, 25 N. J. L. 106; Gibbons v. Dayton. 4 Hun (N. Y.) 451.

[20] Alcorn v. Morgan, 77 Ind. 184; Eastman v. Perkins, 111 Mass. 30.

[21] Folden v. State, 13 Nebr. 328, 14 N. W. 412.

[22] Jones Real Prop., §§ 1238, 1239; Blake v. Fash, 44 Ill. 302; Green v. Robinson, Wright (Ohio) 436.

in the lease for the commencement of the term the date of the lease will be regarded as the time for the commencement of the term.[23] When there was a verbal letting and no time was set for the commencement of the term, it was held that the tenancy began when the tenant went into possession.[24] A lease executed on Sunday has been held to be absolutely void and incapable of subsequent ratification.[25] The parties could not ratify an illegal contract, though they might make a new one with reference to the same subject-matter on a subsequent week-day.[26] But any subsequent arrangement or agreement between the parties on any subsequent week-day, whether direct and express, or implied from their dealings with each other's property, would be a new and independent transaction.[27] Although the agreement made on Sunday is void for immorality, yet it may be looked to as a circumstance, with others, to account for the subsequent conduct of the parties, with reference to the possession of the premises.[28] When the tenant takes possession of the premises on a secular day, he will be liable for rent in an action of use and occupation[29] on proof of the value of such occupation.[30]

§ 4529. **Reservations and exceptions.**—It is valid and not unusual for a lessor to reserve certain rights and privileges in and to the land demised, such as the right to drain over it from his adjoining land.[31] He may also except from the operation of the general granting clause of the lease such portions as minerals upon them,[32] or the trees growing thereon.[33] So the exception of a specified number of acres out of a larger tract covered by the granting clause has been held good.[34] The lessor, by such

[23] Keyes v. Dearborn, 12 N. H. 52; Huffman v. McDaniel, 1 Ore. 259.

[24] Eberlein v. Abel, 10 Ill. App. 626; Feyreisen v. Sanchez, 70 Ill. App. 105.

[25] Thomas v. Hatch, 53 Wis. 296, 10 N. W. 393; Vinz v. Beatty, 61 Wis. 645, 21 N. W. 787.

[26] Harrison v. Colton, 31 Iowa 16.

[27] Pope v. Linn, 50 Maine 83; Plaisted v. Palmer, 63 Maine 576; Day v. McAllister, 15 Gray (Mass.) 433; Vinz v. Beatty, 61 Wis. 645, 21 N. W. 787.

[28] Rainey v. Capps, 22 Ala. 288.

[29] Stebbins v. Peck, 8 Gray (Mass.) 553.

[30] Ainsworth v. Williams, 111 Wis. 17, 86 N. W. 551.

[31] Chadwick v. Marsden, L. R. 2 Exch. 285.

[32] Hamilton v. Graham, L. R. 2 H. L. Sc. 166; Thomas v. Johnston, 78 Ark. 574, 95 S. W. 467; Carhart v. French, Hill & D. Supp. (N. Y.) 17, revd. 1 N. Y. 96, 4 How. Pr. (N. Y.) 181.

[33] Legh v. Heald, 1 B. & Ad. 622.

[34] Spillman v. Brown, 45 Fed. 291, revd. 155 U. S. 665, 39 L. ed. 304,

exception, continues to retain the legal title and has a right to dispossess a stranger who interferes with his right of possession.[35] But a reservation of a room in a farmhouse by a lessor gives him no right to use the yard as a passage-way for his horse and wagon.[36] A provision in an oil lease that no wells were to be drilled within a certain distance of a house was held not to be an exception but merely a limitation upon the right of the lessee to bore wells.[37] However, the exception of a certain designated number of acres described by metes and bounds has received a different construction.[38] A lease of the hunting privileges on land is not rendered invalid by the reservation of a right of pasturage to the lessor, the exercise of these two privileges not being necessarrily inconsistent with each other.[39]

§ 4530. **Consideration.**—A court will not inquire into the lack of consideration in a sealed instrument, and when a demise is made by an instrument under seal the question of consideration becomes immaterial.[40] When the demise is in writing but not under seal, the grant of the leasehold estate to the lessee is a sufficient consideration for his express promise in the same writing to pay rent.[41] On the other hand the payment of rent or something as the equivalent of rent is sufficient consideration for the demise.[42] So a lease executed in consideration of the payment of one dollar and the erection of valuable machinery is sufficiently supported.[43] And a lease given in consideration that the lessee should build bridges and roads and keep off trespassers is supported by ample consideration.[44] Mere inadequacy of con-

15 Sup. Ct. 245; Munn v. Worrall, 53 N. Y. 44, 13 Am. Rep. 470; Roberts v. Robertson, 53 Vt. 690, 38 Am. Rep. 710; Low v. Settle, 32 W. Va. 600, 9 S. E. 922.

[35] Bowers v. Cherokee Bob, 45 Cal. 495; Jordan v. Staples, 57 Maine 352.

[36] Fort v. Brown, 46 Barb. (N. Y.) 366.

[37] Westmoreland &c. Gas Co. v. De Witt, 130 Pa. St. 235, 18 Atl. 724, 5 L. R. A. 731.

[38] Spillman v. Brown, 45 Fed. 291, revd. 155 U. S. 665, 39 L. ed. 304, 15 Sup. Ct. 245.

[39] Kellogg v. King, 114 Cal. 378, 46 Pac. 166, 55 Am. St. 74. In Shaw v. Appleton, 161 Mass. 313, 37 N. E. 372, it was held that a reservation in a lease of the right to sell the leased premises, and to terminate the lease as to the premises sold cannot be held void as repugnant to the demise.

[40] Drew v. Buck, 12 Hun (N. Y.) 267.

[41] Hill v. Woodman, 14 Maine 38.

[42] Chadbourn v. Rahilly, 34 Minn. 346, 25 N. W. 633.

[43] Herrington v. Wood, 6 Ohio C. C. 326, 3 Ohio C. D. 475.

[44] Gilpin v. Adams, 14 Colo. 512, 24 Pac. 566.

sideration or other inequality in the terms of a lease does not of itself constitute ground to avoid it in equity,[45] unless it is so gross as to shock the conscience.[46]

§ 4531. Duration of term.—A valid lease of real estate may be made for any period which will not exceed the interest of the lessor in the premises.[47] A lease, no matter how long in duration, does not violate the rule against perpetuities because it does not suspend the power of alienation. The concurrent action of lessee and lessor can always pass a clear estate and discharge any burdens or conditions created by the lease.[48] Where the term for which a lease may be given is limited by law to a certain number of years, it has been held that when a lease is given for a term exceeding the prescribed limit, the lease will stand good for the term authorized by law.[49] The term for which a lease for years is to run should be certain with a definite time for commencement and for termination, and unless these requirements are complied with, an estate at will only is created.[50] A long-settled rule makes it essential to the validity of a lease that it be for a definite period, either expressly fixed or capable of being fixed by computation. Thus a lease of premises so long as the buildings should be used for a certain business was held not to create a term for years because it lacked a definite term.[51] A lease for so long as both parties shall please, or for so long as the lessee shall please, is said to be a lease at the will of both lessor and lessee. It is at most a tenancy from year to year, so long as both parties please.[52] The fact that the term does not begin at once, but is postponed

[45] Brewster v. Lanyon Zinc Co., 140 Fed. 801, 72 C. C. A. 213.

[46] Smith v. Collins, 148 Ala. 672, 41 So. 825.

[47] Folts v. Huntley, 7 Wend. (N. Y.) 210; Warner v. Tanner, 38 Ohio St. 118.

[48] Toms v. Williams, 41 Mich. 552, 2 N. W. 814; Gomez v. Gomez, 81 Hun (N. Y.) 566, 63 N. Y. St. 607, 31 N. Y. S. 206, affd. 147 N. Y. 195, 41 N. E. 420. See also, Henderson v. Virden Coal Co., 78 Ill. App. 437; Richmond v. Davis, 103 Ind. 449, 3 N. E. 130.

[49] Robertson v. Hayes, 83 Ala. 290, 3 So. 674; Trammell v. Chambers Co., 93 Ala. 388, 9 So. 815; Parish v. Rogers, 20 App. Div. (N. Y.) 279, 46 N. Y. S. 1058.

[50] Collier v. Hyatt, 110 Ga. 317, 35 S. E. 271; Murray v. Cherrington, 99 Mass. 229; McClain v. Abshire, 72 Mo. App. 390. See also, Reed v. Lewis, 74 Ind. 433, 39 Am. Rep. 88; Western Transp. Co. v. Lansing, 49 N. Y. 499; Lea v. Hernandez, 10 Tex. 137; United States v. Gratiot, 14 Pet. (U. S.) 526, 10 L. ed. 573.

[51] Melhof v. Meinhart, 70 Iowa 685, 28 N. W. 545.

[52] Doe v. Richards, 4 Ind. 374.

till a future date, is no objection, because it is a familiar doctrine that a lease for years may commence in futuro, as being an estate which could, even in ancient times, be created without livery of seizin.[53] When the period is fixed and definite, it does not invalidate the lease that it may come to an earlier termination. Whatever the term, it may be subject to a condition which is a qualification annexed to the estate by the grantor[54] or the lessor,[55] whereby the estate or term granted may, among other things, be defeated or terminated.[56] Thus an agreement to surrender possession on a sale operated as a contingent limitation, and when the contingency happened the term was at an end.[57] After a contingent limitation, as distinguished from a condition, no act is necessary to vest the right in him who has the next expectant interest, since the limitation marks the period which is to determine the estate without entry or claim.[58]

§ 4532. Description of premises.—Unless the lease describe the land demised with reasonable certainty, either by particular words or by reference to something by which its location may be determined, a lessee who has not entered cannot be held for rent.[59] And parol evidence is not admissible to contradict the description or supply one not given, but such evidence is competent to aid the description given.[60] Parol evidence of the practical construction given to a lease by the subsequent acts of the parties thereto is admissible in a proper case, but not unless the language in the description of the property leased is doubtful.[61] A technical misdescription of the leased premises is immaterial in an action for rent where the property is otherwise so defined as to fully

[53] McClain v. Abshire, 72 Mo. App. 390; Batchelder v. Dean, 16 N. H. 265; Noyes v. Loughead, 9 Wash. 325, 37 Pac. 452; Hammond v. Barton, 93 Wis. 183, 67 N. W. 412. See also, Rice v. Whitmore, 74 Cal. 619, 16 Pac. 501, 5 Am. St. 479; Field v. Howell, 6 Ga. 423.

[54] Sperry's Lessee v. Pond, 5 Ohio 387, 24 Am. Dec. 296.

[55] Folts v. Huntley, 7 Wend. (N. Y.) 210.

[56] Warner v. Tanner, 38 Ohio St. 118.

[57] Clark v. Rhoads, 79 Ind. 342; Stewart v. Pier, 58 Iowa 15, 11 N. W. 711.

[58] Clark v. Rhoads, 79 Ind. 342; Miller v. Levi, 44 N. Y. 489.

[59] Patterson v. Hubbard, 30 Ill. 201; Bingham v. Honeyman, 32 Ore. 129, 51 Pac. 735, 52 Pac, 755.

[60] Weaver v. Shipley, 127 Ind. 526, 27 N. E. 146; Pulse v. Miller, 81 Ind. 190; Crawford v. Morris, 5 Grat. (Va.) 90.

[61] Durr v. Chase, 161 Mass. 40, 36 N. E. 741.

advise the parties of the subject-matter of the lease,[62] or where the tenant has been in occupation of the premises during the time for which rent is claimed.[63] The practical location of the boundaries of the leased premises, coupled with the subsequent possession of the same by the tenants by and with the landlord's knowledge and consent, is a sufficient location of the property.[64] The lessee cannot escape liability for the rent provided for in the lease, where he enters into possession, on the ground that the description of the premises was uncertain.[65] The possession of the premises by the lessee under the lease cures defects in the description.[66] Where the lease to be valid under the Statute of Frauds is required to be in writing, it has been held that a defective or totally inadequate description cannot be cured by parol evidence.[67] It is a well-settled general rule that the grant of a house, store, mill or other building carries with it the land under the building.[68] So, also, a description of a house by the street number in a demise carries with it the premises of which the building which is strictly the house is the main or principal feature.[69] Any right of way or other easement necessary to the enjoyment of the demised premises ordinarily passes as appurtenant thereto, although not expressly mentioned in the lease, and although there is no express mention of easements, privileges or appurtenances.[70]

§ 4533. **Construction.**—It is the province of the court to construe written leases,[71] and to inform the jury of the true im-

[62] Andrew v. Carlile, 4 Colo. App. 336, 36 Pac. 66.

[63] Whipple v. Shewalter, 91 Ind. 114; Hoyle v. Bush, 14 Mo. App. 408.

[64] Weaver v. Shipley, 127 Ind. 526, 27 N. E. 146; Jackson v. Perrine, 35 N. J. L. 137; Richards v. Snider, 11 Ore. 197, 3 Pac. 177.

[65] Whipple v. Shewalter, 91 Ind. 114; Hoyle v. Bush, 14 Mo. App. 408.

[66] Bulkley v. Devine, 127 Ill. 406, 20 N. E. 16, 3 L. R. A. 330; Appleton v. O'Donnell, 173 Mass. 398, 53 N. E. 882; McLennan v. Grant, 8 Wash. 603, 36 Pac. 682.

[67] Jarboe v. Mulry, 49 N. Y. Super. Ct. 525.

[68] Humiston &c. Co. v. Wheeler, 175 Ill. 514, 51 N. E. 893; Chesebrough v. Pingree, 72 Mich. 438, 40 N. W. 747, 1 L. R. A. 529; Winton v. Cornish, 5 Ohio 477. See also, Rogers v. Snow, 118 Mass. 118; Lanpher v. Glenn, 37 Minn. 4, 33 N. W. 10; Winchester v. Hees, 35 N. H. 43.

[69] Humiston &c. Co. v. Wheeler, 175 Ill. 514, 51 N. E. 893; Houghton v. Moore, 141 Mass. 437, 6 N. E. 517.

[70] Oliver v. Dickinson, 100 Mass. 114.

[71] Stoddard v. Waters, 30 Ark. 156; Durr v. Chase, 161 Mass. 40, 36 N. E. 741; Brown v. Schiappacassee, 115 Mich. 47, 72 N. W. 1096; Morris v. Kettle, 57 N. J. L. 218, 30 Atl. 879;

port thereof.[72] But when there is conflicting testimony regarding a parol lease, it should be left to the jury to determine what the terms of the lease are.[73] The lease must be construed as a whole, and every covenant expounded with regard to its context, so as to ascertain the apparent intent of the parties.[74] For this purpose, in certain cases, it is necessary that a lease be read in the light of the previous agreement out of which it arose.[75] But interpretations which create a forfeiture are not favored and it is the policy of the law to limit, so far as is reasonable, the effect of a covenant in a lease by which a forfeiture is created.[76] Words and sentences should be construed to make sense and reason.[77] The plain meaning of the language of a lease cannot be changed by evidence of the custom of the country.[78] The general rule is that the plain, ordinary and popular sense or meaning of the words or terms used by the parties shall be taken in preference to their strict grammatical and etymological meaning, unless the subject-matter of the contract has acquired, by the usage of trade or the like, a peculiar sense, different from its popular meaning; and in such case, the peculiar sense of such language shall prevail.[79] In case the written provisions of a lease conflict with printed provisions therein, it is the usual rule of construction that such as are written will control those that are printed.[80] Where two leases between the same parties are executed at the

Folsom v. Cook, 115 Pa. St. 539, 9 Atl. 93.

[72] Great Pond Mining &c. Co. v. Buzzell, 39 Maine 173.

[73] State v. Forsythe, 89 Mo. 667, 1 S. W. 834; Millan v. Kephart, 18 Grat. (Va.) 1.

[74] Barrett v. Johnson, 2 Ind. App. 25, 27 N. E. 983; Street v. Chicago Wharfing & Storage Co., 157 Ill. 605, 41 N. E. 1108; Harlow v. Lake Superior Iron Co., 36 Mich. 105. See also, Perkins v. Kirby (R. I.), 85 Atl. 648.

[75] In re Reading Iron Works, 150 Pa. St. 369, 24 Atl. 617.

[76] Hilsendegen v. Hartz Clothing Co., 165 Mich. 255, 130 N. W. 646; Miller v. Havens, 51 Mich. 482, 16 N. W. 865; Crouse v. Mitchell, 130 Mich. 347, 90 N. W. 32, 97 Am. St. 479.

[77] Norris v. Showerman, 2 Doug. (Mich.) 16. See also, First National Bank &c. v. Adam, 138 Ill. 483, 28 N. E. 955; Wyman v. Farrar, 35 Maine 64.

[78] Iddings v. Nagle, 2 Watts & S. (Pa.) 22.

[79] Robertson v. French, 4 East 130.

[80] Seaver v. Thompson, 189 Ill. 158, 59 N. E. 553; Ball v. Wyeth, 8 Allen (Mass.) 275. And it is held that a lease prepared by the landlord should be construed most strongly against him. Thomas Hinds Lodge v. Presbyterian Church (Miss.), 60 So. 66. See also, vol. 2, §§ 1525, 1528.

same time and relating to the same subject-matter, both are to be construed together as one instrument.[81]

§ 4534. Reformation.—The general rule, that an error in a written instrument due to the mutual mistake of the parties will justify its reformation by a court of equity, applies to a lease.[82] But to justify such reformation, the alleged mistake or omission must be shown by clear, unequivocal and satisfactory proof.[83] A lease which by reason of the ignorance and mistake of the scrivener failed to conform to the oral agreement made by the parties was reformed where the evidence clearly showed what the agreement was.[84] A party seeking reformation of a defective lease should use diligence in enforcing his rights and avoid undue delay. But where it appears that the defendant suffered no prejudice from the delay the relief will be granted.[85] Fraudulent conduct on the part of the person seeking reformation will defeat his right to relief. But where the application was by an assignee of the lease who was in no way connected with the alleged fraudulent erasure of a clause in the lease, the court granted his prayer.[86]

§ 4535. Execution—Signing.—It is said that a lease must be signed by the lessor, for he occupies the position of a grantor who is conveying an estate, and until he sign the indenture it creates no estate or interest in the land and imposes no obligation upon either of the parties.[87] It has been declared to be a well established rule that a lease must be signed by the lessor to be evidence

[81] Wilson v. Roots, 119 Ill. 379, 10 N. E. 204. Compare Gardt v. Brown, 113 Ill. 475, 55 Am. Rep. 434.

[82] Rose Clare Lead Co. v. Madden, 54 Ill. 260; Nielander v. Chicago &c. R. Co., 114 Iowa 420, 87 N. W. 285; Crookston Co. v. Marshall, 57 Minn. 333, 59 N. W. 294, 47 Am. St. 612; Jenkins v. Jenkins University, 17 Wash. 160, 49 Pac. 247, 50 Pac. 785; Silbar v. Ryder, 63 Wis. 106, 23 N. W. 106; Green Bay &c. Co. v. Hewitt, 62 Wis. 316, 21 N. W. 216, 22 N. W. 588.

[83] Chapman v. Dunwell, 115 Iowa 533, 88 N. W. 1067; Wyman v. Sperbeck, 66 Wis. 495, 29 N. W. 245; Harter v. Christoph, 32 Wis. 245.

[84] Silbar v. Ryder, 63 Wis. 106, 23 N. W. 106. See also, Neuenberger v. Neuenberger, 16 Ky. L. 710, 29 S. W. 617.

[85] Nielander v. Chicago &c. R. Co., 114 Iowa 420, 87 N. W. 285.

[86] Rose Clare Lead Co. v. Madden, 54 Ill. 260.

[87] Lawrence v. Hasbrouck, 21 Misc. (N. Y.) 39, 46 N. Y. S. 868; Laughran v. Smith, 75 N. Y. 205. See also, Lynch v. Poole (Ga.), 75 S. E. 158. But compare Hirsch v. Lichtenstein, 139 N. Y. S. 4; Sherry v. Proal (N. Y.), 100 N. E. 421.

of a demise,[88] and that a signature by an agent not properly authorized in writing is not a compliance with this requirement.[89] If the lessee in an indenture of lease not executed by the lessor, take possession of the premises, his occupation is as tenant at will or by sufferance only, and he is only liable for rent for the time he actually occupies them.[90] With respect to leases by indenture, the covenants which depend on the interest of the lease—such as those to repair and pay rent during the term—are not obligatory if the lessor does not execute. Unless there be a term, a covenant to repair is void. But with respect to collateral covenants, not depending on the interest in the land, it is otherwise, and they are obligatory.[91] However, where the lessee has occupied during the term, the landlord could recover rent from him in an action of use and occupation.[92] The instrument should be executed by the same person who is named as grantor in the body of the lease.[93] If the lease recites that the lessee is to pay a certain sum as rent for the premises, his acceptance of the lease makes him a direct obligor or promisor to pay the rent, although he has not signed or executed the instrument.[95] An offer in writing made and signed by the owner of land, to allow a tenant to remain in possession for two years, was held to be a lease which the tenant accepted by remaining; and it was not necessary for the tenant to sign it.[96] But where the parties contemplated the signing of the instrument by both parties, and it was signed by the lessor only, and the lessee had not taken possession under it, it was held in New York that the lessee was not liable for rent.[97] But it may be stated as a general rule that a party who enters into possession of property as tenant, after promising to sign a written lease, cannot rely on the fact that he did not sign to relieve himself from the burdens imposed by the lease.[98]

[88] Hyatt v. Third Baptist Church, 10 Mo. App. 582.

[89] Sigmund v. Newspaper Co., 82 Ill. App. 178. See and compare, vol. 1, § 452.

[90] Sigmund v. Newspaper Co., 82 Ill. App. 178; Nickolls v. Barnes, 32 Nebr. 195, 49 N. W. 342.

[91] Pitman v. Woodbury, 3 Exch. 4; Knipe v. Palmer, 2 Wils. K. B. 130.

[92] Codman v. Hall, 9 Allen (Mass.) 335.

[93] Roff v. Duane, 27 Cal. 565.

[95] McFarlane v. Williams, 107 Ill. 33; Kershaw v. Kershaw, 102 Ill. 307; Schmucker v. Sibert, 18 Kans. 104, 26 Am. Rep. 765; Atlantic Dock Co. v. Leavitt, 54 N. Y. 35, 13 Am. Rep. 556.

[96] Hulett v. Nugent, 71 Mo. 131.

[97] Adams v. Boelger, 15 Misc. (N. Y.) 140, 71 N. Y. St. 823, 36 N. Y. S. 801.

[98] Libbey v. Staples, 39 Maine 166;

§ 4536. Execution—Acknowledging and witnessing.—It is not necessary that the lease be either witnessed or acknowledged, except for the purpose of entitling it to record.[99] It is a well established rule that a lease of real property, duly signed by the parties but not witnessed or acknowledged, is valid between the parties and against purchasers having actual notice of its existence.[1] However, the effect of the almost universal legislation on the subject is, that unless a lease for more than seven years or some similar term specified by statute has been acknowledged and recorded according to law, it is valid only between the parties and such as have actual notice thereof. In this respect a lease stands on the same footing as a deed, and an intending purchaser is entitled to rely on the record title for encumbrances.[2] It has been held that a lease reserving a lien which is neither acknowledged or recorded can create no lien on the lessee's goods for rent, even though the creditor attaching the goods has actual notice of the lease.[3] A contrary opinion was reached in a case where the lien for rent was reserved on growing crops, on the ground that if the lease was not valid the entire property in the crops remained in the lessor.[4]

§ 4537. Execution—Sealing.—It is not necessary to the validity of a lease that the lessee affix his seal thereto. His acceptance is shown by claiming under it, occupying and maintaining the premises, and paying rent.[5] Contrary to the early English rule, the authorities of to-day, both in England and in this

Bonaparte v. Thayer, 95 Md. 548, 52 Atl. 496; Carroll v. St. John's &c. Relief Soc., 125 Mass. 565.

[99] Roberts v. Nelson, 65 Minn. 240, 68 N. W. 14; Lydiard v. Chute, 45 Minn. 277, 47 N. W. 967.

[1] Baldwin v. Walker, 21 Conn. 168; Johnson v. Phœnix Mut. Life Ins. Co., 46 Conn. 92; Cherry Lake Turpentine Co. v. Lanier Armstrong Co. (Ga. App.), 73 S. E. 610; Johnson v. Jones, 87 Ga. 85, 13 S. E. 261; Lake v. Campbell, 18 Ill. 106; Emrich v. Union &c. Co., 86 Md. 482, 38 Atl. 943; Kittle v. St. John, 10 Nebr. 605, 7 N. W. 271; Weaver v. Coumbe, 15 Nebr. 167, 17 N. W. 357; McGlauflin v. Holman, 1 Wash. 239, 24 Pac. 439. In Knowles v. Murphy, 107 Cal. 107, 40 Pac. 111, it was held that one is bound by the terms of a lease made to him, which he has signed but not acknowledged.

[2] Wihelm v. Mertz, 4 G. Green (Iowa) 54; Hopping v. Burnam, 2 G. Greene (Iowa) 39; Anthony v. New York &c. R. Co., 162 Mass. 60, 37 N. E. 780; Toupin v. Peabody, 162 Mass. 473, 39 N. E. 280.

[3] Kendall Boot &c. Co. v. Bain, 55 Mo. App. 264.

[4] Buswell v. Marshall, 51 Vt. 87.

[5] Crescent City Wharf & Lighter Co. v. Simpson, 77 Cal. 286, 19 Pac. 426.

country, are unanimous in holding that a written document which furnishes evidence of a demise sufficient to satisfy the Statute of Frauds need not be under seal.[6] By the common law a lease for years written but not sealed was a parol lease as well as a lease unwritten and verbal only.[7] After the Statute of Frauds leases for more than three years could be made by indenture of lease, or by parol agreement "in writing signed by the parties."[8] While a lease is valid without a seal, the consideration for the covenant may be gone into in case the seal is omitted. However, the covenant to pay rent is supported by an abundant consideration in the demise of the premises and can be enforced even though the premises fall into bad repair and become useless for the purpose intended.[9] It has been held that a lease under seal can be executed only by an agent under sealed authority, though the seal was not necessary.[10]

§ 4538. Delivery and acceptance.—The technical requirements for the execution of an instrument include delivery in addition to signing. So in strictness it is true that a lease, though signed by both parties, does not take effect until it has been delivered.[11] But after both parties have signed an indenture of lease it is a sufficient delivery to leave the instrument with the scrivener who prepared it for him to make a copy for the lessee.[12] If the lessee, by formal assent, or unequivocal acts, such as entering into possession, treats the writing as in his possession, it is sufficient to constitute a delivery.[13] As long as the tenant has not entered into possession of the premises, delivery becomes material on the question whether the lease becomes operative or

[6] Lake v. Campbell, 18 Ill. 106; Hill v. Woodman, 14 Maine 38; Gay v. Ihm, 3 Mo. App. 588, affd. 69 Mo. 584; Hunt v. Hazelton, 5 N. H. 216, 20 Am. Dec. 575; Mayberry v. Johnson, 15 N. J. L. 116; O'Brien v. Smith, 59 Hun (N. Y.) 624, 37 N. Y. St. 41, 13 N. Y. S. 408; affirmed without opinion 129 N. Y. 620, 29 N. E. 1029; Witman v. Reading, 191 Pa. St. 134, 43 Atl. 140.

[7] Ford v. Campfield, 11 N. J. Law 327, 20 Am. Dec. 589; Ballard v. Walker, 3 Johns. Cas. (N. Y.) 60.

[8] Mayberry v. Johnson, 15 N. J. L. 116.

[9] Hill v. Woodman, 14 Maine 38.

[10] Hayes v. Atlanta, 1 Ga. App. 25, 57 S. E. 1087.

[11] Stetson v. Briggs, 114 Cal. 511, 46 Pac. 603; Davidson v. Ellmaker, 84 Cal. 21, 23 Pac. 1026; Witthaus v. Starin, 12 Daly (N. Y.) 226.

[12] Reynolds v. Greenbaum, 80 Ill. 416.

[13] Witman v. Reading, 191 Pa. St. 134, 43 Atl. 140.

not.[14] Delivery is a question of intent and it depends on whether the parties meant it to be a delivery to take effect immediately. Thus where a lease was signed by both parties and then put in the hands of the lessee to procure an indorsement for the payment of rent, it was held there was no delivery and the instrument was not binding since the proposed guaranty could not be obtained.[15] Where the lessee has accepted the lease the law will imply a promise to comply with the terms of the lease,[16] and such a promise is not within the Statute of Frauds.[17] In contemplation of law they hold the premises whether they occupy them or not.[18] Where the lessee signed and retained a lease tendered by the lessor, there was held to be an acceptance, even though the lease was accompanied by a letter indicating unwillingness to pay the rent reserved.[19]

§ 4539. **Recording.**—The statutory provisions for recording transfers of real estate usually require, that all such transfers be recorded to be good against subsequent purchasers for value except leases for a short period. This period is usually fixed at one year, though an exception in favor of leases for a term of three years is not unusual and in some states the period is longer.[20] In other statutes no mention is made of leases under that name but

[14] David Stevenson Brew. Co. v. Culbertson, 41 N. Y. S. 1039.

[15] Jordan v. Davis, 108 Ill. 336.

[16] Guild v. Leonard, 18 Pick. (Mass) 511; Kabley v. Worcester Gas Light Co., 102 Mass. 392.

[17] Felch v. Taylor, 13 Pick. (Mass.) 133; Kabley v. Worcester Gas Light Co., 102 Mass. 392.

[18] Pinero v. Judson, 6 Bing. 206.

[19] Leiter v. Pike, 127 Ill. 287, 20 N. E. 23.

[20] Leases for more than one year are not valid without being recorded in California, Connecticut, Florida, Hawaii, Idaho, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Vermont. Leases for more than two years are not valid without being recorded in Rhode Island. Leases for more than three years are not valid without being recorded in Indiana, New York, North Carolina, Ohio, Tennessee, Wisconsin, Wyoming. Leases for more than five years are not valid without being recorded in Kentucky, Virginia, West Virginia. Leases for more than seven years are not valid without being recorded in Maine, Maryland, Massachusetts, New Hampshire. Leases for less than twenty-one years, when accompanied by possession by the lessee need not be recorded in Pennsylvania. Williams v. Downing, 18 Pa. St. 60. In Louisiana the rule is that the fact that a lease is not recorded produces no legal effect as to third persons. Anderson v. Comeau, 33 La. Ann. 1119. In North Carolina leases which must be in writing must be registered. Rev. Code, ch. 18, § 980. In Washington leases for any term not exceeding one year are valid without acknowledgment or seal. Remington & Ballinger's Am. Codes (1910), § 8802.

the expression is that transfers of any interest in land must be recorded. Such general language seems to include leases without regard to the length of the term.[21] In California the form of the statute is that all conveyances of land must be recorded.[22] In New Jersey a lessee is given the privilege of recording certain leases, but is no worse off than he would be at common law if he fails to do so.[23] But it is clear that an unrecorded deed or lease is valid and conveys a title as between the parties thereto.[24] And it has been further declared that the statutes relative to recording were not intended to protect persons who claim no right, title, or interest in the premises conveyed by an unrecorded instrument.[25] In general a sublease must be recorded where an original lease of equal duration must be put on record to bind third persons, such as an assignee for value of the original leasehold who takes without notice.[26]

§ 4540. **Parties in general.**—The capacity to execute a lease depends in general upon the capacity to contract generally. So in the execution of every lease there may arise a question as to the capacity of the person to enter into such a contractual relation, and this has to do with the effect of some personal disability of one of the contracting parties, such as infancy, insanity, or coverture. Then again, there may arise the question as to the authority of the lessor to convey by demise the particular premises covered by the lease, and this involves the rights of persons acting in a representative capacity, such as an agent, executor, or trustee. Although, without any rightful title or interest in the land, a person who can transfer the possession alone can execute a lease which will be binding on the lessee as long as he continues in the undisturbed possession of the premises. So an estate in

[21] Such seems to be the case in Alabama, Arkansas, Arizona, Alaska, Colorado, Georgia, Iowa, Illinois, Kansas, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Mexico, Oregon, Texas. And see note in 24 L. R. A. (N. S.) 879, on lease as conveyance of land within meaning of recording statutes.

[22] Garber v. Gianella, 98 Cal. 527, 33 Pac. 458.

[23] Hodge v. Giese, 43 N. J. Eq. 342, 11 Atl. 484.

[24] Earle v. Fiske, 103 Mass. 491; Smythe v. Sprague, 149 Mass. 310, 21 N. E. 383, 3 L. R. A. 822.

[25] Anthony v. New York &c. R. Co., 162 Mass. 60, 37 N. E. 780; Beach v. Morgan, 67 N. H. 529, 41 Atl. 349, 68 Am. St. 692.

[26] Burr v. Spencer, 26 Conn. 159, 68 Am. Dec. 379.

fee is not necessary to enable one to execute a valid lease.[27] One may be a landlord who is not an owner.[28] So in the absence of restrictive covenants a valid lease may be made by a tenant for life or by a tenant for years.[29] So also a joint lease may be made by adjoining owners who hold severally and not in common.[30] One tenant in common, however, cannot make a lease of community land that will bind his cotenants, and unless he has authority from them he can only lease his individual share.[32] A lease by some of several tenants in common owning land is valid as to those who execute it but voidable as to those who have not joined.[33] But where a lease is executed by a firm composed of several members, it has been held that the covenants thereto are several as well as joint, and each individual member of the firm is liable thereon.[34]

§ 4541. Parties—Leases by and to married women.—At common law a married woman could not execute a lease that would bind her,[35] but a lease executed by her during coverture could be confirmed by her after the death of her husband.[36] So at common law a married woman could not take a lease and thereby render the covenants on her part binding on her,[37] though where possession was taken under a lease to her, it was held that her husband was liable in an action for use and occupation.[38] But where by statute all real and personal property of a married woman is declared to be her sole and separate property, subject to her control, she may execute

[27] Strickland v. Stiles, 107 Ga. 308, 33 S. E. 85; Goldsmith v. Wilson, 68 Iowa 685, 28 N. W. 16; Lindsey v. Leighton, 150 Mass. 285, 22 N. E. 901, 15 Am. St. 199; Cross v. Freeman, 22 Tex. Civ. App. 299, 54 S. W. 246.

[28] Lindsey v. Leighton, 150 Mass. 285, 22 N. E. 901, 15 Am. St. 199.

[29] Sykes v. Benton, 90 Ga. 402, 17 S. E. 1002.

[30] Higgins v. California Petroleum &c. Co., 109 Cal. 304, 41 Pac. 1087.

[32] Tainter v. Cole, 120 Mass. 162; Mussey v. Holt, 24 N. H. 248, 55 Am. Dec. 234; Valentine v. Healey, 158 N. Y. 369, 52 N. E. 1097, 43 L. R. A. 667; Tipping v. Robbins, 64 Wis. 546, 25 N. W. 713; Martens v. O'Connor, 101 Wis. 18, 76 N. W. 774.

[33] Tainter v. Cole, 120 Mass. 162; Martens v. O'Connor, 101 Wis. 18, 76 N. W. 774; Tipping v. Robbins, 64 Wis. 546, 25 N. W. 713.

[34] Dunn v. Jaffray, 36 Kans. 408, 13 Pac. 781.

[35] Goodright v. Straphan, Cowp. 201.

[36] Sanborn v. French, 22 N. H. 246; Ela v. Card, 2 N. H. 175, 9 Am. Dec. 46; Nash v. Berkmeir, 83 Ind. 536.

[37] Westervelt v. Ackley, 62 N. Y. 505.

[38] Vincent v. Buhler, 1 Daly (N. Y.) 165.

a lease which shall bind all the parties to it.[39] Yet to be bound by the lease the married woman must follow the mode of contracting pointed out by the statute.[40] The statutes enabling a married woman to receive, hold, manage and dispose of real and personal property in the same manner as if she were sole, cannot be construed to apply to the estate by entireties of husband and wife, where other statutes prevent this conveyance from being construed as creating a tenancy in common.[41] The decisions in many states upon the effect of such statutes turn more or less upon the particular terms of the statutes. Many cases hold that these statutes do not affect estates by entireties.[42] The contrary conclusion has been reached in a few other jurisdictions.[43]

§ 4542. **Right of husband to lease wife's real estate.**—In the absence of any antenuptial contract or enabling statute, the marriage vests in the husband an estate in all the wife's real property in her possession at the time of the marriage or which comes to her during the marriage, to continue during the joint lives of himself and wife, he being seized thereof with his wife in her right, and the death of the wife or death of the husband will end it.[44] The husband has, during coverture, the usufruct of all the real estate which his wife has in fee simple, fee tail, or for life.[45] "By the great weight of authority, the husband has the right to make a lease of an estate conveyed in fee to him and his wife, which will be good against the wife during coverture, and will fail only in the event of his wife surviving him."[46] But

[39] Parent v. Calbrand, 64 Ill. 97.

[40] Carlton v. Williams, 77 Cal. 89, 19 Pac. 185, 11 Am. St. 243; Keller v. Klopfer, 3 Colo. 132.

[41] Pray v. Stebbins, 141 Mass. 219, 4 N. E. 824, 55 Am. Rep. 462.

[42] Robinson v. Eagle, 29 Ark. 202; Hulett v. Inlow, 57 Ind. 412, 26 Am. Rep. 64; Marburg v. Cole, 49 Md. 402, 33 Am. Rep. 266; Fisher v. Provin, 25 Mich. 347; Hemingway v. Scales, 42 Miss. 1, 97 Am. Dec. 425, 2 Am. Rep. 586; McDuff v. Beauchamp, 50 Miss. 531; Bertles v. Nunan, 92 N. Y. 152, 12 Abb. N. Cas. (N. Y.) 283, 44 Am. Rep. 361; McCurdy v. Canning, 64 Pa. St. 39.

[43] Cooper v. Cooper, 76 Ill. 57; Hoffman v. Stigers, 28 Iowa 302; Clark v. Clark, 56 N. H. 105.

[44] Cheek v. Waldrum, 25 Ala. 152; Montgomery v. Tate, 12 Ind. 615; Gregory's Heirs v. Ford, 5 B. Mon. (Ky.) 471; Beale v. Knowles, 45 Maine 479; Clapp v. Stoughton, 10 Pick. (Mass.) 463; Jackson v. Cairns, 20 Johns. (N. Y.) 301; Shallenberger v. Ashworth, 1 Casey (Pa.) 152; Guion v. Anderson, 8 Humph. (Tenn.) 298.

[45] Pray v. Stebbins, 141 Mass. 219, 4 N. E. 824, 55 Am. Rep. 462;

[46] Washburn v. Burns, 5 Vroom. (N. J.) 18; Barber v. Harris, 15

the principle is said to be well established that a mere verbal lease by husband and wife of her lands, or a written lease to which she is not a party, is void as to the wife.[47] The interest of a surviving spouse in real estate before dower or homestead has been assigned is not such as to enable him to make a valid lease against the right of the administrator to sell the property to pay the debts of the estate.[48] It is a rule of property that a surviving husband or wife cannot sell or convey the right of dower and homestead to a person other than the owner of the fee, or lease the same before dower and homestead have been set off and assigned.

§ 4543. **Parties—Guardians.**—Although it has been said to be a well-settled rule that a guardian cannot by his contract bind the person or estate of his ward,[49] there is no question but that a guardian may lease the real estate of the ward during infancy, if the guardianship so long continue.[50] It has also been held that the guardian may, by a lease in writing, reserve the rent to himself to cover advances which he may make for the use of the ward, and in such case the action for rent must be brought in his own name unless he assign the lease to his ward.[52] The power to lease any of the ward's property does not carry with it the power to convey any part of the realty. It follows that as oil is a mineral, and being a mineral, is a part of the realty, a guardian cannot grant an oil and gas lease of land of his ward, as that would in effect be the grant of a part of the corpus of the estate of the ward.[53] The above statements as to the powers of guardians apply only to guardians of infant's estates, and not to natural guardians or

Wend. (N. Y.) 615; Topping v. Sadler, 5 Jones L. (N. Car.) 357; Wyckoff v. Gardner, Spencer (N. J.) 556, 45 Am. Dec. 388; Bertles v. Nunan, 92 N. Y. 152, 12 Abb. N. Cas. (N. Y.) 283, 44 Am. Rep. 361; Fairchild v. Chastelleux, 1 Barr. (Pa.) 176, 44 Am. Dec. 117; Ames v. Norman, 4 Sneed (Tenn.) 683, 70 Am. Dec. 269.

[47] Winstell v. Hehl, 6 Bush (Ky.) 58.

[48] Union Brewing Co. v. Meier, 163 Ill. 424, 45 N. E. 264.

[49] Jones v. Brewer, 1 Pick. (Mass.) 314.

[50] Huff v. Walker, 1 Ind. 193, Smith (Ind.) 134; Graham v. Chatoque Bank, 5 B. Mon. (Ky.) 45; Hutchins v. Dresser, 26 Maine 76; Weldon v. Lytle, 53 Mich. 1, 18 N. W. 533; Richardson v. Richardson, 49 Mo. 29; Snook v. Sutton, 10 N. J. L. 133; Putnam v. Ritchie, 6 Paige (N. Y.) 390; In re Stoughton's Appeal, 88 Pa. St. 198; Windon v. Stewart, 43 W. Va. 711, 28 S. E. 776.

[52] Ross v. Gill, 1 Wash. (Va.) 87.

[53] In re Stoughton's Appeal, 88 Pa. St. 198; Wilson v. Youst, 43 W. Va. 826, 28 S. E. 781, 39 L. R. A. 292.

guardians for nurture, since natural guardians and guardians for nurture have not even the right of possession of the real estate of their wards and hence would have no right to bring ejectment for it.[54] By statutes in some states guardians can lease the lands of their wards upon such terms as the court may approve or direct.[55] Furthermore, the right of the guardian to lease the lands of his ward is limited to such time as he shall continue to be guardian, and the appointment of another guardian terminates the power of the former guardian, and all leases made by him of his ward's lands cease.[56]

§ 4544. Parties—Power of trustees.—It is within the general power of trustees to execute a lease, but it must be a reasonable lease and not in excess of the estate in them.[57] If the trustee act honestly, and with a reasonable degree of foresight and prudence in leasing the estate entrusted to him, a court of equity will uphold his acts.[58] Not only is a trustee authorized to grant leases of the trust property, but that mode of dealing with trust property which is expected to yield an income is the rule and not the exception. So it was held in a case where a plantation was placed in the hands of a trustee a special authorization was necessary to entitle him to exercise personal supervision over the management rather than renting it out.[59] In the absence of any restriction in the instrument creating the trust, it has been held that the trustee has implied power to grant a lease for such term as the owner might have granted it.[60] Ordinarily the trustees of a charitable use should only lease for years unless they have obtained an order of court to lease for a longer term. But where the terms of the lease are fair and reasonable, and for the benefit of the charity, long-

[54] Magruder v. Peter, 4 Gill & J. (Md.) 323; May v. Calder, 2 Mass. 55; Kinney v. Harrett, 46 Mich. 87, 8 N. W. 708; Ross v. Cobb, 9 Yerg. (Tenn.) 463.

[55] Field v. Herrick, 5 Ill. App. 54, affd. in 101 Ill. 110; Bates v. Dunham, 58 Iowa 308, 12 N. W. 309.

[56] Emerson v. Spicer, 55 Barb. (N. Y.) 428, 38 How. Pr. 114, affd. 46 N. Y. S. 594; Putnam v. Ritchie, 6 Paige (N. Y.) 390.

[57] Naylor v. Arnitt, 1 R. & M. 501; Hutcheson v. Hodnett, 115 Ga. 990, 42 S. E. 422; Richmond v. Davis, 103 Ind. 449, 3 N. E. 130.

[58] Cone v. Corse, 144 N. Y. 569, 39 N. E. 630; Greason v. Keteltas, 17 N. Y. 491.

[59] Dennis v. Dennis, 15 Md. 73.

[60] Hutcheson v. Hodnett, 115 Ga. 990, 42 S. E. 422.

term leases have been upheld.[61] And, even where such long-time leases by a trustee of a charitable use are set aside, a court of equity will protect the lessee acting in good faith under such lease, and will allow him the reasonable value of any permanent improvements he may have placed on the premises during his holding.[62] Where the trustee rightfully and legally assumes in his representative capacity the relation of landlord, he is liable in that capacity to answer to the tenant for the violation of any duty which the general law attaches as an incident to that relation.[63] Where a mere naked trustee, with the consent of the cestui que trust having the beneficial title and right to the possession, leases the trust property, the leasing will be regarded as the act of the cestui que trust, and he will be entitled to whatever rights belong to the landlord.[64] As a general rule, a trustee cannot avoid his contracts, or nullify his acts, because they may be in excess or in abuse of his authority.[65]

§ 4545. Parties—Infants as lessors and lessees.—It is a general rule that a grant of a leasehold estate by an infant lessor is not void but voidable, and to avoid his lease upon attaining his majority, some act of notoriety, such as ejectment, entry, or demand of possession is required of the lessor against the lessee in possession.[66] And it would seem that an infant cannot during infancy avoid a lease made, reserving a rent for his or her benefit.[67] In case an infant acquires the reversion upon a periodical lease, he must give the required notice to quit the same as other lessors.[68] Likewise a lease to an infant is not absolutely void, but voidable only, and it is not for third persons to set up the defense of infancy. It is voidable upon the infant's own application and may be avoided by him when he comes of age.[69] If the lessee,

[61] Richmond v. Davis, 103 Ind. 449, 3 N. E. 130.
[62] Attorney-General v. Balliol College, 9 Mod. 410; Richmond v. Davis, 103 Ind. 449, 3 N. E. 130; Second Unitarian Soc. v. Woodbury, 14 Maine 281.
[63] Miller v. Smythe, 92 Ga. 154, 18 S. E. 46.
[64] White v. Cannon, 125 Ill. 412, 17 N. E. 753.
[65] Stoudenmeier v. Williamson, 29 Ala. 558; Riddle v. Hill, 51 Ala. 224.
[66] Slator v. Brady, 14 Ir. C. L. 61.
[67] Slator v. Brady, 14 Ir. C. L. 61; Lipsett v. Perdue, 18 Ont. 575.
[68] Maddon v. White, 2 Term. Rep. 159.
[69] Field v. Herrick, 101 Ill. 110; Griffith v. Schwenderman, 27 Mo. 412; Roberts v. Wiggin, 1 N. H. 73, 8 Am. Dec. 38; Cheshire v. Barrett, 4 McCord L. (S. Car.) 241, 17 Am. Dec. 735.

being an infant at the time the lease was made, continue to occupy the leased premises subsequent to his becoming of age, it will amount to a ratification of the lease, and will render all its provisions obligatory upon him.[70] Where an infant lessee assigns the term, the lessee is liable to pay rent to the lessor during his occupancy, until the minor disaffirms the assignment.[71]

§ 4546. **Parties—Executors and administrators.**—In the absence of authority conferred by statute, the executor or administrator is not entitled or bound to take charge of the real estate of his testator or intestate, unless he is ordered by the proper court to sell or lease it to pay debts and legacies.[72] Where the right to lease is conferred by statute for the purpose of administration the lease must be limited to that period, and any lease for a definite term is subject to termination by final distribution of the estate and the discharge of the administrator.[73] Moreover, if an administrator leases land in pursuance of a power conferred by statute he must comply with the requirements of the statute as to the mode of effecting the contract.[74] In Arkansas the statutory authority of an administrator to deal with his intestate's lands is narrowly confined. He has control over the lands for the purpose of paying debts, and accordingly may please them for that purpose, but when such lands are no longer needed for such purpose, the administrator would have no power to control the rents.[75] In Michigan the statute gives to the executor the right to lease the real estate of his testator from year to year subject to the contingency that the estate be not settled in the meantime. So a lease by executors for a two years' term, being void, creates a tenancy from year to year, as in ordinary cases, terminable at the expiration of one year from the time of the service of a notice to quit.[76]

[70] Baxter v. Bush, 29 Vt. 465, 70 Am. Dec. 429.

[71] Rothchild v. Hudson, 8 Ohio Dec. 259, affd. 12 Wkly. L. Bul. 263, 6 Wkly. L. Bul. 752.

[72] Grady v. Warrell, 105 Mich. 310, 63 N. W. 204.

[73] Doolan v. McCauley, 66 Cal. 476, 6 Pac. 130.

[74] Martin v. Williams, 18 Ala. 190; Chighizola v. Le Baron, 21 Ala. 406.

[75] Stewart v. Smiley, 46 Ark. 373; Chowning v. Stanfield, 49 Ark. 87, 4 S. W. 276.

[76] Grady v. Warrell, 105 Mich. 310,

§ 4547. **Illegal leases.**—The general rule that courts will not grant relief to parties to illegal contracts applies to illegal leases, and the mere fact that a contract, illegal in the first instance, has been executed gives no right of recovery.[77] Ordinarily the illegality in an illegal lease does not appear on the face of the instrument itself but consists in the purpose to which the parties intend that the demised premises shall be put. To make a lease invalid on such a ground it must be proved that the intention of an illegal use was mutual to both parties.[78] A lease may be avoided by parol evidence that it was made with the intention that the demised premises should be used for an unlawful purpose, and of their actual use for that purpose, although it contains an express covenant of the lessee to make no unlawful use of them.[79] It has been held that a contract to let a house for a purpose forbidden by a city ordinance is void,[80] and if a business, such as maintaining a billiard parlor which requires a license from city authorities, is carried on in the leased premises without any license, a lessor, who has leased the premises for this purpose, with knowledge that no license has been granted, could not recover rent under his lease.[81] It has been held at common law that the letting of a house to be used as a bawdy house is an indictable offense, because the exciting, encouraging and aiding one to commit a misdemeanor is of itself a misdemeanor.[82] So it has been generally held that rent cannot be recovered on a lease when the premises were let to be used for the purpose of prostitution, even in the absence of any statute prohibiting such traffic.[83] And

63 N. W. 204.

[77] Dunn v. Stegemann, 10 Cal. App. 38, 101 Pac. 25; Bishop v. American Preservers' Co., 157 Ill. 284, 41 N. E. 765, 48 Am. St. 317; Hutchins v. Weldin, 114 Ind. 80, 15 N. E. 804; Miller v. Ammon, 145 U. S. 421, 36 L. ed. 759, 12 Sup. Ct. 884. But in Harbison v. Shirley, 139 Iowa 605, 117 N. W. 963, 19 L. R. A. (N. S.) 662n, it was held that mere knowledge or suspicion that lessee is going to use the premises for an illegal purpose will not invalidate the contract.

[78] Ryan v. Potwin, 60 Ill. App. 637; Gibson v. Pearsall, 1 E. D. Smith (N. Y.) 90; Arras v. Richardson, 24 N. Y. St. 742, 5 N. Y. S. 755. See also, Kelly v. Williams, 162 Ill. App. 571; and note in 12 L. R. A. (N. S.) 605.

[79] Sherman v. Wilder, 106 Mass. 537; Ernst v. Crosby, 140 N. Y. 364, 35 N. E. 603; Vanbuskirk v. McNaughton, 34 N. Bruns. 125. But see Ashford v. Mace (Ark.), 146 S. W. 474.

[80] Milne v. Davidson, 5 Mart. (N. S.) (La.) 409, 16 Am. Dec. 189.

[81] Simpson v. Wood, 105 Mass. 263.

[82] King v. Phillipps, 6 East 464.

[83] Troback v. Caro, 60 Cal. 304; Chateau v. Singla, 114 Cal. 91, 45 Pac. 1015, 33 L. R. A. 750, 55 Am. St. 63; Dougherty v. Seymour, 16 Colo. 289, 26 Pac. 823; Egan v. Gordon, 65 Minn. 505, 68 N. W. 103; Ashbrook

where a statute makes it an offense punishable with a fine to let a house for the purpose of a gambling resort, the taint of illegality attaches to the lease and the lessor cannot recover the rent reserved on it.[84] A lease originally void for illegality because of the purpose for which it was made does not become valid by assignment of it by the lessee.[85]

§ 4548. Leases obtained by fraud.—A representation which merely amounts to a statement of opinion, judgment or expectation, or is vague, and indefinite in its nature and terms, or is merely a loose conjectural or exaggerated statement, is not sufficient to justify the rescission of a lease on the ground of fraud.[86] The same is true where the proof fails to show that the representations were false or were made with a fraudulent intent to induce the defendant to lease the premises.[87] It is essential that the lessee should have entered into the contract in reliance on the false representations.[88] The rule is well established that fraud in making a written agreement may be shown by parol evidence.[89] But where a party knowingly and voluntarily signs a deed, although he be induced thereto by the fraudulent contrivances of others, yet if it be such, upon its face, as will convey title, it can only be impeached and set aside, and parol evidence received for that purpose, in a court of equity.[90] It cannot be impeached and set aside in a court of law.[91] Where a landlord by artifice prevents a tenant from discovering defects in the leased premises and fraudulently misrepresents their condition, the tenant is entitled to rescind the lease, vacate the premises and defend an action based on a claim for rent under it.[92] That a

v. Dale, 27 Mo. App. 649; Ernst v. Crosby, 140 N. Y. 364, 35 N. E. 603; Hunstock v. Palmer, 4 Tex. Civ. App. 459, 23 S. W. 294. But see Ashford v. Mace (Ark.), 146 S. W. 474.

[84] Harris v. McDonald, 79 Ill. App. 638; McDonald v. Tree, 69 Ill. App. 134.

[85] Sherman v. Wilder, 106 Mass. 537.

[86] Buschman v. Codd. 52 Md. 202.

[87] Lewis v. Clark, 86 Md. 327, 37 Atl. 1035.

[88] Slyfield v. Cordingly, 72 Iowa 762, 34 N. W. 602.

[89] Sisson v. Kaper, 105 Iowa 599, 75 N. W. 490; Wolfe v. Arrott, 109 Pa. St. 473, 1 Atl. 333.

[90] Equitable Trust Co. v. Fisher, 106 Ill. 189; Chapin v. Billings, 91 Ill. 539; Taylor v. King, 6 Munf. (Va.) 358, 8 Am. Dec. 746.

[91] Resser v. Corwin, 72 Ill. App. 625.

[92] Haines v. Downey, 86 Ill. App. 373; Sisson v. Kaper, 105 Iowa 599, 75 N. W. 490; Rand v. Wickham, 60 Mo. App. 44; Morris v. Shakespeare, 9 Sad. (Pa.) 345, 12 Atl. 414. See also, as to reformation or other remedies for mistake, note in 28 L. R. A. (N. S.) 826.

lessee was induced to accept a lease by fraudulent representations on the part of the lessor as to a material point in the construction of the demised premises is a good defense to an action for rent.[93]

§ 4549. **Collateral parol agreement.**—Under certain circumstances a collateral parol contract between parties to a written lease may exist concurrently with the lease.[94] To be binding, such a contract must not come within the prohibition of the Statute of Frauds; it must be supported by adequate consideration, and it must, furthermore, be sufficiently collateral to the subject-matter covered in the written lease so that the presumption will not apply that all previous oral negotiations had been merged in the written instrument as executed, for such written lease must, in the absence of fraud or mistake, be deemed to embody the final determination of the parties.[95] Where a written lease is perfect and does not indicate that it was to be performed other than as it is written, all antecedent oral agreements on the subject are merged in the writing.[96] When an attempt is made to enforce an oral agreement collateral to a lease, the first inquiry is whether such agreement is within the Statute of Frauds. Thus, an agreement by the landlord to allow the tenant to remove all temporary improvements he may erect might be valid although not in writing, and for that reason, the further question as to whether it would be merged in the written instrument becomes important.[97] A covenant that, at the termination of the lease, the lessee shall deliver up the premises in as good order and condition as they then were or should be put into by the lessor is not inconsistent with such an agreement. There is nothing

[93] Haines v. Downey, 86 Ill. App. 373; Fry v. Day, 97 Ind. 348; Irving v. Thomas, 18 Maine 418; Milliken v. Thorndike, 103 Mass. 382; Barr v. Kimball, 43 Nebr. 766, 62 N. W. 196; Dennison v. Grove, 52 N. J. L. 144, 19 Atl. 186; Daly v. Wise, 132 N. Y. 306, 30 N. E. 837, 16 L. R. A. 236; Wolfe v. Arrott, 109 Pa. St. 473, 1 Atl. 333.

[94] Morgan v. Griffith, L. R. 1 Exch. 70; Erskine v. Adeane, L. R. 8 Ch. 756; Welz v. Rhodius, 87 Ind. 1, 44 Am. Rep. 747; Graffam v. Pierce, 143 Mass. 386, 9 N. E. 819; Chapin v. Dobson, 78 N. Y. 74, 34 Am. Rep. 512.

[95] Abbott v. Seventy-Six Land &c. Co., 101 Cal. 567, 36 Pac. 1.

[96] Kelly v. Chicago &c. R. Co., 93 Iowa 436, 61 N. W. 957; Stevens v. Haskell, 70 Maine 202; Stuebben v. Granger, 63 Mich. 306, 29 N. W. 716. See also, Abbott v. Seventy-Six Land &c. Co., 101 Cal. 567, 36 Pac. 1; Averill v. Sawyer, 62 Conn. 560, 27 Atl. 73.

[97] Powell v. McAshan, 28 Mo. 70.

which requires such an agreement to be in writing, and evidence tending to prove such an agreement is therefore admissible.[98] Where some of the stipulations in a contract are within the Statute of Frauds and others are not, if those which are within it have been performed, an action lies upon the other stipulations, if they are separate.[99] The execution of a new lease to the same tenant for the unexpired term of an old lease operates as a surrender and extinguishment of the old lease so that the rights of the parties are to be governed by the new lease.[1]

§ 4550. Agreement to lease.—Under the authorities, to create a valid agreement to lease, there must be a definite agreement as to the extent and bounds of the property leased, a definite and agreed term, and a definite and agreed price of rental, and the time and manner of payment.[2] The agreement must contain all the ordinary terms in regard to time, amount of rent, etc., or the minds of the parties do not meet and it is not binding.[3] Since the agreement to lease involves the transfer of rights in real estate, the general doctrine that equity will enforce specific performance in such cases may be invoked.[4] It is essential, in deciding whether a contract in regard to letting is a lease or merely an agreement for a lease that the intention of the parties be determined from the entire instrument.[5] The intention of the parties, as declared by the words of the instrument, must govern

[98] Ryder v. Faxon, 171 Mass. 206, 50 N. E. 631, 68 Am. St. 417.

[99] Lowman v. Sheets, 124 Ind. 416, 24 N. E. 351, 7 L. R. A. 784; Trowbridge v. Wetherbee, 11 Allen (Mass.) 361.

[1] Rollins v. Proctor, 56 Iowa 326, 9 N. W. 235.

[2] Cochrane v. Justice Min. Co., 16 Colo. 415, 26 Pac. 780; Boston Clothing Co. v. Solberg, 28 Wash. 262, 68 Pac. 715.

[3] Disbrow v. Wilkins, 11 App. Div. (N. Y.) 628, 44 N. Y. S. 1115.

[4] Clark v. Clark, 49 Cal. 586; Cochrane v. Justice Min. Co., 16 Colo. 415, 26 Pac. 780; Wharton v. Stoutenburgh, 35 N. J. Eq. 266, affd. 39 N. J. Eq. 299; Blaney v. Hoke, 14 Ohio St. 292; Boston Clothing Co. v. Solberg, 28 Wash. 262, 68 Pac. 715; Seaman v. Aschermann, 51 Wis. 678, 8 N. W. 818, 37 Am. Rep. 849. It has been held that a contract to lease a specified floor space in a building being erected will not be specifically enforced where it will necessitate changes in the plans, calling for the exercise of great skill and discretion. Bromberg v. Eugenotto Const. Co., 158 Ala. 323, 48 So. 60, 19 L. R. A. (N. S.) 1175. See as to right of action and measure of damages for breach of executory agreement to lease, Oldfield v. Angeles Brewing Co., 62 Wash. 260, 113 Pac. 630, Ann. Cas. 1912C, 1050 and note.

[5] Thornton v. Payne, 5 Johns. (N. Y.) 74; Colclough v. Carpeles, 89 Wis. 239, 61 N. W. 836.

construction.[6] And the test of intention in regard to making a lease or an agreement to lease is whether the agreement leaves anything incomplete. If it does not, it may operate as a present demise.[7] On the other hand, if the contracting parties intend to do something further after making an agreement for a lease, such as executing a formal lease with covenants, the earlier instrument is not a lease but merely an agreement for a lease.[8] As long as the parties do not consider the matter finished, it is not a completed lease.[9] Where there is no covenant for executing any further instrument, an agreement will take effect as a present lease, even though the term is not to begin until a future time.[10] The words "agree to let" have for a long time been held to be apt words of present demise.[11]

§ 4551. Statute of frauds.—The parts of the English Statute of Frauds applicable to the making of leases and relating to the parol transfers of real estate, without regard to consideration paid, had the effect of creating estates at will merely. This provision is followed by an exception in favor of all leases not exceeding the term of three years from the making thereof, where the rent reserved amounts to two-thirds part at least of the full improved value of the thing demised.[12] The effect of this statute, so far as it applies to parol leases not exceeding three years, is that the leases are valid, and that whatever remedy may be had in their character of leases may be resorted to, but they do not confer a right to sue the lessee for damages for not entering on or occupying the demised premises.[13] In some of the older states of this country, the English mode of expres-

[6] Poole v. Bentley, 12 East 168; Stanley v. Brunswick Tontine Hotel Corporation, 13 Maine 51, 29 Am. Dec. 485; Weed v. Lindsay, 88 Ga. 686, 15 S. E. 836, 20 L. R. A. 33; Grigsby v. Western Union Tel. Co., 5 S. Dak. 561, 59 N. W. 734. See also, to same effect, Buell v. Cook, 4 Conn. 238; Griffin v. Knisely, 75 Ill. 411; Kabley v. Worcester Gas Light Co., 102 Mass. 392; Western Boot & Shoe Co. v. Gannon, 50 Mo. App. 642.

[7] Doe v. Ries, 8 Bing. 178.

[8] Goodtitle v. Way, 1 Term. Rep. 735; Morgan v. Bissell, 3 Taunt. 65.

[9] Harrison v. Parmer, 76 Ala. 157; Buell v. Cook, 4 Conn. 238; Martin v. Davis, 96 Iowa 718, 65 N. W. 1001.

[10] Boisseau v. Fuller, 96 Va. 45, 30 S. E. 457; People ex rel. Ward v. Kelsey, 14 Abb. Pr. (N. Y.) 372, 38 Barb. (N. Y.) 269.

[11] Western Boot & Shoe Co. v. Gannon, 50 Mo. App. 642; Kabley v. Worcester Gas Light Co., 102 Mass. 392; Averill v. Taylor, 8 N. Y. 44, Seld. Notes (N. Y.) 60.

[12] 29 Car. 2, ch. 3, § 1.

[13] Inman v. Stamp, 1 Stark. 12; Edge v. Strafford, 1 C. & J. 391.

sion is followed denying to parol transfers a greater validity than leases at will, while the exception in favor of short-term parol leases is either lengthened, shortened, or omitted altogether. Another common form for such statutes, more usual in the west, is a provision that no action shall be brought on a contract "for the sale of land or for a leasing thereof for a longer period than one year," unless the same is in writing subscribed by the party to be bound or his duly authorized agent.[14] Where the words of the statute are that parol leases for a period of more than one year from the making thereof shall be void, this apparently includes terms beginning in futuro which are to run for a year.[15] The same would seem to be true where the statute excepts parol leases for a period of three years and less. An oral lease for three years to commence in the future would create an estate at will only.[16] In some jurisdictions a verbal lease to begin in futuro but not to last more than a year from the time of beginning is held not invalid.[17] Where a parol lease gives the lessee a privilege of extension for a period beyond the statutory limit for parol leases to run, the entire agreement is void. This is on the ground that the original term and the extension constitute but a single letting, and if the two exceed the prescribed period, the lease is invalid because not reduced to writing.[18] The subject of this section is also treated elsewhere.[19]

[14] The exception in favor of parol leases is put at one year in Alabama, Arkansas, Alaska, Arizona, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New York, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin, Wyoming. At two years in Florida. At three years in Indiana, New Jersey, North Carolina, Pennsylvania. At five years in Virginia. At seven years in Maryland. In Louisiana leases may be made either by written or verbal contract.

[15] Garner v. Ullman, 99 Ala. 218, 13 So. 382; Bain v. McDonald, 111 Ala. 269, 20 So. 77. See also, vol. 2, § 1278, citing other authorities to this effect and also some to the contrary.

[16] Jennings v. McComb, 112 Pa. St. 518, 4 Atl. 812. See also, Schmitz v. Lanferty, 29 Ind. 400.

[17] Becar v. Flues, 64 N. Y. 518; Ward v. Hasbrouck, 169 N. Y. 407, 62 N. E. 434. Contra, Beiler v. Devoll, 40 Mo. App. 251.

[18] Seymour v. Hughes, 105 N. Y. S. 249; Schmitz v. Lanferty, 29 Ind. 400; Kramer v. Cook, 7 Gray (Mass.) 550; Hand v. Osgood, 107 Mich. 55, 64 N. W. 867, 30 L. R. A. 379, 61 Am. St. 312; Carling v. Purcell, 19 N. Y. S. 183, 46 N. Y. St. 287.

[19] See vol. 2, ch. 30, particularly §§ 1270-1278.

CHAPTER CXXXVI.

COVENANTS IN LEASES.

§ 4555. General observations.
4556. Construction and effect.
4557. Covenants for renewal.
4558. Covenants for renewal—Validity.
4559. Covenant for quiet enjoyment—When implied.
4560. Covenants for quiet enjoyment—What amounts to breach.
§ 4561. Covenants in regard to buildings and improvements.
4562. Covenants restricting use of premises.
4563. Covenants as to sale of premises.
4564. Covenants for insurance.
4565. Covenants for repairs.
4566. Covenant to pay taxes.

§ 4555. General observations.—Blackstone says, "A covenant also contained in a deed, to do a direct act or to omit one, is another species of express contracts."[1] A covenant can be created by deed-poll as well as by indenture; for the acceptance of the covenantee in a deed-poll is such an assent to the agreement as will render it binding on him.[2] Not having signed and sealed the deed, the covenantee is not liable for breach of covenant; but by accepting the deed he assumes the performance of the conditions or stipulations from which the law will imply a promise on his part to perform them.[3] No particular form of words is necessary to constitute a covenant; and any words are sufficient which show the intention of the parties.[4] Express covenants may be created by words which at first sight might appear to operate rather as conditions, qualifications, or defeasances of covenants.[5] Covenants have been divided into express and implied covenants, and the latter depend for their existence upon the intendment and construction of the law. Thus a covenant of

[1] 3 Bl. Comm. 155.

[2] Spaulding v. Hallenbeck, 35 N. Y. 204; Atlantic Dock Co. v. Leavitt, 54 N. Y. 35, 13 Am. Rep. 556.

[3] Rising Sun Lodge v. Buck, 58 Maine 426; Maine v. Cumston, 98 Mass. 317.

[4] Davis v. Lyman, 6 Conn. 249; Bull v. Follett, 5 Cow. (N. Y.) 170. See also, vol. 2, ch. 36.

[5] Peers v. Consolidated Coal Co., 59 Ill. App. 595, revd. 166 Ill. 361, 46 N. E. 1105, 38 L. R. A. 624; Smiley v. McLauthlin, 138 Mass. 363; Clapham v. Moyle, 1 Lev. 155.

title[6] and of quiet enjoyment is usually implied from the relationship.[7] All covenants between lessee and lessor are either implied covenants (sometimes called covenants in law) or express covenants.[8] However if a covenant is raised by inference from a construction of the instrument it is an express and not an implied covenant.[9] Where there are several persons executing a deed, it is not necessary to affix a separate seal for each, provided it appear that the seal affixed was intended to be adopted as the seal of all.[10]

§ 4556. **Construction and effect.**—The rule of construction relating to contracts in general applies equally with regard to the construction of the covenants in leases.[11] The general rule for interpretation of covenants in a lease is to expound them so as to give effect to the actual intent of the parties as collected from the entire context.[12] Covenants in an agreement will be construed as conditions precedent or as independent agreements, according to the intention of the parties and the good sense of the case, and technical words must give way to such intention.[13] Therefore, in determining how to class covenants, the safest and best course is to ascertain what was the intention of the parties from the instrument they have executed, and then to give the covenants such a construction as will carry this intention into effect.[14] The construction placed upon the lease by the parties thereto, as shown by their acts and conduct, is entitled to much weight and may even be conclusive upon them.[15] Whether covenants are to be construed as dependent or independent depends

[6] Prestwood v. Carlton, 162 Ala. 327, 50 So. 254.

[7] Milheim v. Baxter, 46 Colo. 155, 103 Pac. 376, 133 Am. St. 50; Ragland v. Conqueror Zinc Cas., 136 Mo. App. 631, 118 S. W. 1194.

[8] Vaughn's Reports 188.

[9] Pordage v. Cole, 1 Saund. 319, i; Lovering v. Lovering, 13 N. H. 513.

[10] Flood v. Yandes, 1 Blackf. (Ind.) 102; Van Alstyne v. Van Slyck, 10 Barb. (N. Y.) 383; McDill's Lessee v. McDill, 1 Dall. (U. S.) 63, 1 L. ed. 38.

[11] French v. Brewer, 3 Wall. Jr. (U. S.) 346, Fed. Cas. No. 5096.

[12] Consolidated Coal Co. v. Peers, 150 Ill. 344, 37 N. E. 937, affg. 39 Ill. App. 453; Walker v. Physick, 5 Pa. St. 193.

[13] Palmer v. Meriden &c. Co., 188 Ill. 508, 59 N. E. 247; Parmelee v. Oswego &c. R. Co., 6 N. Y. 74. See also, vol. 2, § 1575 et seq.

[14] Hill v. Bishop, 2 Ala. 320; Lunn v. Gage, 37 Ill. 19, 87 Am. Dec. 233; Manning v. Brown, 10 Maine 49; Moyer v. Michell, 53 Md. 171; Howland v. Leach, 11 Pick. (Mass.) 151.

[15] Herscher v. Brazier, 38 Ill. App. 654; Oglesby's Exr. v. Hughes, 96 Va. 115, 30 S. E. 439.

upon the fair intention of the parties to be gathered from the lease, and technical words should give way to that intention;[16] and the courts lean to a construction which holds the covenants independent rather than dependent, especially when some benefit has already been derived by the covenantor. Where a covenant goes only to a part of the consideration on both sides, and a breach of such covenant can be readily compensated for in damages, it is generally considered independent.[17]

§ 4557. **Covenants for renewal.**—It is usual to provide in the lease for a short term for which the lessee is bound to retain the premises and then give him a right to occupy them for a further period at his option. This option must be exercised by the tenant during the original term, and while the privilege is dependent on the will of only one of the parties it does not impair the mutuality of the contract.[18] If such option is to hold the premises for an additional term of one, two or three years at the tenant's election, there can be but one election on his part, which may be for either of the periods so designated.[19] A lease for one year with an agreement that if the tenant should continue on the premises after the first year, then the lease should be in force another year, and so on from year to year, does not create an ordinary tenancy from year to year, but it is a lease binding for only one year.[20] An indorsement of an agreement on the back of a lease may operate as an extension of the original lease, or it may take the form of a new demise; and such was the case where the writing contained no exceptions or reservations and did not import to be an extension of the previous lease.[21] A distinction is sometimes made between the effect of a mere holding over by a tenant in case of a covenant to extend a lease, and of a covenant to renew a lease, and it is held that, although a mere holding over is sufficient to extend a lease, it is not sufficient to

[16] Lewis v. Chisholm, 68 Ga. 40; Bailey v. White, 3 Ala. 330. See also, vol. 2, § 1576.

[17] Barnes v. Strohecker, 17 Ga. 340. See, however, vol. 2, § 1578.

[18] Spear v. Orendorf, 26 Md. 37. See also, Kerr v. Black, 137 Ga. 832, 74 S. E. 535; Anderson v. Frye (Wash.), 124 Pac. 499.

[19] Falley v. Giles, 29 Ind. 114.

[20] Jones v. Kroll, 116 Pa. St. 85, 8 Atl. 857; McGregor v. Rawle, 57 Pa. St. 184; Boyd v. Pico, 1 Hawaii 398; Dod v. Monger, 6 Mod. 215.

[21] Walsh v. Martin, 69 Mich. 29, 37 N. W. 40.

renew a lease.[22] But this distinction between extension and renewal of a lease has not been universally approved,[23] and it has also been held that both the words "extended" and "renewed" require the making of a new lease.[24] Where a tenant is entitled to the renewal of his lease, he must give notice promptly at or before the expiration of the first term or in accordance with the agreement,[25] and a failure to give such notice within the required time will justify the landlord in treating the lease as not extended or renewed.[26] But, inasmuch as the stipulation for notice is for the benefit of the landlord, he may waive it.[27] When there is an option to lessee to have the same term extended, the exercise of the option has the effect to continue the old lease and no notice of election is required unless the lease makes provision for notice.[28] The rule seems to be well established that where notice is required of the lessee's intention to claim the extended term, such notice must be given, or the intention must be otherwise manifested, and that a naked holding over is insufficient to warrant a finding that the lease has been extended.[29] But where there is a stipulation for an extension and no clause requiring notice, the mere holding over, even for a few days, amounts to an election to take advantage of the option for a longer term.[30]

[22] Shamp v. White, 106 Cal. 220, 39 Pac. 537; Gray v. Maier & Zobelein Brewery, 2 Cal. App. 653, 84 Pac. 280; Hamby v. Georgia Iron & Coal Co., 127 Ga. 792, 56 S. E. 1033; Callahan Co. v. Michael, 45 Ind. App. 215, 90 N. E. 642; Andrews v. Marshall Creamery Co., 118 Iowa 595, 92 N. W. 706, 60 L. R. A. 399, 96 Am. St. 412; Quinn v. Valiquette, 80 Vt. 434, 68 Atl. 515, 14 L. R. A. (N. S.) 962n.

[23] Insurance & Law Bldg. Co. v. Nat. Bank, 71 Mo. 58.

[24] Orton v. Noonan, 27 Wis. 272; Kollock v. Scribner, 98 Wis. 104, 73 N. W. 776.

[25] Thiebaud v. First Nat. Bank, 42 Ind. 212; Darling v. Hoban, 53 Mich. 599, 19 N. W. 545.

[26] Bluthenthal v. Atkinson, 93 Ark. 252, 124 S. W. 510; Lanham v. McWilliams, 6 Ga. App. 85, 64 S. E. 294; Gerhart Realty Co. v. Brecht, 109 Mo. App. 25, 84 S. W. 216; Murtland v. English, 214 Pa. 325, 63 Atl. 882, 112 Am. St. 747.

[27] Stone v. St. Louis Stamping Co., 155 Mass. 267, 29 N. E. 623; Holton v. Andrews, 151 N. Car. 340, 66 S. E. 212. But it is held that a covenant to renew runs with the land. Standard Oil Co. v. Slye (Cal.), 129 Pac. 589.

[28] Terstegge v. First German Mut. Benev. Soc., 92 Ind. 82, 47 Am. Rep. 135; Chandler v. McGinning, 8 Kans. App. 421, 55 Pac. 103.

[29] Cooper v. Joy, 105 Mich. 374, 63 N. W. 414. See also, Bradford v. Patten, 108 Mass. 153.

[30] Holley v. Young, 66 Maine 520; Cooper v. Joy, 105 Mich. 374, 63 N. W. 414. See also, Lyons v. Osborn, 45 Kans. 650, 26 Pac. 31; Scheelky v. Koch, 119 N. Car. 80, 25 S. E. 713.

§ 4558. **Covenants for renewal—Validity.**—A covenant to renew for another term implies an agreement to renew on the same terms and conditions as the original lease, except any provision for further renewal which would tend to create a perpetual lease. Such a provision must be supported by language clear and certain, and could not be deduced by construction from a general agreement.[31] It is held, however, that a covenant in a lease for the perpetual renewal thereof is valid, and passes as an incident when the lease is assigned by a proper description.[32] A renewal agreement cannot be made to apply to a part of the premises but must be claimed in its entirety,[33] but subtenants of different parts of the premises may join in asking the lessee to secure a renewal and force him to act in their behalf, or compel the landlord to deal with them directly in renewing the lease where the landlord has led them to believe he would do so.[34] Any one of several lessees has a right to object to the extension of the lease, or to have a voice in saying what terms are satisfactory if a new lease is to be entered into.[35] A conditional covenant to renew upon the termination of the lease is not a present demise to take effect upon the termination of the first year, but a mere covenant to execute a lease in the future. It is merely an executory covenant for a lease, and not an executed covenant passing a present interest. No action for rent in favor of the lessor will lie in case the lessee refuse to accept a renewal, but his remedy would be one in damages or for specific performance.[36] Where there was a lease for a year and agreement that if it were satisfactory the premises would be leased to him another year, it was held that the tenant did not have an estate in the land for the second year.[37] Where

[31] Hughes v. Windpfennig, 10 Ind. App. 122, 37 N. E. 432; Cunningham v. Pattee, 99 Mass. 248; Ranlett v. Cook, 44 N. H. 512, 84 Am. Dec. 92; McAdoo v. Callum, 86 N. Car. 419; Kollock v. Scribner, 98 Wis. 104, 73 N. W. 776.

[32] Diffenderfer v. St. Louis Pub. Schools, 120 Mo. 447, 25 S. W. 542.

[33] Barge v. Schiek, 57 Minn. 155, 58 N. W. 874.

[34] Cook v. Jones, 96 Ky. 283, 16 Ky. L. 469, 28 S. W. 960. Where a subtenant continues in possession under asserted right of renewal and rent is accepted without objection it is held a waiver of conditions to the right to demand renewal. In re Allen's Estate (Minn.), 135 N. W. 812.

[35] Howell v. Behler, 41 W. Va. 610, 24 S. E. 646.

[36] Sutherland v. Goodnow, 108 Ill. 528, 48 Am. Rep. 560; Swank v. St. Paul City R. Co., 61 Minn. 423, 63 N. W. 1088.

[37] Mullen v. Pugh, 16 Ind. App. 337, 45 N. E. 347.

the tenant has the option to extend or renew the lease for one of several named periods, by holding over without designating which period he desires, it has been held that he will be deemed to hold over for the shortest period.[38]

§ 4559. Covenants for quiet enjoyment—When implied.—A covenant for quiet enjoyment is often expressed in the lease but may be implied from the words used to transfer the estate. The words "grant and demise"[39] and, when standing alone, the word "demise" in a lease import a covenant on the part of the lessor of good right and title to make the lease and for quiet enjoyment.[40] The prevailing rule in this country seems to be that a covenant for quiet enjoyment by the lessor is implied in every demise of land for years, by whatever form of words the agreement is made.[41] On the other hand, in England and in some cases in the United States the doctrine is that a covenant for quiet enjoyment is not to be implied from the mere relation of landlord and tenant, but only arises from the use of certain special words.[42] It is a familiar and well-settled rule that where an instrument contains an express covenant in regard to any subject, no covenants are to be implied in respect to the same subject.[43] But an express and unqualified general covenant for quiet enjoyment in a lease is not limited by a subsequent special covenant reciting that certain persons had an interest in the

[38] Lanham v. McWilliams, 6 Ga. App. 85, 64 S. E. 294; Falley v. Giles, 29 Ind. 114.

[39] Barney v. Keith, 4 Wend. (N. Y.) 502.

[40] Harms v. McCormick, 132 Ill. 104, 22 N. E. 511; Hamilton v. Wright's Admr., 28 Mo. 199; Crouch v. Fowle, 9 N. H. 219, 32 Am. Dec. 350; Conrad v. Morehead, 89 N. Car. 31.

[41] Arkansas: Prickett v. Ferguson, 45 Ark. 177, 55 Am. Rep. 545; California: McDowell v. Hyman, 117 Cal. 67, 48 Pac. 984; Illinois: Streeter v. Streeter, 43 Ill. 155; Indiana: Hoagland v. New York &c. R. Co., 111 Ind. 443, 12 N. E. 83, 13 N. E. 572; Voss v. Capital City Brewing Co. (Ind. App.), 96 N. E. 11; Maryland: Sigmund v. Howard Bank, 29 Md. 324; New York: Mack v. Patchin, 42 N. Y. 167, 1 Am. Rep. 506; American Tract Soc. v. Jones, 76 Misc. (N. Y.) 236, 134 N. Y. S. 236; Ohio: Young v. Hargrave's Administrator, 7 Ohio 394; Oklahoma: Hanley v. Banks, 6 Okla. 79, 51 Pac. 664; Pennsylvania: Maule v. Ashmead, 20 Pa. St. 482: Wisconsin: Eldred v. Leahy, 31 Wis. 546; United States: Owens v. Wright, 18 Fed. 865, 5 McCrary (U. S.) 642.

[42] Granger v. Collins, 6 M. & W. 458; Gano v. Vanderveer, 34 N. J. L. 293; Mershon v. Williams, 63 N. J. L. 398, 44 Atl. 211.

[43] Line v. Stephenson, 5 Bing. N. Cas. 183; Blair v. Hardin, 1 A. K. Marsh. (Ky.) 231; Burr v. Stenton, 43 N. Y. 462; Crouch v. Fowle, 9 N. H. 219, 32 Am. Dec. 350.

premises and binding the lessor to hold the lessee harmless against such claims.[44] The legal implication of the covenant for quiet enjoyment is that the landlord has an adequate title to the estate created by the lease, and that he will permit the tenant to enjoy, without disturbance or interruption, the interest, title or privilege demised, subject to all such rights as are expressly or by natural implication reserved to the lessor.[45] Every grant carries with it an implied undertaking, on the part of the grantor, that so far as he is concerned he will do no act to interrupt the free and peaceful enjoyment of the thing granted.[46]

§ 4560. **Covenants for quiet enjoyment—What amounts to breach.**—A breach of a covenant for quiet enjoyment is caused by an eviction which justifies the tenant in abandoning the premises and allows him to escape further liability for rent. But there must be ouster or disturbance by means of it amounting to an eviction.[47] However, an actual forcible eviction need not be shown, but proof of demand for possession by persons holding a title paramount to that of the landlord, and surrender of possession in acquiescence to such demand entitles the tenant to a recovery.[48] Lessees have a right to yield to a demand for possession by one having a paramount right without losing their remedy against their lessors on the covenant for quiet enjoyment.[49] A tenant is not bound to retain possession until actually expelled by legal process.[50] After the tenant has been evicted, there can be no recovery of rent during the continuance of the eviction.[51] But an eviction does not forfeit rent already accrued and overdue at the date of the eviction.[52] It is implied that the tenant shall have free use of the whole premises, and if he is

[44] Sheets v. Joyner, 11 Ind. App. 205, 38 N. E. 830.

[45] Hoagland v. New York &c. R. Co., 111 Ind. 443, 12 N. E. 83, 13 N. E. 572.

[46] Dexter v. Manley, 4 Cush. (Mass.) 14.

[47] Crawford v. Jones, 54 Ala. 459; Russell v. Fabyan, 27 N. H. 529; Hayes v. Ferguson, 15 Lea (Tenn.) 1, 54 Am. Rep. 398.

[48] Tyson v. Chestnut, 118 Ala. 387, 24 So. 73; Kane v. Mink, 64 Iowa 84, 19 N. W. 852.

[49] King v. Bird, 148 Mass. 572, 20 N. E. 196; Duncklee v. Webber, 151 Mass. 408, 24 N. E. 1082.

[50] Marsh v. Butterworth, 4 Mich. 575.

[51] Leopold v. Judson, 75 Ill. 536; Hunter v. Reiley, 43 N. J. L. 480; Briggs v. Thompson, 9 Pa. St. 338.

[52] Livingston v. L'Engle, 27 Fla. 502, 8 So. 728; Hunter v. Reiley, 43 N. J. L. 480.

ousted from any material part of them he may treat it as an eviction and rescind the lease.[53] The general rule is that if the landlord is responsible for a partial eviction the entire rent is suspended, while if the partial eviction is caused by the act of a stranger, the rent is only abated pro tanto.[54] It has been held that the tenant assumes the burden of enforcing his right to possession as against all wrongful possessors, even against a former tenant who holds over, provided the landlord has given him a complete and perfect right of possession to the demised premises;[55] and in some jurisdictions it is considered that the tenant, being clothed with the title by virtue of the lease, ought to pursue such legal remedies as the law has provided for gaining possession.[56] But in England and in many of the states of this country the rule is that the lessor is bound to put the lessee in possession.[57]

§ 4561. Covenants in regard to buildings and improvements.—Where the lease contains a covenant by the lessee to erect a building such covenant is satisfied if the building is completed before the end of the term,[58] unless the lease specifically fixes a time when such building is to be completed,[59] in which latter case it is not a continuing covenant. In the absence of agreement a landlord is not liable for the value of improvements made by his tenant upon the demised premises.[60] To en-

[53] Rice v. Dudley, 65 Ala. 68; Hayner v. Smith, 63 Ill. 430, 14 Am. Rep. 124; Avery v. Dougherty, 102 Ind. 443, 2 N. E. 123, 52 Am. Rep. 680; Miller v. Michel, 13 Ind. App. 190, 41 N. E. 467; Skally v. Shute, 132 Mass. 367.

[54] Collins v. Karatopsky, 36 Ark. 316; Skaggs v. Emerson, 50 Cal. 3; Hyman v. Jockey Club Wine &c. Co., 9 Colo. App. 299, 48 Pac. 671; Smith v. McEnany, 170 Mass. 26, 48 N. E. 781, 64 Am. St. 272; Wreford v. Kenrick, 107 Mich. 389, 65 N. W. 234; Morris v. Kettle, 57 N. J. L. 218, 30 Atl. 879.

[55] Ratkowski v. Masolowski, 57 Ill. App. 525; Becker v. DeForest, 31 N. Y. Super. Ct. 528.

[56] Gazzolo v. Chambers, 73 Ill. 75; Sigmund v. Howard Bank, 29 Md. 324; Pendergast v. Young, 21 N. H. 234; Underwood v. Birchard, 47 Vt. 305.

[57] Coe v. Clay, 5 Bing. 440; Jenks v. Edwards, 11 Exch. 775; King v. Reynolds, 67 Ala. 229, 42 Am. Rep. 107; Clark v. Butt, 26 Ind. 236; Voss v. Capital City Brewing Co. (Ind. App.), 96 N. E. 11; Vincent v. Defield, 98 Mich. 84, 56 N. W. 1104; Hughes v. Hood, 50 Mo. 350; Hertzberg v. Beisenbach, 64 Tex. 262.

[58] Chipman v. Emeric, 5 Cal. 49, 63 Am. Dec. 80.

[59] Palethorp v. Bergner, 52 Pa. St. 149.

[60] Hopkins v. Ratliff, 115 Ind. 213, 17 N. E. 288; Mull v. Graham, 7 Ind. App. 561, 35 N. E. 134; Wilkerson v. Farnham, 82 Mo. 672; Guay v. Kehoe, 70 N. H. 151, 46 Atl. 688; Kline v. Jacobs, 68 Pa. St. 57.

title a tenant to pay for improvements there must be a certain, clear and distinct agreement in reference thereto.[61] The mere fact that the landlord permits the tenant to make permanent improvements without protest or warning that he will not pay raises no presumption of a promise to pay for improvements.[62] If the tenant enlarges the building for his own convenience, even though it be by the persuasion of the landlord, he does not, in the absence of agreement or promise, thereby acquire a right to charge the landlord with the expense of the improvements.[63] Although the terms of a lease require the lessee to erect buildings, if there is no agreement for their removal by the lessee, he has no right to remove them.[64] A covenant to make specific repairs excludes other repairs not mentioned.[65] A covenant requiring lessee to make repairs from time to time calls for repairs when needed, but he cannot let such repairs go unmade until the expiration of the term.[66] However, under such covenant the tenant is only required to make necessary repairs.[67] At common law, obligations to repair are not implied, and in the absence of an express contract or a statutory requirement the landlord is under no obligation to make repairs.[68] A covenant by the lessor to pay the value of improvements on the expiration of the term runs with the land and the right to enforce such payment passes to the purchaser of the leasehold estate as incident to the term.[69]

§ 4562. **Covenants restricting use of premises.**—A lessee has, by implication, the right to possess and enjoy the property during the term specified, and to put it to such use and employment as he pleases, not materially different from that in which

[61] Leslie v. Smith, 32 Mich. 64; Wilson v. Scruggs, 7 Lea (Tenn.) 635.

[62] Gocio v. Day, 51 Ark. 46, 9 S. W. 433; Woolley v. Osborne, 39 N. J. Eq. 54; Dunn v. Bagby, 88 N. Car. 91.

[63] Hopkins v. Ratliff, 115 Ind. 213, 17 N. E. 288; Lucas v. Coulter, 104 Ind. 81, 3 N. E. 622. And a tenant who makes alterations in a building has been required to restore the building at the termination of the lease. Sale v. Smith &c. Co., 147 Ky. 146, 143 S. W. 737.

[64] Peirce v. Grice, 92 Va. 763, 24 S. E. 392.

[65] Norris v. McFadden, 159 Mich. 424, 124 N. W. 54; Jaffe v. Harteau, 56 N. Y. 398, 15 Am. Rep. 438.

[66] Herboth v. American Radiator Co. (Mo. App.), 123 S. W. 533. See also, Spikings v. Fox, 145 Ill. App. 337.

[67] Woods v. Marietta Chair Co., 37 Pa. Super. Ct. 39.

[68] Morgan v. Sheppard, 156 Ala. 403, 47 So. 147; Glenn v. Hill, 210 Mo. 291, 109 S. W. 27, 16 L. R. A. (N. S.) 699; Byrnes v. McNevin, 112 N. Y. S. 1064.

[69] Woodward v. Payne, 16 Cal. 444; Stockett v. Howard, 34 Md. 121.

it is usually employed, to which it is adapted, and for which it was constructed.[70] But a landlord may by contract lawfully restrict his tenant's use of the property, and, in case of such an agreement, if the latter use the demised premises for a purpose prohibited by the lease, it is a breach of the agreement for which the law affords relief.[71] Unless restricted by the terms of the lease,[72] a tenant may use the premises for any lawful purpose consistent with the character of the premises, and not amounting to waste.[73] It has been uniformly held that a provision in a deed that no intoxicating liquors shall be manufactured or sold on the premises conveyed is valid, however much the same may affect the value of the property conveyed.[74] A lessor may bind himself not to engage in a rival business in the same city, and such a promise is not void because not in writing.[75] An infraction of an agreement in a lease respecting the use of the premises may be restrained, although such lease does not contain a formal covenant or a forfeiture clause with a right of reentry.[76] But while equity will protect a restriction as to use,[77] a lessor who knowingly permits a tenant to incur large expenses in adapting the premises for a prohibited use, without objection, will be denied relief.[78] But for all injury caused by a prohibited

[70] Nave v. Berry, 22 Ala. 382; Bucklen v. Cushman, 145 Ind. 51, 44 N. E. 6. In White v. Kane, 53 Mo. App. 300, it was held that in the absence of express prohibition, offices rented for real estate business could be used by a constable without a breach of the covenant. See also, Fred v. Moreley (Tex. Civ. App.), 146 S. W. 343; Rockwell v. Eiler's Music House, 67 Wash. 478, 122 Pac. 12.

[71] Hayward v. Ramge, 33 Nebr. 836, 51 N. W. 229; Steward v. Winters, 4 Sandf. Ch. (N. Y.) 587. In Ferris v. American Brewing Co., 155 Ind. 539, 58 N. E. 701, 52 L. R. A. 305, it was held that a covenant in a lease that the lessee shall sell no beer upon the leased premises except that manufactured by a certain brewing company may be enforced by the company for whose benefit the contract is made, although the company is not a party thereto.

[72] Chamberlain v. Brown, 141 Iowa 540, 120 N. W. 334.

[73] Forbes v. Gorman, 159 Mich. 291, 123 N. W. 1089, 25 L. R. A. (N. S.) 318, 134 Am. St. 718; Brown v. Broadway &c. Realty Co., 131 App. Div. (N. Y.) 780, 116 N. Y. S. 306.

[74] Collins Mfg. Co. v. Marcy, 25 Conn. 242; Sutton v. Head, 86 Ky. 156, 9 Ky. L. 453, 5 S. W. 410, 9 Am. St. 274; Watrous v. Allen, 57 Mich. 362, 24 N. W. 104; Cowell v. Springs Co., 100 U. S. 55, 25 L. ed. 547.

[75] Doyle v. Dixon, 97 Mass. 208, 93 Am. Dec. 80; Hill v. Jamieson, 16 Ind. 125, 79 Am. Dec. 414.

[76] Bryden v. Northrup, 58 Ill. App. 233; Ferris v. American Brewing Co., 155 Ind. 539, 58 N. E. 701, 52 L. R. A. 305; Kraft v. Welch, 112 Iowa 695, 84 N. W. 908; Gannett v. Albree, 103 Mass. 372; Spalding Hotel Co. v. Emerson, 69 Minn. 292, 72 N. W. 119.

[77] Chamberlain v. Brown, 141 Iowa 540, 120 N. W. 334.

[78] Malley v. Thalheimer, 44 Conn. 41; Campau v. National Film Co., 159 Mich. 169, 123 N. W. 606.

use of leased premises the lessee is liable to the lessor in damages in an action at law.[79]

§ 4563. **Covenants as to sale of premises.**—An option to purchase is sometimes included in the lease,[80] in which case the consideration of the lease is sufficient to support both.[81] Such option is binding on the vendee of the premises without knowledge.[82] Such option to purchase must be definite and certain.[83] The option to purchase is not a separate and distinct offer which could be withdrawn at any time before acceptance,[84] but is a continuing and binding obligation on the lessor to sell upon certain terms if the lessee wishes to buy.[85] It is common to insert a clause in a lease reserving to the lessor the right to sell and providing that any of the premises sold during the term should cease to be a part of the demised premises. Such a clause is valid and enforcible.[86] Parties who contract respecting a sale have in contemplation a bona fide sale, and the lessor cannot, by a fraudulent sale made for the purpose of defeating his lease, avoid the lease and thus avail himself of his own wrong.[87]

§ 4564. **Covenants for insurance.**—The duty of the tenant to pay insurance premiums is usually covered by a clause in the lease,[88] and the custom has become so common to fasten on the lessee the burden of insuring that it has been held that, if an agreement be made for a lease, with usual covenants, the lessee is not entitled to have the insurance covenant omitted.[89] A gen-

[79] Taylor v. Koshetz, 88 Ill. 479.

[80] Elliott v. Delaney, 217 Mo. 14, 116 S. W. 494; Pearson v. Millard, 150 N. Car. 303, 63 S. E. 1053.

[81] Harper v. Runner, 85 Nebr. 343, 123 N. W. 313; Pearson v. Millard, 150 N. Car. 303, 63 S. E. 1053, holding that the lessor cannot withdraw his option. See also, Smiddy v. Grafton (Cal.), 124 Pac. 433; Miller v. Citizens' Bldg. &c. Assn. (Ind. App.), 98 N. E. 70.

[82] Harper v. Runner, 85 Nebr. 343, 123 N. W. 313.

[83] Pollard v. Sayre, 45 Colo. 195, 98 Pac. 816; Napier v. Darlington, 70 Pa. St. 64. In Brink v. Mitchell, 135 Wis. 416, 116 N. W. 16, it was held that a lease and option giving the lessee the right to purchase during the term and apply rent to the purchase-price, though separately executed, were a part of the same transaction.

[84] Hall v. Center, 40 Cal. 63; Perkins v. Hadsell, 50 Ill. 216; Souffrain v. McDonald, 27 Ind. 269; Rogers v. Saunders, 16 Maine 92, 33 Am. Dec. 635; Schroeder v. Gemeinder, 10 Nev. 355; Corson v. Mulvany, 49 Pa. St. 88, 88 Am. Dec. 485.

[85] De Rutte v. Muldrow, 16 Cal. 505.

[86] Shaw v. Appleton, 161 Mass. 313, 37 N. E. 372; Aydlett v. Pendleton, 114 N. Car. 1, 18 S. E. 971.

[87] Davis v. Schweikert, 130 Cal. 143, 62 Pac. 411; Trout v. Perciful, 105 Ind. 532, 5 N. E. 558.

[88] Frank v. Auerbach, 110 N. Y. S. 890.

[89] Bodman v. John Murphy & Co., 35 Md. 154.

eral covenant on the part of the lessee to insure binds him to insure against loss by fire if the demised premises consist of a building.[90] If the insurance companies selected by the lessor become insolvent after the lessee has complied with his covenant by insuring in such companies he cannot be compelled to pay over again.[91] It is now the rule that a covenant to insure runs with the land and binds assignees.[92] Upon a breach of a covenant to keep the premises insured for a specified amount, the lessor may recover the loss sustained not exceeding the amount specified, especially if he was not aware of lessee's default in time to procure insurance.[93] The same doctrine as to damages is applied in the case of an agent or factor who fails to insure goods of his principal.[94]

§ 4565. **Covenant for repairs.**—It is the established rule of the common law that an express covenant to repair binds the covenantor to make good any injury which human power can remedy, even if caused by storm, flood, fire, inevitable accident, or the act of a stranger.[95] The foundation of the rule is the doctrine that a person who has bound himself unconditionally cannot be relieved, and that a covenant to repair is equivalent to a covenant to rebuild.[96] A covenant in a lease that the lessee will maintain buildings and return the same to the lessor at the expiration of the term in as good condition as the same then are, reasonable wear and tear from ordinary use alone excepted, imposes the duty on the lessee to rebuild in case of the destruction

[90] Rhone v. Gale, 12 Minn. 54.

[91] Quincy v. Carpenter, 135 Mass. 102.

[92] Vernon v. Smith, 5 B. & Ald. 1; Merchants' Ins. Co. v. Mazange, 22 Ala. 168.

[93] Franck v. Stout, 139 Wis. 223, 120 N. W. 867. See also, Douglass v. Murphy, 16 U. C. Q. B. 113.

[94] Ela v. French, 11 N. H. 356.

[95] California: Polack v. Pioche, 35 Cal. 416, 95 Am. Dec. 115; Illinois: Barnhart v. Boyce, 102 Ill. App. 172; Iowa: David v. Ryan, 47 Iowa 642; Kentucky: Proctor v. Keith, 12 B. Mon. (Ky.) 252; Massachusetts: Leavitt v. Fletcher, 10 Allen (Mass.) 119; Mississippi: Fowler v. Payne, 49 Miss. 32; Missouri: O'Neil v. Flanagan, 64 Mo. App. 87; Lincoln Trust Co. v. Nathan, 175 Mo. 32, 74 S. W. 1007; Ohio: Linn v. Ross, 10 Ohio 412, 36 Am. Dec. 95; New York: Beach v. Crain, 2 N. Y. 86, 49 Am. Dec. 369; Pennsylvania: Hoy v. Holt, 91 Pa. St. 88, 36 Am. Rep. 659; United States: Dermott v. Jones, 2 Wall. (U. S.) 1, 17 L. ed. 762. A covenant to "put" in repair is distinguished from one to "keep" in repair in Marsicano v. Phillips (Ala. App.), 60 So. 553.

[96] Meyers v. Myrrell, 57 Ga. 516; Leavitt v. Fletcher, 10 Allen (Mass.)

of the buildings by accidental fire.[97] A general covenant to repair must be construed to have reference to the condition of the premises at the time when the covenant begins to operate.[98] The tenant takes the premises for better and for worse and cannot involve his landlord in expense for repairs, without his consent.[99] A mere naked promise of the landlord to repair the demised premises based on no sufficient consideration cannot be enforced in favor of the tenant,[1] but such an agreement might be supported by the lessee's obligation to comply with the recitals in a deed-poll which he has accepted.[2]

§ 4566. **Covenant to pay taxes.**—A covenant to pay taxes, like one to pay rent, is an undertaking to do something in respect to the land itself and therefore runs with the land and binds an assignee of the leasehold estate.[3] And the assignee of a portion of the premises would be liable to pay taxes in proportion to the extent of the premises assigned to him.[4] The general rule in regard to leases for years is that where the lease is silent on the subject, the landlord is bound to pay all state and municipal taxes and assessments on the property during the term.[5] But the tenant of a perpetual leasehold must pay the taxes, even

119; Fowler v. Payne, 49 Miss. 32; Wattles v. South Omaha Ice & Coal Co., 50 Nebr. 251, 69 N. W. 785, 36 L. R. A. 424, 61 Am. St. 554.

[97] Ely v. Ely, 80 Ill. 532; Phillips v. Stevens, 16 Mass. 238; Abby v. Billups, 35 Miss. 618, 72 Am. Dec. 143; Armstrong v. Maybee, 17 Wash. 24, 48 Pac. 737, 61 Am. St. 898. In Wainscott v. Silvers, 13 Ind. 497, the court held that the lessee is not responsible to the lessor for the accidental, casual destruction by fire of the property demised unless by his covenant he has made himself so.

[98] Walker v. Hatton, 10 M. & W. 249. See to same effect, St. Joseph & St. L. R. Co. v. St. Louis, I. M. & S. R. Co., 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607; Stultz v. Locke, 47 Md. 562.

[99] Turner v. Townsend, 42 Nebr. 376, 60 N. W. 587; Witty v. Matthews 52 N. Y. 512; Medary v. Cathers, 161 Pa. St. 87, 28 Atl. 1012; Weinstein v. Harrison, 66 Tex. 546, 1 S. W. 626. At common law the landlord is generally under no obligation to keep in repair. Wall Estate Co. v. Standard Box Co. (Cal. App.), 128 Pac. 1020.

[1] Purcell v. English, 86 Ind. 34, 44 Am. Rep. 255; Libbey v. Tolford, 48 Maine 316, 77 Am. Dec. 229.

[2] Vass v. Wales, 129 Mass. 38.

[3] Ellis v. Bradbury, 75 Cal. 234, 17 Pac. 3; Mason v. Smith, 131 Mass. 510; Wills v. Summers, 45 Minn. 90, 47 N. W. 463; Hendrix v. Dickson, 69 Mo. App. 197; Post v. Kearney, 2 N. Y. 394, 51 Am. Dec. 303; Washington Natural Gas Co. v Johnson, 123 Pa. St. 576, 16 Atl. 799, 10 Am. St. 553; West Virginia Cent. & P. R. Co. v. McIntire, 44 W. Va. 210, 28 S. E. 696.

[4] Ellis v. Bradbury, 75 Cal. 234, 17 Pac. 3.

[5] Bettison v. Budd, 17 Ark. 546, 65 Am. Dec. 442; Sargent v. Pray, 117 Mass. 267; Anderson v. Harwood, 47 Mo. App. 660; People v. Barker, 153 N. Y. 111, 47 N. E. 31; Kitchen v.

though the scrivener drawing a new lease mistakingly omits the provision.[6] In some states the lessee is charged by statute with the payment of taxes, but the obligation is usually controlled by the lease.[7] The intention of the parties, as shown by the language of the instrument, determines what taxes, burdens and assessments are to be borne by the lessee.[8]

Smith, 101 Pa. St. 452; Sheldon v. Hamilton, 22 R. I. 230, 47 Atl. 316, 84 Am. St. 839.

[6] Norfolk v. Perry Co., 108 Va. 28, 61 S. E. 866, 35 L. R. A. (N. S.) 167n, 128 Am. St. 940.

[7] Norfolk v. Perry Co., 108 Va. 28, 61 S. E. 866, 35 L. R. A. (N. S.) 167n, 128 Am. St. 940.

[8] Blake v. Baker, 115 Mass. 188.

CHAPTER CXXXVII.

RENEWALS, ASSIGNMENTS AND SUBLETTING.

§ 4570. Assignment by lessor.
4571. Assignment by lessee.
4572. Assignment by lessee—Mode of assignment.
4573. Assignment—Rights and liabilities of lessor and lessee.
§ 4574. Assignment—Rights and liabilities of assignee.
4575. Assignment — Conditions against assignment and subletting.

§ 4570. Assignment by lessor.—The ancient common-law doctrine of attornment, being unsuited to modern conditions and especially being inconsistent with our laws, customs and institutions, has never been a part of the law of this country. So the modern rule is that a lessor has power to transfer either the entire reversion or his interest under the lease, and such transfer is effective to vest in the transferee the right to all rent reserved in the lease, without any further action on the part of the tenant.[1] In regard to the effect of a transfer of the reversion on the rents, it is a well-settled principle of the common law that the grant of the reversion of an estate expectant on the determination of a lease for years, passes to the grantee the rents reserved in the lease as incident to the reversion.[2] A warranty deed by the lessor of demised premises operates as an assignment of the lease,[3] and entitles the purchaser to all the rights of a lessor.[4] So a convey-

[1] American Freehold Land Mortgage Co. v. Turner, 95 Ala. 272, 11 So. 211; King v. Housatonic R. Co., 45 Conn. 226; Kellum v. Berkshire Life Ins. Co., 101 Ind. 455; Jones v. Rigby, 41 Minn. 530, 43 N. W. 390; Hendrickson v. Beeson, 21 Nebr. 61, 31 N. W. 266; Tilford v. Fleming, 64 Pa. St. 300; McCardell v. Williams, 19 R. I. 701, 36 Atl. 719; Pelton v. Place, 71 Vt. 430, 46 Atl. 63.

[2] King v. Housatonic R. Co., 45 Conn. 226; Peck v. Northrop, 17 Conn. 217; Foote v. Overman, 22 Ill. App. 181; Chandler v. Pittsburgh &c. Co., 20 Ind. App. 165, 50 N. E. 400; Hecht v. Dittman, 56 Iowa 679, 7 N. W. 495, 10 N. W. 241, 41 Am. Rep. 131; Beal v. Boston Car Spring Co., 125 Mass. 157, 28 Am. Rep. 216; Perrin v. Lepper, 34 Mich. 292; Holly v. Holly, 94 N. Car. 670.

[3] Starbuck v. Avery, 132 Mo. App. 542, 112 S. W. 33.

[4] Depere Co. v. Reynen, 65 Wis. 271, 22 N. W. 761, 27 N. W. 155.

ance of a reversion in fee to a lessee or his assignee holding an outstanding lease causes the lease to merge in the freehold estate.[5]

§ 4571. Assignment by lessee.—The rule of the common law is that the owner of a leasehold estate has a right to alienate his interest, either by assigning the lease in toto or by subletting a part of the premises.[6] An exception to the general rule has been made in case where the amount of rent received must depend on the character and skill of the lessee, or where it gives the lessee the use of the lessor's tools on condition that they may be properly kept.[7] In a lease for mining or agricultural purposes, the lessor is interested in having a tenant who is skilled in the particular business. Therefore, it may be stated as a general rule that an unauthorized assignment is only valid when the lease itself contains no restriction against assignment or subletting.[8] Some states have enacted statutes against assignment and subletting, but in the absence of such statute or restrictive covenant in the lease, the tenant may assign his lease.[9] By such assignment he is not thereby released from his covenants unless the landlord accepts the assignee as a substitute tenant.[10] An assignment of the lease carries with it a clause giving the tenant

[5] McMahan v. Jacoway, 105 Ala. 585, 17 So. 39; Carroll v. Ballance, 26 Ill. 9, 79 Am. Dec. 354; Liebschutz v. Moore, 70 Ind. 142, 36 Am. Rep. 182; Gunn v. Sinclair, 52 Mo. 327; Beckwith v. Howard, 6 R. I. 1.

[6] Alabama: Crommelin v. Thiess, 31 Ala. 412, 70 Am. Dec. 499; Georgia: Robinson v. Perry, 21 Ga. 183, 68 Am. Dec. 455; Illinois: Kew v. Trainor, 150 Ill. 150, 37 N. E. 223; Indiana: Taylor v. Moffatt, 2 Blackf. (Ind.) 304; Iowa: Goldsmith v. Wilson, 68 Iowa 685, 28 N. W. 16; Kansas: Mabry v. Harp, 54 Kans. 398, 36 Pac. 743; Kentucky: Montague v. Jamison, 16 Ky. L. (abst.) 238; Louisiana: Weatherly v. Baker, 25 La. Ann. 229; Maine: Wheeler v. Hill, 16 Maine 329; Minnesota: Gould v. Sub-District No. 3, 8 Gil. (Minn.) 382; Mississippi: Harris v. Frank, 52 Miss. 155; North Carolina: Krider v. Ramsay, 79 N. Car. 354; New York: Howard v. Ellis, 6 N. Y. Super. Ct. 369; Ohio: Crowe v. Riley, 63 Ohio St. 1, 57 N. E. 956; Tennessee: Eastham v. Crowder, 10 Humph. (Tenn.) 194.

[7] Randell v. Chubb, 46 Mich. 311, 9 N. W. 429, 41 Am. Rep. 165; Lewis v. Sheldon, 103 Mich. 102, 61 N. W. 269.

[8] Crommelin v. Thiess, 31 Ala. 412, 70 Am. Dec. 499; Goldsmith v. Wilson, 68 Iowa 685, 28 N. W. 16; Mabry v. Harp, 53 Kans. 398, 36 Pac. 743; Gould v. Sub-District No. 3, 8 Gil. (Minn.) 382.

[9] E. H. Powers Shoe Co. v. Odd Fellows Hall Co., 133 Mo. App. 229, 113 S. W. 253; Gazlay v. Williams, 210 U. S. 41, 52 L. ed. 950, 28 Sup. Ct. 687; O'Brien v. Pabst Brewing Co., 31 App. D. C. 56;

[10] Page v. Ellsworth, 44 Barb. (N. Y.) 636. See also, Midland Tel. Co. v. National Tel. News Co., 236 Ill. 476, 86 N. E. 107; Manley v. Berman, 111 N. Y. S. 711; Verschleiser v. Newman, 76 Misc. 544, 135 N. Y. S. 671.

the right to renew at the end of the term as well as all other clauses.[11] It is held that an assignment of a term for years is governed generally by the rules applicable to the sale of personal property; and on such sale, while as to the quality of the thing sold caveat emptor is the general rule, the seller impliedly warrants the title.[12] In accordance with the principle that the form of the instrument of assignment is immaterial,[13] it has been held that a memorandum sufficient to satisfy the statute of frauds can be collected from letters and telegrams.[14] The mere form of the instrument, though professing to pass a fee simple estate, will not operate as a disseizen of the superior landlord's estate, but only as an assignment of the unexpired term.[15]

§ 4572. **Assignment by lessee—Mode of assignment.**—The transfer of a lease by assignment may be by indorsement on the back of the lease or by separate instrument,[16] and in the latter case such instrument, being a transfer of an interest in land, may properly be recorded; but it will not operate as constructive notice to a subsequent purchaser, if it fail to describe the premises and define the term, or to contain language of description by which the original lease can be recognized as the thing transferred.[17] An indorsement upon the original lease with reference to it incorporates the description of the premises and the terms upon which they are to be held into the assignment, and the delivery of the lease makes apparent the intent to convey the estate.[18] In case the lessees do not use the word "assign" in the instrument executed by them, but use the word "sold," this is equivalent to "assign" and is sufficient to effect a transfer of the

[11] Sutherland v. Goodnow, 108 Ill. 528, 48 Am. Rep. 560; McClintock v. Joyner, 77 Miss. 678, 27 So. 837, 78 Am. St. 541.

[12] Jeffers v. Easton, 113 Cal. 345, 45 Pac. 680; Wetzell v. Richcreek, 53 Ohio St. 62, 40 N. E. 1004. Contra, Waldo v. Hall. 14 Mass. 486; Blair v. Rankin, 11 Mo. 440.

[13] Walsh v. Martin, 69 Mich. 29, 37 N. W. 40; Craig v. Summers, 47 Minn. 189, 49 N. W. 742, 15 L. R. A. 236; Pelton v. Place, 71 Vt. 430, 46 Atl. 63.

[14] Kingsley v. Siebrecht, 92 Maine 23, 42 Atl. 249, 69 Am. St. 486.

[15] Esty v. Baker, 48 Maine 495; Worthington v. Lee, 61 Md. 530; McLennan v. Grant, 8 Wash. 603, 36 Pac. 682.

[16] Cleveland &c. R. Co. v. Mitchell, 74 Ill. App. 602; Esty v. Baker, 48 Maine 495.

[17] Martindale v. Price, 14 Ind. 115.

[18] Barnes v. Northern Trust Co., 169 Ill. 112, 48 N. E. 31; Keeley Brewing Co. v. Mason, 102 Ill. App. 381; Sanders v. Partridge, 108 Mass. 556; Blake v. Sanderson, 1 Gray (Mass.) 332; Patten v. Deshon, 1 Gray (Mass.) 325.

leasehold estate.[19] A leasehold estate, even though created by an instrument under seal, may be assigned by an instrument not under seal.[20] The statute of frauds extends to agreements for the assignment of a lease,[21] and the real question in every case is whether the instrument of assignment is sufficient to satisfy the statute of frauds.[22] A valid assignment in parol may be made of a lease existing only in parol.[23] Unless the lease is within the statute of frauds, it may be assigned by an act evincing such purpose[24] by the lessee or one having authority to act for him.[25] An assignment of a lease is a contract resulting from the meeting of the minds upon all essential particulars,[26] and is determinative of the rights of the parties,[27] no covenants being implied from the use of particular words as in the case of the original lease.[28] Where one other than the lessee occupies leased premises during the continuation of the term or pays rent, the law infers an assignment to him of the lease.[29] But this presumption may, in either case, be rebutted by proof that there never was, in fact, such an assignment, or that the instrument of assignment was invalid.[30] A receiver appointed by a court to take charge of a lessee's property does not thereby become an assignee of the term.[31]

[19] Cleveland &c. R. Co. v. Mitchell, 74 Ill. App. 602.

[20] Keeley Brewing Co. v. Mason, 102 Ill. App. 381; Barnes v. Northern Trust Co., 169 Ill. 112, 48 N. E. 31; Sanders v. Partridge, 108 Mass. 556. See also, Stillman v. Harvey, 47 Conn. 26.

[21] Chicago Attachment Co. v. Davis &c. Co., 142 Ill. 171, 31 N. E. 438, 15 L. R. A. 754; Hunt v. Coe, 15 Iowa 197; Smith v. Smith, 9 Ky. L. 100; Kingsley v. Siebrecht, 92 Maine 23, 42 Atl. 249, 69 Am. St. 486; Sanders v. Partridge, 108 Mass. 556; Johnson v. Reading, 36 Mo. App. 306, affd. 107 Mo. 350, 17 S. W. 978; Durand v. Curtis, 57 N. Y. 7; Potter v. Arnold, 15 R. I. 350, 5 Atl. 379.

[22] Sanders v. Partridge, 108 Mass. 556.

[23] Ross v. Schneider, 30 Ind. 423; Peters v. Barnes, 16 Ind. 219. See also, McKinney v. Reader, 7 Watts (Pa.) 123, where it was held that a lease for less than three years, whether written or not, may be surrendered or transferred by an oral expression of assent. See also, Leadbetter v. Pewtherer (Ore.), 121 Pac. 799.

[24] Grauer v. Rudinsky, 111 N. Y. S. 530.

[25] Milstein v. Mosher, 110 N. Y. S. 568.

[26] Hummer v. McGee, 141 Wis. 216, 124 N. W. 302.

[27] Stewart v. Morris, 84 S. Car. 148, 65 S. E. 1044; Johnson v. Zufeldt, 56 Wash. 5, 104 Pac. 1132.

[28] Shannon v. Mastin, 135 Mo. App. 50, 114 S. W. 1127.

[29] Ecker v. Chicago &c. R. Co., 8 Mo. App. 223; Leadbetter v. Pewtherer (Ore.), 121 Pac. 799.

[30] Dickinson Co. v. Fitterling, 67 Minn. 162, 71 N. W. 1030; Ecker v. Chicago &c. R. Co., 8 Mo. App. 223; Frank v. New York &c. R. Co., 122 N. Y. 197, 25 N. E. 332; Cross v. Upson, 17 Wis. 618. See also, Landaur v. Littman, 135 N. Y. S. 8.

[31] Gaither v. Stockbridge, 67 Md. 222; 9 Atl. 632, 10 Atl. 309; Bell v.

§ 4573. Assignment—Rights and liabilities of lessor and lessee.—The express covenants in a lease continue to be binding upon the covenantor notwithstanding his assignment of the lease.[32] While the privity of estate between lessor and lessee is terminated by the assignment, there still remains the privity of contract between them created by the lease, which is not affected by the assignment, although made with the assent of the lessor, and the lessee still continues liable on his covenant by virtue of this privity of contract.[33] If the covenant to pay rent is express, the lessee is bound so long as the term continues; but if implied, he is discharged whenever he is divested of the estate.[34] But it is not correct to state, as a rule of law, that a lessee who has not made an express covenant to pay rent may discharge himself to all future responsibility by assigning the lease.[35] The lessor may pursue either lessee or assignee, or both at the same time, though he will be entitled to but one satisfaction.[36] The contract of the original lessee continues in force unless the lessor accepts the assignee as sole tenant and absolves the original lessee.[37] Mere acceptance of rent from an assignee does not discharge the lessee from an express covenant.[38] There must be some new leasing, some understanding that the lessee is released or some acts from which an intention to discharge the lessee can be inferred.[39] The nature of the liability of a lessee to the lessor is that of a

American Protective League, 163 Mass. 558, 40 N. E. 857, 28 L. R. A. 452, 47 Am. St. 481; Quincy &c. R. Co. v. Humphreys, 145 U. S. 82, 36 L. ed. 632, 12 Sup. Ct. 787. Contra, United States Trust Co. v. Wabash W. R. Co., 150 U. S. 287, 37 L. ed. 1085, 14 Sup. Ct. 86.

[32] Brosnan v. Kramer, 135 Cal. 36, 66 Pac. 979; Barhydt v. Burgess, 46 Iowa 476; Jones v. Parker, 163 Mass. 564, 40 N. E. 1044, 47 Am. St. 485; Wineman v. Phillips, 93 Mich. 223, 53 N. W. 168; Whetstone v. McCartney, 32 Mo. App. 430.

[33] Garner v. Byard, 23 Ga. 289, 68 Am. Dec. 527; Barhydt v. Burgess, 46 Iowa 476; Oswald v. Fratenburgh, 36 Minn. 270, 31 N. W. 173.

[34] Peers v. Consolidated Coal Co., 59 Ill. App. 595, revd. 166 Ill. 361, 46 N. E. 1105, 38 L. R. A. 624; Barhydt v. Burgess, 46 Iowa 476; Mason v. Smith, 131 Mass. 510; Holliday v. Nolan, 93 Mo. App. 403, 67 S. W. 663.

[35] Consumers' Ice Co. v. Bixler, 84 Md. 437, 35 Atl. 1086.

[36] Whetstone v. McCartney, 32 Mo. App. 430; Taylor v. De Bus, 31 Ohio St. 468.

[37] Laird v. Mantonya, 83 Ill. App. 327.

[38] Brosnan v. Kramer, 135 Cal. 36, 66 Pac. 979; Burnham v. Hubbard, 36 Conn. 539; Barnes v. Northern Trust Co., 169 Ill. 112, 48 N. E. 31; Harris v. Heackman, 62 Iowa 411, 17 N. W. 592; Deane v. Caldwell, 127 Mass. 242.

[39] Wineman v. Phillips, 93 Mich. 223, 53 N. W. 168; Bailey v. Wells, 8 Wis. 141, 76 Am. Dec. 233.

surety for the assignee during the continuance of his interest, and although the assignee is not bound by an express promise, yet the law imposes a duty upon him to perform the covenants while he enjoys the estate.[40] In case a lessee has been held to his liability for rent after an assignment, he will be entitled to recover the rent from his assignees.[41] Being a surety, he must pay the debt for which he is liable before he can recover of the principal.[42]

§ 4574. Assignment—Rights and liabilities of assignee.—An assignee of a lease is bound by privity of estate to perform the express covenants which run with the land, but in the absence of express agreement on his part, he is liable only on such covenants as run with the land and only during such time as he holds the term.[43] Because of privity of estate he is liable upon covenants maturing and broken while title is held by him.[44] The assignee is in privity of estate but not in privity of contract with the lessor and is only liable on covenants which run with the land, such as covenants for rent, to pay taxes and to yield up premises in good repair.[45] The assignee of a lease may by reassignment, divest himself of all liability upon the lease.[46] If the assignee has no knowledge of an assignment made to him at the instance of an arrangement between the assignor and third parties, and the assignee never accepts the assignment, he is not

[40] Latta v. Weiss, 131 Mo. 230, 32 S. W. 1005; Sutliff v. Atwood, 15 Ohio St. 186.

[41] Mason v. Smith, 131 Mass. 510; Farrington v. Kimball, 126 Mass. 313, 30 Am. Rep. 680.

[42] Hoyt v. Wilkinson, 10 Pick. (Mass.) 31.

[43] Bonetti v. Treat, 91 Cal. 223, 27 Pac. 612, 14 L. R. A. 151; Consolidated Coal Co. v. Peers, 166 Ill. 361, 46 N. E. 1105, 38 L. R. A. 624; Gordon v. George, 12 Ind. 408; Nickel v. Brown, 75 Md. 172, 23 Atl. 736; Darmstaetter v. Hoffman, 120 Mich. 48, 78 N. W. 1014; Trask v. Graham, 47 Minn. 571, 50 N. W. 917; Gray v. Clement, 12 Mo. App. 579; Le Gierse v. Green, 61 Tex. 128.

[44] Bailey v. Richardson, 66 Cal. 416, 5 Pac. 910; Webster v. Nichols, 104 Ill. 160; Bedford v. Terhune, 30 N. Y. 453, 27 How. Pr. (N. Y.) 422, 86 Am. Dec. 394; Washington Natural Gas Co. v. Johnson, 123 Pa. St. 576, 16 Atl. 799, 10 Am. St. 553; West Virginia Cent. & P. Co. v. McIntire, 44 W. Va. 210, 28 S. E. 696; Overman v. Sanborn, 27 Vt. 54.

[45] Peck v. Christman, 94 Ill. App. 435; Trask v. Graham, 47 Minn. 571, 50 N. W. 917.

[46] Smith v. Ingram, 90 Atl. 529, 8 So. 144; Chicago Attachment Co. v. Davis &c. Co., 142 Ill. 171, 31 N. E. 438, 15 L. R. A. 754; Meyers Bros.' Assignee v. Gaertner, 106 Ky. 481, 50 S. W. 971, 21 Ky. L. 52, 45 L. R. A. 513; Nickel v. Brown, 75 Md. 172, 23 Atl. 736; Sanders v. Partridge, 108 Mass. 556; Durand v. Curtis, 57 N. Y. 7; Taylor v. De Bus, 31 Ohio St.

bound by it.[47] Nor does his acceptance of a general assignment bind him as assignee, unless he elects to accept the lease.[48] An actual entry by an assignee upon the demised premises is not necessary in order that he should be bound by the covenant to pay rent, for, by accepting an interest under the conveyance, he incurs the responsibility connected with the estate.[49] An assignee of part of leased premises is liable for his pro rata share of the rent reserved in the lease, but he is not liable for the entire rent.[50] Where the assignee of a lease at the time of the assignment covenants under seal to assume all the covenants of the original lessee, he remains liable on the covenants of the lease after an assignment over just as if he were an original lessee, bound by express covenants.[51] The assignee is entitled to all the rights of the lessee under the lease[52] but he is not entitled to concessions granted as a favor.[53]

§ 4575. Assignment—Conditions against assignment and subletting.—It is usually true that, in the construction of deeds, courts will incline to interpret the language as a covenant rather than a condition,[54] and covenants against assignment or underletting are not looked upon with favor by the courts, and are liberally construed in favor of lessees, so as to prevent the restriction from extending any further than necessary.[55] But

468; Tibbals v. Iffland, 10 Wash. 451, 39 Pac. 102.

[47] McFarland v. Heim, 127 Md. 327, 29 S. W. 1030, 48 Am. St. 629.

[48] Smith v. Ingram, 90 Ala. 529, 8 So. 144; Medinah Temple Co. v. Currey, 162 Ill. 441, 44 N. E. 839, 53 Am. St. 320.

[49] Benedict v. Everard, 73 Conn. 157, 46 Atl. 870; Babcock v. Scoville, 56 Ill. 461; Edmonds v. Mounsey, 15 Ind. App. 399, 44 N. E. 196; Willi v. Dryden, 52 Mo. 319; University of Vermont v. Joslyn, 21 Vt. 52.

[50] Curtis v. Spitty, 1 Bing. N. Cas. 756; Babcock v. Scoville, 56 Ill. 461; Hogg v. Reynolds, 61 Nebr. 758, 86 N. W. 479, 87 Am. St. 522; Woodhull v. Rosenthal, 61 N. Y. 382.

[51] Wilson v. Lunt, 11 Colo. App. 56, 52 Pac. 296; Springer v. De Wolf, 194 Ill. 218, 62 N. E. 542, 56 L. R. A. 465, 88 Am. St. 155; Adreon v. Hawkins, 4 H. & J. (Md.) 319; Lindsley v. Schnaide Brew. Co., 59 Mo. App. 271; Consumers Ice Co. v. Bixler, 84 Md. 437, 35 Atl. 1086.

[52] Hollander v. Central Metal & Supply Co., 109 Md. 131, 71 Atl. 442; Marino v. Williams, 30 Nev. 360, 96 Pac. 1073.

[53] Kean v. Rogers, (Iowa) 118 N. W. 515.

[54] Gallaher v. Herbert, 117 Ill. 160, 7 N. E. 511.

[55] Caley v. Portland, 12 Colo. App. 397, 56 Pac. 350; Boyd v. Fraternity Hall Assn., 16 Ill. App. 574; Hutchinson v. Ulrich, 145 Ill. 336, 34 N. E. 556, 21 L. R. A. 391; Goldsmith v. Wilson, 68 Iowa 685, 28 N. W. 16; Presby v. Benjamin, 169 N. Y. 377, 62 N. E. 430, 57 L. R. A. 317. See also, Burns v. Dufresne, 67 Wash. 158, 121 Pac. 46.

the intention of the parties to the instrument, when clearly ascertained, must control.[56] Where there is a condition in a lease prohibiting subletting, no valid sublease can be made without the lessor's consent.[57] Thus the subletting of an apartment in an apartment house has been enjoined where the lease contained a covenant against it.[58] But it is a well-established general principle that an assignment contrary to a restriction in a lease is not absolutely void but voidable only at the election of the lessor.[59] An ordinary covenant against subletting and assignment is not broken by a transfer of the leased premises by operation of law, but the covenant may be so drawn as to expressly prohibit such a transfer, and in that case the lease would be forfeited by an assignment by operation of law.[60] The rule is universal that a covenant against the assignment of a lease is not broken by an underletting;[61] but it is said that the converse of this is not true, and that an assignment is a violation of a stipulation not to underlet.[62] A covenant not to assign or sublet is not necessarily broken because some one other than the lessee shares in the benefits and advantages of a leasehold estate.[63]

[56] Kew v. Trainor, 150 Ill. 150, 37 N. E. 223.

[57] Meyer v. Rothschild, 46 La. Ann. 1174, 15 So. 383; Emery v. Hill, 67 N. H. 330, 39 Atl. 266.

[58] Barrington Apartment Assn. v. Watson, 38 Hun (N. Y.) 545.

[59] Springer v. Chicago &c. Trust Co., 102 Ill. App. 294, affd. 202 Ill. 17, 66 N. E. 850; Mabry v. Harp, 53 Kans. 398, 36 Pac. 743; Bemis v. Wilder, 100 Mass. 446; Holman v. DeLin-River Finley Co., 30 Ore. 428, 47 Pac. 708. It may be waived by the lessor. Fred v. Moseley (Tex. Civ. App.), 146 S. W. 343.

[60] Farnum v. Hefner, 92 Cal. 542, 28 Pac. 602; Parks v. Union Mfg. Co., 14 Ky. L. 206; Riggs v. Pursell, 66 N. Y. 193.

[61] Crusoe v. Bugby, 2 W. Bl. 766, 3 Wils. 234; Copland v. Parker, 4 Mich. 660; Moore v. Guardian Trust Co., 173 Mo. 218, 73 S. W. 143; Field v. Mills, 33 N. J. L. 254; Jackson v. Harrison, 17 Johns. (N. Y.) 66.

[62] Den v. Post, 25 N. J. L. 285; Greenaway v. Adams, 12 Ves. 395.

[63] Sommers v. Reynolds, 103 Mich. 307, 61 N. W. 501; Pence v. St. Paul &c. R. Co., 28 Minn. 488, 11 N. W. 80.

CHAPTER CXXXVIII.

KINDS OF TENANCY CREATED.

§ 4580. Estates for years—Nature and extent.
4581. Tenancy at will.
4582. Tenancy at will—Termination of.
4583. Tenancy from year to year—Generally.
§ 4584. Tenancy from year to year—Created by reservation of rent.
4585. Tenancy from year to year—Created by holding over.
4586. Tenancy from month to month.
4587. Tenancy at sufferance.

§ 4580. Estates for years—Nature and extent.—The requisite of an estate for years is definiteness of duration, and embraces such as are for a single year or for a period less than a year, if definite and certain, as a term for a fixed number of weeks or months, as well as for any definite number of years, however great.[1] So where the term and duration of a tenancy is fixed and certain, it is an estate for years and not a tenancy from year to year. A lease for years is a chattel real only, and goes to the administrator and may be sold by him without an order of court as is required in cases of freehold and fee estates.[2] If the lease is for a year certain with a provision that the agreement is to run as long as the parties agree it means that the tenant shall hold for the year and only so much longer as the landlord sees fit to allow him to hold, and it is not necessary that the landlord give his tenant notice any definite length of time before his year expires that he cannot remain longer. If the tenant holds beyond the year, after receiving notice that he must surrender possession, his possession is unlawful.[3] A lease to hold from the

[1] Brown v. Bragg, 22 Ind. 122. See also, to same effect, Casey v. King, 98 Mass. 503; Shaffer v. Sutton, 5 Bin. (Pa.) 228.

[2] Lake v. Campbell, 18 Ill. 106; Mark v. North, 155 Ind. 575, 57 N. E. 902; Cunningham v. Baxley, 96 Ind. 367; Chapman v. Gray, 15 Mass. 439; Faler v. McRae, 56 Miss. 227; Brewster v. Hill, 1 N. H. 350; Warner v. Tanner, 38 Ohio St. 118.

[3] Dunphy v. Goodlander, 12 Ind. App. 609, 40 N. E. 924. But see, Brady v. Flint, 23 Nebr. 785, 37 N. W. 647.

first day of April from year to year, so long as both lessor and lessee should agree, does not necessarily imply more than from the commencement of one year to the commencement of another.[4] Where premises are leased by a landlord until he can sell them, the lease ends upon such a sale, and notice to quit is unnecessary.[5] A lease to be valid for any greater estate than an estate at will must be certain as to its commencement and duration. So a lease to run until such time as the lessor is prepared to improve the ground with new buildings[6] or until the property is sold creates a tenancy at will.[7] However, it is the law that a term greater than an estate at will may be limited conditionally and yet the condition be uncertain. But in such case there must always be a term certain, though it may be terminated sooner by the happening of the contingency.[8]

§ 4581. **Tenancy at will.**—An estate at will, in the technical sense of that expression, is created by grant and contract, whereby one person lets lands to another to hold at the will of the lessor.[9] Both the entry and occupation in such a tenancy are lawful, but for no definite term or purpose, subject to be determined at common law by either party instanter and without notice, or, at most, by mere demand of possession by the landlord.[10] Such tenancy rests on the actual or presumed consent of the owner of the premises.[11] Such a tenancy may be created by express agreement,[12] and in a few states arises from possession under a lease within the statute of frauds.[13] A tenancy of this kind differs from terms for years or for life in that it may be brought to an end at any time at the whim of the parties, instead of continuing until the happening of a certain event or the lapse of a certain period of time, and either party may so terminate it.[14] Where a tenant

[4] Fox v. Nathans, 32 Conn. 348.
[5] Clark v. Rhoads, 79 Ind. 342.
[6] Corby v. McSpadden, 63 Mo. App. 648.
[7] Murray v. Cherrington, 99 Mass. 229; Lea v. Hernandez, 10 Tex. 137.
[8] Munigle v. Boston, 3 Allen (Mass.) 230; Shaw v. Hoffman, 25 Mich. 162; Corby v. McSpadden, 63 Mo. App. 648; Miller v. Levi, 44 N. Y. 489.
[9] Den v. Drake, 14 N. J. L. 523.
[10] Brown v. Kayser, 60 Wis. 1, 18 N. W. 523; Webb v. Seekins, 62 Wis. 26, 21 N. W. 814.
[11] Gault v. Stormont, 51 Mich. 636, 17 N. W. 214; Ridgely v. Stillwell, 25 Mo. 570.
[12] Buford v. Wasson, 49 Tex. Civ. App. 454, 109 S. W. 275.
[13] Price v. Thompson, 4 Ga. App. 46, 60 S. E. 800; Womach v. Jenkins, 128 Mo. App. 408, 107 S. W. 423.
[14] Doe v. Richards, 4 Ind. 374;

occupies the premises without rent and without any time agreed upon to limit the occupation and without in any way binding himself to become a tenant for any definite time or at any agreed price, his occupation is that of a tenant at will.[15] Nor does it alter the result that the tenant's holding in such a case had its origin in a written demise.[16] A mere tenancy at will was created where a life tenant verbally leased the premises for the full term of his life in consideration of an agreement for his support.[17] And where the owner of land allowed some of his relatives to use and improve it without payment of rent, they became mere tenants at will.[18] A parol gift of land creates merely an estate at will in the donee, and he is not entitled to a notice to quit, except where such a right is conferred by statute.[19] To constitute one holding over a tenant at will, it is held that there must be something implying an assent of the landlord.[20] But a lessee in possession on the disaffirmance of a lease for fraud is held a tenant at will.[21] Entry and occupation under a void parol lease creates a tenancy, which is either strictly at will or from year to year or from month to month, according to the circumstances of the case.[22]

§ 4582. **Tenancy at will—Termination of.**—In the absence of statutory requirements the mode of terminating a tenancy at will is said to be for the landlord to enter, use words declaring the tenancy at an end, and then notify the tenant of his action.[23] At common law a tenant at will was not entitled to notice to quit; a

Cowan v. Radford Iron Co., 83 Va. 547, 3 S. E. 120. See also, Knight v. Indiana Coal &c. Co., 47 Ind. 105, 17 Am. Rep. 692.

[15] Maher v. James Hanley &c. Co., 23 R. I. 323, 50 Atl. 330.

[16] Amick v. Brubaker, 101 Mo. 473, 14 S. W. 627.

[17] Barrett v. Cox, 112 Mich. 220, 70 N. W. 446.

[18] Ellsworth v. Hale, 33 Ark. 633.

[19] Dossee v. East India Co., 1 L. T. 345; Jackson v. Rogers, 1 Johns. Cas. (N. Y.) 33. Contra, Kaufman v. Cook, 114 Ill. 11, 28 N. E. 378.

[20] Guenther v. Gilchrist Improved Jar Co., 28 Pa. Super. Ct. 232. See also, Kuhn v. Smith, 125 Cal. 615, 58 Pac. 204, 73 Am. St. 79; Canning v. Fibush, 77 Cal. 196, 19 Pac. 376.

[21] Altschuler v. Lipschitz, 113 N. Y. S. 1058.

[22] Phelan v. Anderson, 118 Cal. 504, 50 Pac. 685; Lockwood v. Lockwood, 22 Conn. 425; Huyser v. Chase, 13 Mich. 98; Whitney v. Swett, 22 N. H. 10, 53 Am. Dec. 228; Dumn v. Rothermel, 112 Pa. St. 272, 3 Atl. 800; Duke v. Harper, 6 Yerg. (Tenn.) 280, 27 Am. Dec. 462; Sartwell v. Sowles, 72 Vt. 270, 48 Atl. 11, 82 Am. St. 943; Dolan v. Scott, 25 Wash. 214, 65 Pac. 190.

[23] Cook v. Cook, 28 Ala. 660. But an actual entry is not now generally required, nor is an express and formal demand and notice always necessary. It is generally sufficient that the words or acts are equivalent thereto and show such intention.

mere demand on him for possession was all that was required.[24] On the other hand, a tenant at will could put an end to his holding instanter at common law and avoid further liability for rent. If there were no statute requiring notice, such tenant could not be held for rent after he abandoned the premises; he could in any event only be held liable for damages which might result to the property, or for loss thereof by reason of his abandonment without notice.[25] Until some act is done which terminates the tenancy at will the possession of the tenant is lawful, and the landlord cannot recover possession by suit.[26] Hence, it has been held that a tenant at will has a right to have reasonable notice of his landlord's intention to terminate the estate before an action can be brought against him for possession.[27] Nor can a vendee, after having been placed in possession of the land by his vendor, be ejected therefrom without previous demand and notice by the vendor.[28] A total destruction of the subject-matter of a lease terminates the tenancy, and the tenant is thereby ousted.[29] Also, a tenancy at will, at common law, is terminated by the death of either party.[30] An estate at will is uncertain and defeasible, and is destroyed by the alienation of the premises by either party.[31] The tenant, in case of an alienation by the owner of the estate, becomes a mere tenant at sufferance; for the estate at will, not being the subject of alienation, is terminated by its own legal limitations.[32] The lessor at will need not make a conveyance in fee in order to bring the tenancy to an end. If he make a feoffment or a lease for years to commence immediately, the estate at will is thereby determined.[33] But notice of the transfer of the landlord's title must in some way be brought home to the tenant in

[24] Cross v. Campbell, 89 Ill. App. 489; Ross v. Garrison, 1 Dana (Ky.) 35; Curl v. Lowell, 19 Pick. (Mass.) 25.

[25] Dolan v. Scott, 25 Wash. 214, 65 Pac. 190; Goodtitle v. Herbert, 4 T. R. 680.

[26] Denn v. Rawlings, 10 East 261.

[27] Blum v. Robertson, 24 Cal. 127; Frisbie v. Price, 27 Cal. 253.

[28] Right v. Beard, 13 East 210; Jones v. Temple, 87 Va. 210, 12 S. E. 404, 24 Am. St. 649.

[29] O'Brien v. Cavanaugh, 61 Mich. 368, 28 N. W. 127.

[30] James v. Dean, 11 Ves. 383.

[31] Jackson v. Aldrich, 13 Johns. (N. Y.) 106; Disdale v. Iles, 2 Lev. 88.

[32] Joy v. McKay, 70 Cal. 445, 11 Pac. 763; Esty v. Baker, 50 Maine 325, 79 Am. Dec. 616; Hammond v. Thompson, 168 Mass. 531, 47 N. E. 137; Lash v. Ames, 171 Mass. 487, 50 N. E. 996.

[33] Pratt v. Farrar, 10 Allen (Mass.) 519; Kelly v. Waite, 12 Metc. (Mass.) 300.

order to have the effect of bringing a tenancy at will to an end.[34] The estate of a tenant at will cannot be assigned without the landlord's consent, and an unauthorized transfer gives the transferee no right that he can hold against the will of the landlord.[35]

§ 4583. **Tenancy from year to year—Generally.**—The law pertaining to tenancies from year to year originated from the judiciary, whereby certain restraining limitations were placed upon both landlord and tenant where the holding was at will. Statutes on the subject were merely declaratory of the rules laid down by the courts.[36] As we have seen, a tenancy at will may be terminated at the pleasure of either party. In some places, and especially in the country, this was found extremely inconvenient, and it was to obviate this inconvenience that courts have qualified the estate at will by requiring the determination of the estate to take effect at the end of a current year, month, or the like, as the case may be, by a notice to quit.[37] It thus appears that a tenancy from year to year is a qualified tenancy at will, and seems so much more favorable to the tenant that the courts have, from a very early period, leaned strongly in favor of regarding every tenancy, the terms of which do not show a strict tenancy at will, or which is not created by a written instrument, a tenancy from year to year.[38] A tenancy from year to year or a tenancy from month to month is, therefore, a modified tenancy at will. The modification, however, did not alter the essential elements of the tenure, but only set up certain restrictions as to the termination of the will. For the sake of convenience, a period of notice is required before either party can terminate the will, and in addition the holding can only be brought to a close at the end of a year, month, or the like, as the case may be.[39] The tenant from year to year is liable for the full year's rent if the landlord choose to hold him,

[34] Pratt v. Farrar, 10 Allen (Mass.) 519; Doe v. Thomas, 6 Exch. 854.

[35] Cook v. Cook, 28 Ala. 660; McLeran v. Benton, 73 Cal. 329, 14 Pac. 879, 2 Am. St. 814; Atlanta K. & N. R. Co. v. McHan, 110 Ga. 543, 35 S. E. 634; Dingley v. Buffum, 57 Maine 381; Austin v. Thomson, 45 M. H. 113; McCann v. Rathbone, 8 R. I. 403.

[36] Hauser v. Romer, 4 Ky. L. 815.

[37] Timmins v. Rawlinson, 3 Burr. 1603; Godard's Exrs. v. South Carolina R. Co., 2 Rich. L. (S. Car.) 346.

[38] Currier v. Perley, 24 N. H. 219; Crawford v. Morris, 5 Grat. (Va.) 90.

[39] Woodrow v. Michael, 13 Mich. 187.

even though he abandons the premises,[40] but such rent is not due till the end of the term, and a suit to recover it prior to that time is prematurely brought.[41] The tenancy from year to year is to be considered as recommencing every year.[42] The entire topic of estates at will and from year to year is rather generally covered by statutes, which prescribe the form of notice, the length of time it must cover and the mode of serving it in order that a holding of this kind may be terminated. While the statutes regulate the matters of notice and so forth, the better view seems to be that a tenancy from year to year continues to exist until expressly abolished by statute.[43]

§ 4584. Tenancy from year to year—Created by reservation of rent.—A tenancy from year to year may, of course, be created by the express contract of the parties to hold from year to year, month to month, or week to week.[44] But the tenancy from year to year is commonly created by implication from circumstances, such as the payment of periodical rent, holding over, and the like. Thus an estate at will may be converted into an estate from year to year by the payment of rent; the conversion is wrought, not by the length of time of the holding, but by the fact that the tenant entered under an agreement to pay an annual rent and pays accordingly.[45] The occupancy of a stranger will be treated as a tenancy from year to year whenever the reservation of rent or other circumstance plainly indicates an agreement for an annual holding.[46] On the tenant's first going into occupation he holds as a tenant at will and his tenure becomes a year to year holding by the lapse of time and the payment of rent. Although it is sometimes held that occupation under a void lease creates a tenancy from year to year, regardless of whether an annual rent is

[40] Lockwood v. Lockwood, 22 Conn. 425; Currier v. Perley, 24 N. H. 219. See also, Tanton v. Van Alstine, 24 Ill. App. 405.

[41] Indianapolis, D. & W. R. Co. v. First Nat. Bank, 134 Ind. 127, 33 N. E. 679.

[42] Tomkins v. Lawrence, 8 Car. & P. 729; Gladwell v. Holcomb, 60 Ohio St. 427, 54 N. E. 473, 71 Am. St. 724.

[43] Hunter v. Frost, 47 Minn. 1, 49 N. W. 327.

[44] Fox v. Nathans, 32 Conn. 348; Dix v. Atkins, 130 Mass. 171; Brady v. Flint, 23 Nebr. 785, 37 N. W. 647; Finkelstein v. Herson, 55 N. J. L. 217, 26 Atl. 688.

[45] Silsby v. Allen, 43 Vt. 172.

[46] Judd v. Fairs, 53 Mich. 518, 19 N. W. 266; Farley v. McKeegan, 48 Nebr. 237, 67 N. W. 161.

received or paid,[47] this is not true of an occupation without payment of rent and with no agreement as to time of holding, which creates but a strict tenancy at will.[48] To create a tenancy from year to year some acts must occur from which a new agreement can be inferred, such as the payment of some aliquot part of a yearly rent. Without evidence to the contrary, such payment is controlling evidence of a year to year tenancy.[49] When the entry into occupation has been under a void parol lease, which reserves an annual rent, the payment of any aliquot of such rent will have the effect of creating a tenancy from year to year, or at least for one year.[50] The leading circumstance which turns parol leases for uncertain terms into tenancies from year to year is the reservation of an annual rent.[51] Other circumstances, such as putting the premises in repair in lieu of payment of rent, may change a tenancy at will into a tenancy from year to year.[52]

§ 4585. Tenancy from year to year—Created by holding over.—One of the most common ways in which a tenancy from year to year originates is for a landlord to allow his tenant for years to hold over after the expiration of his term, and in those states where the principle of tenancy from year to year is recognized, the rule is that if a tenant continue in possession after the end of his term, the landlord may charge him on the contract as yearly tenant.[53] Where the tenant holds over after his lease has expired, the inference that the parties consent to a continuation of the same term is so strong that it has been adopted,

[47] Larkin v. Avery, 23 Conn. 304; Hunt v. Morton, 18 Ill. 75; Kerr v. Clark, 19 Mo. 132; Rogers v. Wheaton, 88 Tenn. 665, 13 S. W. 689. See also, Indianapolis, D. & W. R. Co. v. First Nat. Bank, 134 Ind. 127, 33 N. E. 679.

[48] Kankakee & S. R. Co. v. Horan, 131 Ill. 288, 23 N. E. 621; Johnson v. Johnson, 13 R. I. 467; Doe v. Wood, 14 M. & W. 682.

[49] Barrett v. Cox, 112 Mich. 220, 70 N. W. 446; Williams v. Deriar, 31 Mo. 13; Talamo v. Spitzmiller, 120 N. Y. 37, 23 N. E. 980, 8 L. R. A. 221, 17 Am. St. 607.

[50] Steketee v. Pratt, 122 Mich. 80, 80 N. W. 989; Huntington v. Parkhurst, 87 Mich. 38, 49 N. W. 597, 24 Am. St. 146. See also, Coudert v. Cohn, 118 N. Y. 309, 16 Am. St. 761; Rosenblat v. Perkins, 18 Ore. 156.

[51] Herrell v. Sizeland, 81 Ill. 457; Williams v. Deriar, 31 Mo. 13; Johnson v. Johnson, 13 R. I. 467.

[52] Brant v. Vincent, 100 Mich. 426, 59 N. W. 169; Thomas v. Wright, 9 Serg. & R. (Pa.) 87; Dumn v. Rothermel, 112 Pa. St. 272, 3 Atl. 800.

[53] Alabama: Crommelin v. Thiess, 31 Ala. 412, 70 Am. Dec. 499; Arkansas: Belding v. Texas Produce Co., 61 Ark. 377, 33 S. W. 421; Colorado: Burkhard v. Mitchell, 16 Colo. 376, 26 Pac. 657; Georgia: Roberson v. Simons, 109 Ga. 360, 34 S. E. 604; Illinois: Hately v. Myers, 96 Ill. App. 217; Indiana: Kleespies v. Mc-

in some instances at least, as a rule of law.[54] The law fixes the tenant's liability for holding over without regard to his wishes in the matter.[55] The terms of a year to year holding are generally the same as those of the lease which preceded it in the absence of any agreement changing them.[56]

§ 4586. Tenancy from month to month.—We have seen that where the original term was for one year, the tenancy upon the holding over and receipt of rent became in effect from year to year. So where the original term was for a less period than a year, as for one month, it was held the tenancy became upon holding over and payment of rent a tenancy from month to month.[57] The holding over is generally implied to be for a like term as the original, and the notice to quit is determined thereby and is sufficient if it equal the length of the term or the interval between the

Kenzie, 12 Ind. App. 404, 40 N. E. 648; Kansas: Adams Express Co. v. McDonald, 21 Kans. 680; Maryland: Hobbs v. Batory, 86 Md. 68, 37 Atl. 713; Minnesota: Gardner v. Dakota County, 21 Minn. 33; Missouri: Finney's Trustees v. St. Louis, 39 Mo. 177; Nebraska: Bradley v. Slater, 50 Nebr. 682, 70 N. W. 258; New Jersey: Yetter v. King Confectionary Co., 66 N. J. L. 491, 49 Atl. 678; North Carolina: Harty v. Harris, 120 N. Car. 408, 27 S. E. 90; Oregon: Parker v. Page, 41 Ore. 579, 69 Pac. 822; Pennsylvania: Harvey v. Gunzberg, 148 Pa. St. 294, 23 Atl. 1005; South Carolina: State v. Fort, 24 S. Car. 510; South Dakota: Banbury v. Sherim, 4 S. Dak. 88, 55 N. W. 723; Texas: Shipman v. Mitchell, 64 Tex. 174; Vermont: Amsden v. Atwood, 67 Vt. 289, 31 Atl. 448; Virginia: Peirce v. Grice, 92 Va. 763, 24 S. E. 392; West Virginia: Allen v. Bartlett, 20 W. Va. 46; Wisconsin: Peehl v. Bumbalek, 99 Wis. 62, 74 N. W. 545.

[54] New York, C. & St. L. R. Co. v. Randall, 102 Ind. 453, 26 N. E. 122. Compare Gladwell v. Holcomb, 60 Ohio St. 427, 71 Am. St. 724 and note.

[55] Goldsbrough v. Gable, 140 Ill. 269, 29 N. E. 722, 15 L. R. A. 294; Tolle v. Orth, 75 Ind. 298, 39 Am. Rep. 147; Bradley v. Slater, 50 Nebr. 682, 70 N. W. 258; Providence &c. Bank v. Hall, 16 R. I. 154, 13 Atl. 122; Voss v. King, 38 W. Va. 607, 18 S. E. 762; Gilman v. Milwaukee, 31 Wis. 563. It is held that the landlord may regard the holding either as that of a trespasser or as tenant for another year. Mason v. Wierango, 113 Mich. 151, 67 Am. St. 461; Haynes v. Aldrich, 133 N. Y. 287, 28 Am. St. 636, and note.

[56] Alabama: Ames v. Schuesler, 14 Ala. 600; Arkansas: Belding v. Texas Produce Co., 61 Ark. 377, 33 S. W. 421; Burkhard v. Mitchell, 16 Colo. 376, 26 Pac. 657; Connecticut: Bacon v. Brown, 9 Conn. 334; Maine: Wheeler v. Cowan, 25 Maine 283; Maryland: Hobbs v. Batory, 86 Md. 68, 37 Atl. 713; Missouri: Hunt v. Bailey, 39 Mo. 257; Nebraska: Bradley v. Slater, 50 Nebr. 682, 70 N. W. 258; New York: Webber v. Shearman, 3 Hill (N. Y.) 547; Oregon: Parker v. Page, 41 Ore. 579, 69 Pac. 822; Pennsylvania: Harvey v. Gunzberg, 148 Pa. St. 294, 23 Atl. 1005; South Carolina: Dorrill v. Stephens, 4 McCord (S. Car.) 59; Texas: San Antonio v. French, 80 Tex. 575, 16 S. W. 440, 26 Am. St. 763; Virginia: Peirce v. Grice, 92 Va. 763, 24 S. E. 392; West Virginia: Voss v. King, 38 W. Va. 607, 18 S. E. 762.

[57] Shirk v. Hoffman, 57 Minn. 230, 58 N. W. 990.

times of payment of rent.[58] Where no time is mentioned in the original letting and no annual rent reserved, the intervals between the rent payment determines the kind of tenancy and the time of giving notice to quit.[59] It is held in Indiana that where a lessee for a term of eight months at a monthly rental held over and paid a month's rent, the term was renewed for another eight months;[60] but under a similar situation in Minnesota the court held that the holding over created a tenancy from month to month.[61] A tenancy for one month is technically a term for years, and not a tenancy from year to year or from month to month. But if the tenant for one month hold over after the expiration of the month, he would then become a tenant from month to month.[62] The general rule is that a tenant holding by a verbal letting for an indefinite term at a monthly rental becomes a tenant from month to month. The mere fact that a tenant under such an arrangement continues to occupy for two years does not have the effect to make him a tenant from year to year. The rule of law favoring tenancies from year to year applies only as between such tenancies and tenancies at will.[63] Occupation for several years under a void lease for years has been held to create a tenancy from year to year, although rent was paid monthly, because that might have been merely for the sake of convenience and was not inconsistent with a letting from year to year.[64] However, there are cases holding that at no time can a parol demise, void under the statute of frauds, be resorted to for the purpose of ascertaining the duration of the term.[65] A tenancy from month to month is not a continuing right of possession; but as in the case of a tenancy from year to year, it is taken to end and recommence at the expiration of every month.[66]

[58] Hurd v. Whitsett, 4 Colo. 77; Noel v. McCrory, 7 Coldw. (Tenn.) 623.

[59] Bright v, McOuat, 40 Ind. 521; Steffens v. Earl, 40 N. J. L. 128, 29 Am. Rep. 214.

[60] Rothschild v. Williamson, 83 Ind. 387; Bollenbacker v. Fritts, 98 Ind. 50.

[61] Backus v. Sternberg, 59 Minn. 403, 61 N. W. 335.

[62] Stoppelkamp v. Mangeot, 42 Cal. 316; Hislop v. Moldenhauer, 23 Ore. 119, 31 Pac. 252. See also, Branton v. O'Briant, 93 N. Car. 99.

[63] Edmundson v. Preville, 12 Colo. App. 73, 54 Pac. 394; Sebastian v. Hill; 51 Ill. App. 272; Haines v. Beach, 90 Mich. 563, 51 N. W. 644; Rogers v. Brown, 57 Minn. 223, 58 N. W. 981; Branton v. O'Briant, 93 N. Car. 99; H. R. E. B. & B. Assn. v. Cochran, 60 Tex. 620; Utah Loan & Trust Co. v. Garbutt, 6 Utah 342, 23 Pac. 758; Jones v. Willis, 53 N. Car. 430.

[64] Laughran v. Smith, 75 N. Y. 205.

[65] Warner v. Hale. 65 Ill. 395; Brownell v. Welch, 91 Ill. 523.

[66] Borman v. Sandgren, 37 Ill. App.

§ 4587. **Tenancy at sufferance.**—"A tenancy by sufferance," as described by one court, "is not by the consent, but by the laches of the owner, * * * and it follows that where the owner has been guilty of no laches there can be no tenancy by sufferance."[67] It has never been required that there should be privity either of contract or estate between the parties to a tenancy at sufferance.[68] The distinguishing feature of a holding by sufferance is the absence of consent. It is to a certain extent a wrongful holding. If there is any agreement it cannot be a tenancy at sufferance.[69] A tenancy at sufferance arises under the statutes of some states from a bare holding over,[70] especially where the lease stipulates for payment of rent beyond the term.[71] Where the term of holding of a tenant for life or for years comes to an end and he nevertheless continues in occupation of the demised premises, the tenant thereby becomes a tenant at sufferance.[72] But to constitute a tenancy at sufferance there need not have been any prior contract of letting; all that is required is that the tenant should have entered into possession lawfully and shall continue to hold after the termination of his right. But if he comes into possession by act of law and then holds over, he is regarded as a trespasser.[73] An employé occupying premises owned by his master becomes, on holding over after the termination of his employment, a tenant at sufferance.[74] A tenancy at sufferance may be converted into one at will by contract, actual or implied.[75]

160; Clarke v. Thatcher, 9 Mo. App. 436.

[67] Moore v. Morrow, 28 Cal. 551; Spalding v. Hall, 6 D. C. 123. But it is held that the death of a life tenant terminates a lease between him and his lessee and that the latter is bound to take notice of the title and on such termination becomes a tenant at sufferance. Guthmann v. Vallery, 51 Nebr. 824, 66 Am. St. 475.

[68] Bennett v. Robinson, 27 Mich. 26; Smith v. Littlefield, 51 N. Y. 539.

[69] Columbia Ins. Co. v. Ashby, 4 Pet. (U. S.) 139; Johnson v. Carter, 16 Mass. 443.

[70] Brown v. Markham, 56 Fla. 202, 48 So. 39; Swift v. Boyd, 202 Mass. 26, 88 N. E. 439; Leavitt v. Maykel, 203 Mass. 506, 89 N. E. 1056, 133 Am. St. 323.

[71] Benton v. Williams, 202 Mass. 189, 88 N. E. 843.

[72] Hauxhurst v. Lobree, 38 Cal. 563; Coomler v. Hefner, 86 Ind. 108; Hanson v. Johnson, 62 Md. 25, 50 Am. Rep. 199; Warren v. Lyons, 152 Mass. 310, 25 N. E. 721, 9 L. R. A. 353; Abeel v. Hubbell, 52 Mich. 37, 17 N. W. 231; Guthmann v. Vallery, 57 Nebr. 824, 66 Am. St. 475; Poole v. Engelke, 61 N. J. L. 124, 38 Atl. 823; Smith v. Littlefield, 51 N. Y. 539.

[73] Johnson v. Donaldson, 17 R. I. 107, 20 Atl. 242.

[74] Eichengreen v. Appel, 44 Ill. App. 19; School District No. 11 v. Batsche, 106 Mich. 330, 64 N. W. 196, 29 L. R. A. 576.

[75] Benton v. Williams, 202 Mass. 189, 88 N. E. 843.

TITLE TWELVE

MORTGAGES OF REAL PROPERTY.

CHAPTER CXXXIX.

ORIGIN, NATURE, DEFINITION AND GENERAL CHARACTERISTICS.

§ 4600. Origin and history.
4601. Nature of early English mortgages.
4602. Common-law mortgage—Growth of the equity of redemption.
4603. Mortgages at law and in equity.
4604. Definition—Mortgages distinguished from other transactions.
§ 4605. Mortgages distinguished from deeds of trust.
4606. Mortgages distinguished from conditional sales.
4607. Intention and the existence of a debt—The test.
4608. Evidence and construction.
4609. Rights of the parties under a mortgage and under a conditional sale.

§ 4600. **Origin and history.**—The origin of the law of mortgages of real property in English law dates back to the time of the Anglo-Saxon kings. The records of this early period are extremely meager and the extent of the custom to pledge real estate to secure the payment of debts is unknown, but enough evidence exists to conclusively show that such pledges were sometimes made.[1] Upon the advent of the Norman kings and the inauguration of the feudal system the alienation of land was so restricted that the custom fell into disuse and was practically unknown for a period of two hundred years. After the passage of the statute of Quia Emptores, A. D. 1325,[2] removing the feudal restrictions and permitting the alienation of land, the records show that pledges of real property gradually came into use again as one of the means of securing the payment of debts.

[1] Essays in Anglo-Saxon Law, Appendix, Case No. 18, p. 342.

[2] 18 Edw. 2, Stat. 1.

§ 4601. **Nature of early English mortgages.**—Little is known of the nature of the contract under the early English law and of the rights of the parties thereunder. It seems, however, that, upon the execution of the mortgage, the mortgagee was entitled to take possession of the property as the legal owner thereof and to hold the same so long as the debt remained unpaid. But upon the payment of the debt which the mortgage was given to secure the mortgagor was entitled to have the property reconveyed to him, and upon failure of the mortgagee to do so he could resort to the courts for the enforcement of this right.[3] In course of time these pledges of land had taken two distinct forms, the vivum vadium and the mortuum vadium. The former seems to have been the one in general use in early times and under it the creditor took possession of the property and held it for a certain period, applying the rents and profits thereof to the payment of the debt. Upon the extinguishment of the obligation the mortgagor was entitled to have the property reconveyed to him. This form contained no condition that upon the payment of the debt the property was to be restored to the mortgagor, and in this respect was like the Welsh mortgage of a later period. Under the mortuum vadium the mortgagee did not necessarily take possession of the land under the conveyance or receive the rents and profits therefrom in reduction of the debt. This form contained the condition that upon the payment of the debt the mortgagee should reconvey the property to the mortgagor and become the common-law form of mortgage. This provision, however, was always strictly construed and upon the failure of the mortgagor to comply therewith and to make payment upon the time fixed, he forfeited his right to a reconveyance of the property and the legal title vested absolutely in the mortgagee.[4]

§ 4602. **Common-law mortgage—Growth of the equity of redemption.**—A common-law mortgage was an absolute conveyance with the condition that, on the payment of the debt which the mortgage was given to secure, the property would be reconveyed to the mortgagor. Upon the failure of the mortgagor to

[3] Essays in Anglo-Saxon Law, Appendix, Case No. 18, p. 342.

[4] Lyttleton's Tenures, Book iii. ch. 5, § 332.

pay at the specified time or to otherwise comply with the strict terms of the condition, he lost his right to the property and the mortgagee became the absolute owner thereof. The injustice of this condition, especially in those cases where the value of the property was out of proportion to the amount of the debt secured, was so apparent that courts of equity assumed jurisdiction to grant relief to the debtor. This relief was known as the equity of redemption and under it a party was permitted to pay the debt after the day specified in the condition had passed, and, upon so doing, the court would compel the mortgagee to restore the property to him. The time when this right was first recognized is uncertain but it seems to have become generally established during the reign of Charles I.[5] "Once a mortgage always a mortgage,"[6] early became one of the most important maxims in this branch of the law and has always been strictly adhered to. Accordingly, the parties cannot provide that upon the happening of a specified contingency, the transaction will cease to be a mortgage and become an absolute conveyance. An agreement, made at the time of giving the mortgage, cutting off the right of redemption has always been held void,[7] and a subsequent release of the right will only be upheld when it clearly appears that it was made without oppression and upon sufficient consideration.[8]

§ 4603. **Mortgages at law and in equity.**—A mortgage at law and in equity and the rights of the parties thereunder were very different. At law, a mortgage was a conveyance of an estate upon condition, and, upon the failure of the mortgagor to perform the condition strictly according to its terms, his rights to the estate were forfeited and the title vested absolutely in the mortgagee. The mortgagor had no further right that a court of law could enforce and, no matter how unjust the forfeiture, he was without remedy. But in equity the rule was different. While courts of equity could not alter the legal effect of the forfeiture

[5] Goodall's Case, 5 Coke 96; Wade's Case, 5 Coke 114; Emanuel College v. Evans, 1 Rep. in Ch. 18.

[6] Newcomb v. Bonham, 1 Vern. 7.

[7] Quartermous v. Kennedy, 29 Ark. 544; Lee v. Evans, 8 Cal. 424. See also, Fairclough v. Swan Brewing Co., A. C. (1912) 565, Ann. Cas. 1912D, 957, and note.

[8] Pritchard v. Elton, 38 Conn. 434; Wilson v. Fisher, 148 N. Car. 535, 62 S. E. 622.

which followed a breach of condition and did not attempt to do so, they regarded it as in the nature of a penalty which ought to be relieved against. They recognized the purpose as merely a pledge to secure a debt, and declared it unreasonable that the mortgagee should, by the failure of the debtor to meet his obligation at the day appointed, be entitled to keep as his own what was intended as a pledge. At law the legal right of the mortgagor to have his estate again was forfeited; but in equity he was still allowed to reclaim it upon payment of his debt with interest. In equity a mortgage was merely a security for the payment of a debt or the performance of an obligation and this is the view which prevails generally at the present time in courts of law as well as in courts of equity.[9]

§ 4604. Definition—Mortgages distinguished from other transactions.—A mortgage, in its broadest sense, is a conveyance of land as security for the payment of a debt or the performance of an obligation.[10] This definition embraces the two essential things necessary to constitute a mortgage and if more be attempted, it results in a description of one of the many forms which a mortgage may take. It is distinguished from other conveyances of land in that there must be a debt or an obligation to perform, which the conveyance was given to secure, and that the grantor must have an absolute right to a reconveyance of the land upon the performance of the condition specified in the deed. The debt may be either a present subsisting obligation or it may be one that is to be incurred in the future, but there must be a debt to secure or an obligation to perform.

§ 4605. Mortgages distinguished from deeds of trust.—A deed of trust to secure a debt is in legal effect a mortgage.[11] It is

[9] 1 Jones on Mortgages (6th ed.), § 8; British South Africa Co. v. De Beers Consol. Mines (1910), 2 Ch. 502; Aetna Life Ins. Co. v. Broecker, 166 Ind. 576, 77 N. E. 1092.

[10] Gassert v. Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240, affd. 149 U. S. 17, 37 L. ed. 631, 13 Sup. Ct. 738; Fiske v. Mayhew, 90 Nebr. 196, 133 N. W. 195; In re Helfenstein's Estate, 135 Pa. St. 293, 20 Atl. 151; Poarch v. Duncan, 41 Tex. Civ. App. 275, 91 S. W. 1110.

[11] Middleton v. Parke, 3 App. D. C. 149; Turner v. Watkins, 31 Ark. 429; Barth v. Deuel, 11 Colo. 494, 19 Pac. 471; Pershing v. Wolfe, 6 Colo. App. 410, 40 Pac. 856; De Wolf v. A. & W. Sprague Mfg. Co., 49 Conn. 282; Stafford Nat. Bank v. Sprague, 17 Fed. 784, 21 Blatchf. (U. S.) 473;

a conveyance made to a person other than the creditor, conditioned to be void if the debt be paid at a specified time, but if not paid the grantee may sell the land and apply the proceeds to the extinguishment of the debt, paying over the surplus to the grantor.[12] Such a deed has all the essential elements of a mortgage; it is a conveyance of land as security for a debt and the addition of the power of sale does not change the character of the instrument.[13] Both instruments convey a defeasible title only; and the right to redeem is the same in one case as it is said to be in the other. The only important difference between them is that in the one case the conveyance is directly to the creditor, while in the other it is to a third person for his benefit and the trustee's title is in the nature of a base or determinable fee.[14] An absolute deed of trust and a deed of trust in the nature of a mortgage should not be confused. The former is for trust purposes and is unconditional and indefeasible; while the latter is conditioned and defeasible, in the same way that a mortgage is.[15] The distinction was clearly pointed out by the Supreme Court of Ohio, which said: "A deed conveying land to a trustee as mere collateral security for the payment of a debt, with the condition that it shall become void on the payment of the debt when due, and with power to the trustee to sell the land and pay the debt in case of default on the part of the debtor, is a deed of trust in the nature

Christopher v. Mungen, 61 Fla. 513, 534, 55 So. 273; Brantley v. Wood, 97 Ga. 755, 25 S. E. 499; Sargent v. Howe, 21 Ill. 148; Ware v. Schintz, 190 Ill. 189, 60 N. E. 67; Newman v. Samuels, 17 Iowa 528; Lenox v. Reed, 12 Kans. 223; Chafee v. Fourth Nat. Bank, 71 Maine 514, 36 Am. Rep. 345; Eaton v. Whiting, 3 Pick. (Mass.) 484; Flint & P. M. R. Co. v. Auditor-General, 41 Mich. 635, 2 N. W. 835; Webb v. Hoselton, 4 Nebr. 308, 19 Am. Rep. 638; Hurley v. Estes, 6 Nebr. 386; Fiske v. Mayhew, 90 Nebr. 196, 133 N. W. 195; Palmer v. Gurnsey, 7 Wend. (N. Y.) 248; Lawrence v. Farmers' Loan & Trust Co., 13 N. Y. 200, 642; Woodruff v. Robb, 19 Ohio 212; Martin v. Alter, 42 Ohio St. 94; Kemper v. Campbell, 44 Ohio St. 210, 6 N. E. 566; National Bank v. Tennessee &c. R. Co., 62 Ohio St. 564, 57 N. E. 450; Thompson v. Marshall, 21 Ore. 171, 27 Pac. 957; Austin v. Sprague Mfg. Co., 14 R. I. 464; Union Co. v. Sprague, 14 R. I. 452; McVay v. Tousley, 20 S. Dak. 258, 105 N. W. 932; Driskill v. Rebbe, 22 S. Dak. 242, 117 N. W. 135; Robinson v. State (Tex. Cr.), 139 S. W. 978.

[12] De Wolf v. A. & W. Sprague Mfg. Co., 49 Conn. 282; State Bank v. Chapelle, 40 Mich. 447.

[13] Newman v. Samuels, 17 Iowa 528; Eaton v. Whiting, 3 Pick. (Mass.) 484.

[14] Lightcap v. Bradley, 186 Ill. 510, 58 N. E. 221; Ware v. Schintz, 190 Ill. 189, 60 N. E. 67.

[15] Weber v. McCleverty, 149 Cal. 316, 86 Pac. 706; Fox v. Frazer, 92 Ind. 265; Union Co. v. Sprague, 14 R. I. 452.

of a mortgage. By an absolute deed of trust, the grantor parts absolutely with the title, which rests in the grantee unconditionally for the purpose of the trust. The latter is a conveyance to a trustee for the purpose of raising a fund to pay debts, while the former is a conveyance in trust for the purpose of securing a debt, subject to conditions of defeasance."[16]

§ 4606. Mortgages distinguished from conditional sales.—At law, an agreement for a reconveyance, to constitute a defeasance and make the transaction a mortgage, must be executed at the same time with the conveyance and as a part of the same transaction and must be under seal; while in equity any evidence, whether it be in writing or merely parol, which clearly shows that the conveyance was in fact intended only as a security, will make the transaction a mortgage; and if there be a written agreement for reconveyance, it matters not how informal it may be or when it was executed.[17] It follows, therefore, that a court of equity will often pronounce that to be an equitable mortgage which at law would be considered a conditional sale. A court of equity is not concluded by the form of the transaction, whether this seems to indicate a mortgage or a conditional sale, but will have regard to the actual facts.[18] Whether a conveyance be a mortgage or a conditional sale must be determined by a consideration of the peculiar circumstances of each case.[19]

§ 4607. Intention and the existence of a debt—The test.—The intention of the parties as to whether or not the transaction

[16] Hoffman v. Mackall, 5 Ohio St. 124, 64 Am. Dec. 637.

[17] Pearson v. Leay, 38 Ala. 643; Beidleman v. Koch (Ind.), 85 N. E. 977; Dougherty v. McColgan, 6 Gill & J. (Md.) 275; Harmon v. Grants Pass Banking & Trust Co., 60 Ore. 69, 118 Pac. 188; Flagg v. Mann, 2 Sumn. (U. S.) 486, Fed. Cas. No. 4847.

[18] McNamara v. Culver, 22 Kans. 661.

[19] Pendergrass v. Burris, 77 Cal. 19, 19 Pac. 187; Davis v. Stonestreet, 4 Ind. 101; Heath v. Williams, 30 Ind. 495; Hughes v. Sheaff, 19 Iowa 335; Trimble v. McCormick, 12 Ky. L. 857, 15 S. W. 358; Edrington v. Harper, 3 J. J. Marsh. (Ky.) 353, 20 Am. Dec. 145; King v. McCarthy, 50 Minn. 222, 52 N. W. 648; Gassert v. Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240, affd. 149 U. S. 17, 37 L. ed. 631, 13 Sup. Ct. 738; Sanders v. Ayres, 63 Nebr. 271, 88 N. W. 526; Devore v. Woodruff, 1 N. Dak. 143, 45 N. W. 701; Stephens v. Allen, 11 Ore. 188, 3 Pac. 168; Bradley v. Helgerson, 14 S. Dak. 593, 86 N. W. 634; Stamper v. Johnson, 3 Tex. 1; Gibbs v. Penny, 43 Tex. 560; Loving v. Milliken, 59 Tex. 423; Gray v. Shelby, 83 Tex. 405, 18 S. W. 809; Horbach v. Hill, 112 U. S. 144, 28 L. ed. 670, 5 Sup. Ct. 81.

constitutes a mortgage or a conditional sale is perhaps the safest test. This intention is to be ascertained by considering the situation and surroundings of the parties, the circumstances attending the transaction, and the conduct of the parties, as well as the written memorials of the transaction.[20] While in all doubtful cases the courts will construe the contract to be a mortgage rather than a conditional sale,[21] yet, when a conditional sale is clearly established, it will be enforced.[22] The character of the transaction is fixed at the inception of it and is what the intention of the parties makes it.[23] The form of the transaction and the circumstances attending it are the means of finding out the intention. If it was a mortgage in the beginning it remains so;[24] and if it was a conditional sale at the start, no lapse of time will make a mortgage of it. The recording of the conveyance as a mortgage, if it was intended as a sale with a right of repurchase at the option of the grantor, does not make it a mortgage. If not a security

[20] Henley v. Hotaling, 41 Cal. 22; Burnside v. Terry, 45 Ga. 621; Hughes v. Sheaff, 19 Iowa 335; Hawes v. Williams, 92 Maine 483, 43 Atl. 101; Hopper v. Smyser, 90 Md. 363, 45 Atl. 206; Cornell v. Hall, 22 Mich. 377; Smith v. Crosby, 47 Wis. 160, 2 N. W. 104.

[21] Mitchell v. Wellman, 80 Ala. 16; Cosby v. Buchanan, 81 Ala. 574, 1 So. 898; Douglass v. Moody, 80 Ala. 61; Moseley v. Moseley, 86 Ala. 289, 5 So. 732; Peagler v. Stabler, 91 Ala. 308, 9 So. 157; Daniels v. Lowery, 92 Ala. 519, 8 So. 352; Reeves v. Abercrombie, 108 Ala. 535, 19 So. 41; Glass v. Hieronymus, 125 Ala. 140, 28 So. 71, 82 Am. St. 225; Gibson v. Martin, 38 Ark. 207; Sears v. Dixon, 33 Cal. 326; Keithley v. Wood, 47 Ill. App. 102, affd. in 151 Ill. 566, 38 N. E. 149, 42 Am. St. 265; White v. Redenbaugh (Ind.), 82 N. E. 110; Jones v. Gillett, 142 Iowa 506, 118 N. W. 314, 121 N. W. 5; Sheffield v. Hurst, 31 Ky. L. 890, 104 S. W. 350; Skinner v. Miller, 5 Litt. (Ky.) 84; Poindexter v. McCannon, 1 Dew. Eq. (N. Car.) 373, 18 Am. Dec. 591; Tucker v. Witherbee, 130 Ky. 281, 113 S. W. 123; Mooney v. Byrne, 163 N. Y. 86, 57 N. E. 163, revg. 15 App. Div. (N. Y.) 624, 44 N. Y. S. 1124; Walker v. McDonald, 49 Tex. 458; Gray v. Shelby, 83 Tex. 405, 18 S. W. 809; Hume v. Le Compte (Tex. Civ. App.), 142 S. W. 934; Conway v. Alexander, 7 Cranch (U. S.) 218, 3 L. ed. 321; King v. Newman, 2 Munf. (Va.) 40; Robertson v. Campbell, 2 Call (Va.) 421; Rogers v. Burrus, 53 Wis. 530, 9 N. W. 786.

[22] Davis v. Thomas, 1 Russ. & M. 506; Goodman v. Grierson, 2 Ball & B. 274; Felton v. Grier, 109 Ga. 320, 35 S. E. 175; Bloodgood v. Zeily, 2 Caines Cas. (N. Y.) 124; Pennington v. Hanby, 4 Munf. (Va.) 140.

[23] Knowles v. Williams, 58 Kans. 221, 48 Pac. 856; Gassert v. Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240, affd. 149 U. S. 17, 37 L. ed. 631, 13 Sup. Ct. 738; Kleinschmidt v. Kleinschmidt, 9 Mont. 477, 24 Pac. 266; Macauley v. Smith, 132 N. Y. 524, 30 N. E. 997; Devore v. Woodruff, 1 N. Dak. 143, 45 N. W. 701; Davis v. Brewster, 59 Tex. 93; Gray v. Shelby, 83 Tex. 405, 18 S. W. 809.

[24] Poston v. Jones, 122 N. Car. 536, 29 S. E. 951; Hawes v. Williams, 92 Maine 483, 43 Atl. 101; Wasatch Min. Co. v. Jennings, 5 Utah 243, 15 Pac. 65; Froidevaux v. Jordon, 64 W. Va. 388, 62 S. E. 686, 131 Am. St. 911n.

in the beginning, but an absolute sale or conditional sale, no subsequent event, short of a new agreement between the parties, can convert it into a mortgage.[25] Where an instrument contains the exact terms agreed on by the parties, and expresses their intent and meaning, the fact that they thought it a mortgage, while it was in fact a conditional sale, does not change its character or effect.[26]

If the relation of debtor and creditor in any given case existed in the beginning, and the debt still subsists as to the consideration of the conveyance, the transaction will be treated as a mortgage.[27] If, however, the debt was extinguished by a fair agreement, and if the grantor has the privilege merely of refunding if he pleases, by a given time, and thereby entitling himself to a reconveyance, the transaction is a conditional sale and the equity of redemption does not continue.[28] If intended by the parties as a security for money an absolute conveyance is in equity a mortgage. Different instruments executed at the same time, constituting one transaction, are to be read together, in order to ascertain the intent of the parties. It is always competent for persons capable of contracting for themselves to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price, and at a specified time; and the inquiry in every case therefore is whether the contract is a security for the repayment of money or an actual conditional sale.[29] The existence of a

[25] Reed v. Reed, 75 Maine 264; Buse v. Page, 32 Minn. 111, 19 N. W. 736, 20 N. W. 95; Frinck v. Adams, 36 N. J. Eq. 485; Kearney v. Macomb, 16 N. J. Eq. 189; Clark v. Henry, 2 Cow. (N. Y.) 324.

[26] Hershey v. Luce, 56 Ark. 320, 19 S. W. 963, 20 S. W. 6.

[27] Voss v. Eller, 109 Ind. 260, 10 N. E. 74; Blake v. Lowry, 43 Tex. Civ. App. 17, 93 S. W. 521.

[28] Martin v. Martin, 123 Ala. 191, 26 So. 525; Hopper v. Smyser, 90 Md. 363, 45 Atl. 206; Robinson v. Cropsey, 2 Edw. Ch. (N. Y.) 138, affd. 6 Paige (N. Y.) 480; Blumberg v. Beekman, 121 Mich. 647, 80 N. W. 710; Duell v. Leslie, 207 Mo. 658, 106 S. W. 489; Holmes v. Grant, 8 Paige (N. Y.) 243; Brown v. Dewey, 2 Barb. (N. Y.) 28, revg. 1 Sandf. (N. Y.) Ch. 56; Whitney v. Townsend, 2 Lans. (N. Y.) 249; Woodworth v. Morris, 56 Barb. (N. Y.) 97; Kunert v. Strong, 103 Wis. 70, 79 N. W. 32; Francis v. Francis, 78 S. Car. 178, 58 S. E. 804; Cockrill v. Whitworth, (Tenn.) 52 S. W. 524.

[29] Spence v. Steadman, 49 Ga. 133; Clark v. Lyon, 46 Ga. 202; Bearss v. Ford, 108 Ill. 16; Jackson v. Lynch, 129 Ill. 72, 21 N. E. 580, 22 N. E. 246; Morriss v. Blackman, 179 Ill. 103, 53 N. E. 547; Whittemore v. Fisher, 132 Ill. 243, 24 N. E. 636; Brey v. Barbour, 14 Ky. L. 655, 20 S. W. 899; Hawes v. Williams, 92 Maine 483, 43 Atl. 101; Hicks v. Hicks, 5 Gill & J. (Md.) 75; Sanborn v. Sanborn, 104 Mich. 180, 62 N. W. 371; Hill v. Edwards, 11 Gil. (Minn.) 5; Holton v. Meighen, 15 Gil. (Minn.)

debt is the test. If an absolute conveyance be made and accepted in payment of an existing debt, and not merely as security for it, an agreement by the grantee to reconvey the land to the grantor upon receiving a certain sum within a specified time does not create a mortgage, but a conditional sale, and the grantee holds the premises subject only to the right of the grantor to demand a reconveyance according to the terms of the agreement.[30]

50; Weide v. Gehl, 21 Minn. 449; Buse v. Page, 32 Minn. 111, 19 N. W. 736, 20 N. W. 95. "If the deed or conveyance be accompanied by a condition or matter of defeasance expressed in the deed, or even contained in a separate instrument, or exist merely in parol—let the consideration for it have been a pre-existing debt or a present advance of money to the grantor—the only inquiry necessary to be made is, whether the relation of debtor and creditor remains and the debt still subsists between the parties? For, if it does, then the conveyance must be regarded as a security for the payment and be treated in all respects as a mortgage. * * * On the other hand, where the debt forming the consideration for the conveyance is extinguished at the time by the express agreement of the parties, or the money advanced is not paid by way of loan so as to constitute a debt and liability to repay it, but, by the terms of the agreement, the grantor has the privilege of refunding or not at his election, there it must be deemed purchase money and the transaction will be a sale upon condition, which the grantor can defeat only by repurchase or performance of the condition on his part within the time limited for the purchase, and in this way entitle himself to a reconveyance of the property." Robinson v. Cropsey, 2 Edw. Ch. (N. Y.) 138, affd. 6 Paige (N. Y.) 480. Lipp v. South Omaha Land Syndicate, 24 Nebr. 692, 40 N. W. 129; Huston v. Canfield, 57 Nebr. 345, 77 N. W. 763; Leahigh v. White, 8 Nev. 147; White v. Megill (N. J. Eq.), 18 Atl. 355; Pidcock v. Swift, 51 N. J. Eq. 405, 27 Atl. 470, affd. 53 N. J. Eq. 238, 34 Atl. 1135; Montgomery v. Beecher (N. J.), 31 Atl. 451; Garland v. Sperling, 6 N. Mex. 623, 30 Pac. 925, affd. 7 N. Mex. 121, 32 Pac. 499; Connor v. Atwood, 22 N. Y. St. 442, 4 N. Y. S. 561; Mooney v. Byrne, 163 N. Y. 86, 57 N. E. 163, revg. 15 App. Div. (N. Y.) 624, 44 N. Y. S. 1124; Shields v. Russell, 66 Hun (N. Y.) 226, 20 N. Y. S. 909, 49 N. Y. St. 134, affd. 142 N. Y. 290, 36 N. E. 106; Jasper v. Hazen, 4 N. Dak. 1, 51 N. W. 454, 23 L. R. A. 58; National Bank v. Tennessee Coal, Iron & R. Co., 62 Ohio St. 564, 57 N. E. 450; Weiseham v. Hocker, 7 Okla. 250, 54 Pac. 464; Cole v. Bolard, 22 Pa. St. 431; Wheeland's Lessee v. Swartz, 1 Yeates (Pa.) 579; Lapowski v. Smith, 1 Tex. Civ. App. 391, 20 S. W. 957; Wing v. Cooper, 37 Vt. 169; Schriber v. LeClair, 66 Wis. 579, 29 N. W. 570; Hoile v. Bailey, 58 Wis. 434, 17 N. W. 322; Schierl v. Newburg, 102 Wis. 552, 78 N. W. 761; Ferguson v. Bond, 39 W. Va. 561, 20 S. E. 591.

[30] "If the parties intended a sale, whether in payment of an antecedent debt or a present consideration paid, with the right to repurchase within a specified time, and for an agreed price, the purchaser becomes the owner of the property, and the vendor of the right to repurchase, if he sees proper to do so. No obligations rest upon the grantor to do so. It is optional whether he will or not. If he declines to do so, the vendee has no cause of action against him, either by reason of money paid, or for the debt satisfied by the conveyance. If there remain in the vendee a cause of action for the money paid, or, in the other case, for the antecedent debt, this will determine the transaction to have been intended as a mortgage, and not an absolute conveyance. It is not left optional with the grantor to determine whether he

§ 4608. Evidence and construction.—In order to convert what appears to be a conditional sale into a mortgage, the evidence should be so clear as to leave no doubt that the real intention of the parties was to execute a mortgage.[31] A covenant or agreement to reconvey is not necessarily either at law or in equity a defeasance. It is one fact which may, in connection with other

owes a debt to the grantee or not, and, by his election to owe a debt to the grantee, convert a sale with the right of repurchase into a mortgage. His power to elect to repurchase or redeem exists only where there is a sale with the right to be repurchased. If a mortgage was intended by the parties, the debt exists, whether he consents or not, and the mortgagee has the same legal authority to enforce the instrument as a mortgage as the grantor to have the instrument declared a mortgage." Adams v. Pilcher, 92 Ala. 474, 8 So. 757; Robinson v. Farrelly, 16 Ala. 472; West v. Hendrix, 28 Ala. 226; Wells v. Marrow, 38 Ala. 125; Peoples v. Stolla, 57 Ala. 53; Haynie v. Robertson, 58 Ala. 37; Tisdale v. Maxwell, 58 Ala. 40; Mobile Bldg. & Loan Assn. v. Robertson, 65 Ala. 382; Turner v. Wilkinson, 72 Ala. 361; Douglass v. Moody, 80 Ala. 61; Booker v. Waller, 81 Ala. 549, 8 So. 225; Perdue v. Bell, 83 Ala. 396, 3 So. 698; McMillan v. Jewett, 85 Ala. 476, 5 So. 145; Vincent v. Walker, 86 Ala. 333, 5 So. 465; Adams v. Pilcher, 92 Ala. 474, 8 So. 757; Martin v. Martin, 123 Ala. 191, 26 So. 525; Stryker v. Hershy, 38 Ark. 264; Hillhouse v. Dunning, 7 Conn. 139; Spence v. Steadman, 49 Ga. 133; Murphy v. Purifoy, 52 Ga. 480; Pitts v. Maier, 115 Ga. 281, 41 S. E. 570; Magnusson v. Johnson, 73 Ill. 156; Union Mut. Life Ins. Co. v. Slee, 110 Ill. 35; Rue v. Dole, 107 Ill. 275; Pitts v. Cable, 44 Ill. 103; Batcheller v. Batcheller, 144 Ill. 471, 33 N. E. 24; Fisher v. Green, 142 Ill. 80, 31 N. E. 172; Freer v. Lake, 115 Ill. 662, 4 N. E. 512; Sutphen v. Cushman, 35 Ill. 186; Burgett v. Osborne, 172 Ill. 227, 50 N. E. 206; Kerting v. Hilton, 152 Ill. 658, 38 N. E. 941; Crane v. Chandler, 190 Ill. 584, 60 N. E. 826; Rogers v. Beach, 115 Ind. 413, 17 N. E. 609; Voss v. Eller, 109 Ind. 260, 10 N. E. 74; Hall v. Savill, 3 G. Greene (Iowa) 37, 54 Am. Dec. 485; Bridges v. Linder, 60 Iowa 190, 14 N. W. 217; Hughes v. Sheaff, 19 Iowa 335; Bigler v. Jack, 114 Iowa 667, 87 N. W. 700; Honore v. Hutchings, 8 Bush (Ky.) 687; Stinchfield v. Milliken, 71 Maine 567; French v. Sturdivant, 8 Greenl. (Maine) 246; Reed v. Reed, 75 Maine 264; Hawes v. Williams, 92 Maine 483, 43 Atl. 101; O'Neil v. Capelle, 62 Mo. 296; Slowey v. McMurray, 27 Mo. 113, 72 Am. Dec. 251; Stowe v. Banks, 123 Mo. 672, 27 S. W. 347; Kleinschmidt v. Kleinschmidt, 9 Mont. 477, 24 Pac. 266; Gassert v. Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240, affd. 149 U. S. 17, 37 L. ed. 631, 13 Sup. Ct. 738; Morrison v. Brand, 5 Daly (N. Y.) 40, affd. 56 N. Y. 657; Glover v. Payn, 19 Wend. (N. Y.) 518; Odell v. Montross, 68 N. Y. 499; Kraemer v. Adelsberger, 122 N. Y. 467, 25 N. E. 859; Pemberton v. Simmons, 100 N. Car. 316, 6 S. E. 122; King v. Kincey, 36 N. Car. 187, 36 Am. Dec. 40; McGuin v. Lee, 10 N. Dak. 160, 86 N. W. 714; Ruffier v. Womack, 30 Tex. 332; Gray v. Shelby, 83 Tex. 405, 18 S. W. 809; Seeligson v. Singletary. 66 Tex. 271, 17 S. W. 541; Wilcox v. Tennant, 13 Tex. Civ. App. 220, 35 S. W. 865; Snavely v. Pickle, 29 Gratt. (Va.) 27; Kerr v. Hill, 27 W. Va. 576; Hoffman v. Ryan, 21 W. Va. 415; Davis v. Demming, 12 W. Va. 246; Smith v. Crosby, 47 Wis. 160, 2 N. W. 104; Hoile v. Bailey, 58 Wis. 434, 17 N. W. 322; Villa v. Rodriguez, 12 Wall. (U. S.) 323, 20 L. ed. 406.

[31] Mulhaupt v. Youree, 35 La. Ann. 1052; Cotton v. McKee, 68 Maine 486; Winters v. Earl, 52 N. J. Eq. 52, 28 Atl. 15, affd. 52 N. J. Eq. 588, 33 Atl. 50; Fullerton v. McCurdy, 55 N. Y. 637.

facts, go to show that the party really intended a deed to operate as a mortgage; but standing alone it does not produce that result. Something more is necessary; and an indispensable thing is a debt by the grantor to the grantee for which the conveyance is security.[32] A contract of repurchase may, upon its face, show that the parties really intended an absolute sale, with the privilege to the vendor of repurchasing on the terms named. It will be so interpreted when the provisions of the contract are inconsistent with the idea that a mortgage to secure an indebtedness was intended.[33] The agreement upon its face may be either an agreement to reconvey merely, or may amount with the deed to a mortgage, in which case a resort to evidence outside of these instruments may be necessary to determine the character of the transaction.[34] An express provision that the contract for reconveyance should be regarded only as a contract to reconvey, and not as an acknowledgment that the deed was intended as a mortgage, should be given effect if consistent with the whole transaction, as declaring the intention of the parties that it should not create a mortgage.[35] If an instrument declares that it is a conditional deed and not a mortgage, and is to be absolute upon the nonpayment of the sum

[32] Perdue v. Bell, 83 Ala. 396, 3 So. 698; Haynie v. Robertson, 58 Ala. 37; Henley v. Hotaling, 41 Cal. 22; Rue v. Dole, 107 Ill. 275; Bearss v. Ford, 108 Ill. 16; Wolfe v. McMillan, 117 Ind. 587, 20 N. E. 509; Eckert v. McBee, 27 Kans. 232; Edrington v. Harper, 3 J. J. Marsh. (Ky.) 353, 20 Am. Dec. 145; Hopper v. Smyser, 90 Md. 363, 45 Atl. 206; Buse v. Page, 32 Minn. 111, 19 N. W. 736; 20 N. W. 95; Butman v. James, 34 Minn. 547, 27 N. W. 66; Heaton v. Darling, 66 Minn. 262, 68 N. W. 1087; McGuin v. Lee, 10 N. Dak. 160, 86 N. W. 714; Mooney v. Byrne, 163 N. Y. 86, 57 N. E. 163, revg. 15 App. Div. (N. Y.) 624, 44 N. Y. S. 1124; In re Callahan's Estate, 13 Phila. (Pa.) 381; Hodge v. Weeks, 31 S. Car. 276, 9 S. E. 953; Calhoun v. Lumpkin, 60 Tex. 185; Horbach v. Hill, 112 U. S. 144, 28 L. ed. 670, 5 Sup. Ct. 81; Wallace v. Johnstone, 129 U. S. 58, 32 L. ed. 619, 9 Sup. Ct. 243; Holladay v. Willis, 101 Va. 274, 43 S. E. 616; Kerr v. Hill, 27 W. Va. 576.

[33] Hanford v. Blessing, 80 Ill. 188; Hays v. Carr, 83 Ind. 275; Voss v. Eller, 109 Ind. 260, 10 N. E. 74; Yost v. First National Bank, 66 Kans. 605, 72 Pac. 209; Pumilla v. DeGeorge (Tex.), 74 S. W. 813; Smith v. Crosby, 47 Wis. 160, 2 N. W. 104.

[34] Parish v. Gates, 29 Ala. 254; McCarron v. Cassidy, 18 Ark. 34; Bishop v. Williams, 18 Ill. 101; Snyder v. Griswold, 37 Ill. 216; McNamara v. Culver, 22 Kans. 661; Devore v. Woodruff, 1 N. Dak. 143, 45 N. W. 701; Rich v. Doane, 35 Vt. 125.

[35] Ford v. Irwin, 18 Cal. 117; Henley v. Hotaling, 41 Cal. 22; Chicago, B. & Q. R. Co. v. Watson, 113 Ill. 195; Hays v. Carr, 83 Ind. 275; McGuin v. Lee, 10 N. Dak. 160, 86 N. W. 714; Jasper v. Hazen, 4 N. Dak. 1, 58 N. W. 454, 23 L. R. A. 58.

mentioned at a time specified, it is to be construed as a conditional deed and not a mortgage.[36]

§ 4609. Rights of the parties under a mortgage and under a conditional sale.—While a conditional sale and a mortgage are, in form and substance, very much alike, the rights of the parties under them are very different.[37] A mortgage may be redeemed at any time before the right is cut off by foreclosure, but there can be no redemption under a conditional sale after the day appointed. This is the contract of the parties, and either one of them is entitled to have it enforced according to its terms.[38] The option to repurchase under a conditional sale may be a personal privilege which cannot be enforced in case of the death of the obligee during the continuance of the option.[39] The rights of the parties to the conveyance must be reciprocal. If the transaction be in the nature of a mortgage so that the grantor may insist upon a reconveyance, the grantee may at the same time insist upon repayment, but if it be a conditional sale, so that the grantor need not repurchase except at his option, the grantee cannot insist upon repayment.[40]

[36] Burnside v. Terry, 45 Ga. 621.

[37] Flagg v. Mann, 14 Pick. (Mass.) 467; Conway v. Alexander, 7 Cranch (U. S.) 218, 3 L. ed. 321.

[38] Joy v. Birch, 4 Cl. & F. 57; Pegg v. Wisden, 16 Beav. 239; Barrell v. Sabine, 1 Vern. 268; Thornborough v. Baker, 3 Swanst. 628; Ensworth v. Griffiths, 1 Bro. P. C. 149; Perry v. Meddowcroft, 4 Beav. 197; People v. Irwin, 14 Cal. 428, 18 Cal. 117; Henley v. Hotaling, 41 Cal. 22; Phipps v. Munson, 50 Conn. 267; Hanford v. Blessing, 80 Ill. 188; Pitts v. Cable, 44 Ill. 103; Carr v. Rising, 62 Ill. 14; Dwen v. Blake, 44 Ill. 135; Shays v. Norton, 48 Ill. 100; Trucks v. Lindsey, 18 Iowa 504; Cornell v. Hall, 22 Mich. 377; Merritt v. Brown, 19 N. J. Eq. 286; Holmes v. Grant, 8 Paige (N. Y.) 243; Brown v. Dewey, 2 Barb. (N. Y.) 28; Glover v. Payn, 19 Wend. (N. Y.) 518; Moss v. Green, 10 Leigh (Va.) 251, 34 Am. Dec. 731; Haines v. Thomson, 70 Pa. St. 434; Ransone v. Frayser's Exrs., 10 Leigh (Va.) 592; Rich v. Doane, 35 Vt. 125; Schriber v. LeClair, 66 Wis. 579, 29 N. W. 570.

[39] Newton v. Newton, 11 R. I. 390, 23 Am. Rep. 476.

[40] Williams v. Owen, 10 Sim. 386; Davis v. Thomas, 1 Russ. & M. 506; Shaw v. Jeffery, 13 Moore P. C. 432; Goodman v. Grierson, 2 Ball & B. 274; Alderson v. White, 2 De G. & J. 97; Tapply v. Sheather, 8 Jur. (N. S.) 1163; McNamara v. Culver, 22 Kans. 661; Eckert v. McBee, 27 Kans. 232.

CHAPTER CXL.

FORM, CONTENTS AND REQUISITES OF MORTGAGES.

A. Form and Contents.

§ 4615. Form of conveyance — In general.
4616. Statutory forms.
4617. Description of parties.
4618. Description of the premises.
4619. Description of debts — In general.
4620. Description of note.
4621. Specification of the amount of the debt.
4622. Determination of amount of debt—Construction.
4623. Increasing amount of debt.
4624. Habendum.
4625. Defeasance.
4626. Covenants—In general.
4627. Covenants for payment of debt.
4628. Interest.
4629. Taxes.
4630. Insurance.
4631. Time of payment of debt.
4632. Execution.
4633. Date.
4634. Filling in blanks.
4635. Delivery and acceptance.
4636. Alteration of mortgage.
4637. Reformation.
4638. Evidence to vary terms of mortgage.
4639. Construction.
4640. Recording.
4641. Mortgages to secure future advances.
4642. Mortgages to secure future advances—Effect of record.
4643. Mortgages to secure future advances—Priority.
4644. Limitation of amount of future advances.
4645. Mortgage of indemnity.
4646. Mortgages for support.

B. Absolute Deed as Mortgage.

4647. In general.
4648. Deed and defeasance—Time of execution.
§ 4649. Cancelation of defeasance.
4650. Absolute deed as mortgage or conditional sale—Facts considered.
4651. Existence of debt.
4652. Extinguishment of debt.
4653. Contract for loan.
4654. Adequacy or inadequacy of price.
4655. Evidence.
4656. Waiver of right of redemption.

C. Equitable Mortgages.

4657. Definition.
4658. By agreements.
4659. Informal mortgages.
4660. By assignment of contracts of purchase.
4661. By deposit of title deeds.

D. Parties.

4662. Parties—In general.
4663. Executors, administrators and guardians.
4664. Insane persons.
4665. Infants.
4666. Married women—In general.
4667. Married women—Mortgage to secure husband's debts.
4668. Married women — Mortgages under statutes.
4669. Partners.
4670. Corporations.
4671. Power to mortgage.
4672. Who may take a mortgage.
4673. Joint mortgagees.

E. Consideration—Void and Usurious Mortgages.

4674. In general.
4675. Failure of consideration.
4676. Illegal consideration.
4677. Mortgage obtained by fraud.
4678. Mortgage obtained by duress.
4679. Mortgage fraudulent as to creditors.
4680. Usury.
4681. Commissions.

§ 4682. Proof and defense of usury.
4683. Compound interest.
F. What May Be the Subject of a Mortgage.
4684. In general.
4685. Vested, contingent and future interests.
4686. Interest conveyed.
4687. Buildings.
4688. Fixtures—In general.
§ 4689. Rule for determining whether fixtures are covered by mortgage.
4690. Effect of chattel mortgage in determining whether fixtures covered.
4691. Accessions to mortgaged property.
4692. Products of the soil.
4693. After-acquired property.

A. Form and Contents.

§ 4615. Form of conveyance—In general.—No particular form is necessary to constitute a mortgage.[1] It must be in writing,[2] and must clearly indicate the creation of a lien, specify the debt to secure which it is given, and the property upon which it is to take effect.[3] It is not necessary that the entire mortgage be embraced in one instrument. It may consist of an absolute deed with a separate defeasance executed by the grantee; and this defeasance may even rest in parol. It differs from a warranty deed in an added condition that, if the grantor pay a certain sum of money, or perform other obligations named, then it shall be void. There may be other conditions contained in the instrument, such as the payment of interest and of taxes upon the premises, or insurance upon the building; but these do not change the effect of the conveyance as a mortgage.

§ 4616. Statutory forms.—In some states statutes have been enacted providing forms for the execution of mortgages. Under these statutes the granting part of the deed, as well as the condition, differs much in different parts of the country. Under them the legal tenor and effect of the different covenants may be,

[1] Georgia Code (1911), § 3257; Woodworth v. Guzman, 1 Cal. 203; DeLeon v. Higuera, 15 Cal. 483; Connor v. Connor, 59 Fla. 467, 52 So. 727; Burnside v. Terry, 45 Ga. 621; Baldwin v. Jenkins, 23 Miss. 206; Mason v. Moody, 26 Miss. 184; Cagliostro v. Galgano, 69 Misc. (N. Y.) 321, 125 N. Y. S. 523; Harris v. Jones, 83 N. Car. 317.

[2] Georgia Civ. Code (1911), § 3257; Williams v. Davis, 154 Ala. 422, 45 So. 908; Porter v. Muller, 53 Cal. 677; Eikelman v. Perdew, 140 Cal. 687, 74 Pac. 291; Duke v. Culpepper, 72 Ga. 842; Georgia, S. & F. R. Co. v. Thompson, 111 Ga. 731, 36 S. E. 945; American Sav. Bank & T. Co. v. Helgesen, 64 Wash. 54, 116 Pac. 837.

[3] National Bank v. Tenn. Coal &c. R. Co., 62 Ohio St. 564, 57 N. E. 450; New Orleans Nat. Bank. Assn. v. Adams, 109 U. S. 211, 27 L. ed. 910, 3 Sup. Ct. 161.

and in some states are, obtained simply by naming them, without repeating the covenants themselves. In like manner the full effect of a power of sale may be had by a simple reference in the mortgage to a statutory power, instead of encumbering the record with the elaborate powers now in use. The purpose of this legislation has been to simplify the mortgage conveyance and to get away from the cumbersome forms that grew up under the common law.[4]

§ 4617. **Description of parties.**—While it is important that the names of the parties to the mortgage should be given, accurately and fully in the granting part of the instrument,[5] it is not absolutely necessary. Parol evidence is admissible to show who was really intended as the grantee, when the name is claimed to be erroneous and there is a person of the name used in the mortgage.[6] It is not absolutely essential that the mortgagee be described by name, if there be such other description as will distinguish the person intended from all others.[7] Even a mortgage, made under an assumed name by the owner of the land, is valid if the identity of the mortgagor as owner is proved.[8] While the mortgagor's name and description should be stated at the beginning of the instrument, it will be valid if it occurs later in the body of the same.[9] The omission of the mortgagee's name from the

[4] For further statutory forms see Jones on Mortgages (6th ed.), § 61; Cal. Civ. Code (1906), § 2948; Ill. R. S. (1908), ch. 30, § 11; Ind. R. S. (1908), § 3961; Iowa Ann. Code. (1897), § 2958; Md. Pub. G. Laws (1904), art. 21, § 60; Mich. Comp. Laws (1897), § 9017; Miss. Ann. Code (1906), § 2820; 1 Mo. R. S. (1899), Supp. of Forms V; 4 N. Y. B. C. & G. Consol. Laws 5085; N. Dak. R. Code (1905), § 6174; Okla. Ter. R. S. (1903), §§ 916, 3565; S. Dak. R. Code (1903), § 2063; Tenn. Ann. Code (1896), § 3680; Utah Comp. Laws (1907), § 1983; Va. Code (1904), § 2441; W. Va. Code (1906), ch. 72, § 3052; Wis. Ann. Stat. (1898), § 2209; Wyo. R. S. (1899), § 2774.

[5] See Shelden v. Carter, 90 Ala. 380, 8 So. 63; Davidson v. Alabama Iron &c. Co., 109 Ala. 383, 19 So. 390.

[6] Peabody v. Brown, 10 Gray (Mass.) 45. See Anglo-Californian Bank v. Cerf, 147 Cal. 384, 81 Pac. 1077; Fisher v. Milmine, 94 Ill. 328; Swan v. Vogel, 31 La. Ann. 38; Scanlan v. Wright, 13 Pick. (Mass.) 523, 25 Am. Dec. 344; Menage v. Burke, 43 Minn. 211, 45 N. W. 155, 19 Am. St. 235.

[7] Madden v. Floyd, 69 Ala. 221; Frederick v. Wilcox, 119 Ala. 355, 24 So. 582, 72 Am. St. 925; Carpenter v. Zarbuck, 74 Ark. 474, 86 S. W. 299; Healey v. Zobel, 45 Colo. 294, 101 Pac. 56; Beaver v. Slanker, 94 Ill. 175; Richey v. Sinclair, 167 Ill. 184, 47 N. E. 364; Bay v. Posner, 78 Md. 42, 24 Atl. 1084.

[8] Scanlan v. Grimmer, 71 Minn. 351, 74 N. W. 146, 70 Am. St. 326.

[9] Frederick v. Wilcox, 119 Ala. 355, 24 So. 582, 72 Am. St. 925.

granting clause will not invalidate a mortgage, if the person intended to be secured is identified by other parts of the instrument.[10] The designation of "junior" or "second" is no part of a man's name; and, although convenient and desirable for the purpose of distinguishing one party from another of the same name, it is not essential, and the person intended may be shown in some other way.[11] The description of a person by his occupation is an addition of the same character, though of less importance because the terms used to describe the occupation are so general that they are of little aid in identifying the person. Where a woman is a party, her husband's name should be given if she is married, and if not married the mortgage should state that fact. It is also desirable to state the residences of the parties by naming the city, county and state.

§ 4618. **Description of the premises.**—An accurate description of the premises is important as affecting the value of the security, and oftentimes affecting, as well, the interest of the mortgagor and of persons holding title under him. But a description, although general and indefinite in itself, if by extrinsic evidence it can be made practically certain what property it was intended to cover, will be sufficient to sustain the lien.[12] Thus a

[10] Beaver v. Slanker, 94 Ill. 175; Richey v. Sinclair, 167 Ill. 184, 47 N. E. 364; Bay v. Posner, 78 Md. 42, 26 Atl. 1084.

[11] Cobb v. Lucas, 15 Pick. (Mass.) 7; Kincaid v. Howe, 10 Mass. 203.

[12] Johnson v. McKay, 119 Ga. 196, 45 S. E. 992, 100 Am. St. 166; Walden v. Walden, 128 Ga. 126, 57 S. E. 323; Payton v. McPhaul, 128 Ga. 510, 58 S. E. 50; Godfrey v. White, 32 Ind. App. 265, 69 N. E. 688; Watts v. Parks, 25 Ky. L. 1908, 78 S. W. 1125; Coogan v. Burling Mills, 124 Mass. 390; Tucker v. Field, 51 Miss. 191. See O'Neal v. Seixas, 85 Ala. 80, 4 So. 745; Whitney v. Buckman, 13 Cal. 536; De Leon v. Higuera, 15 Cal. 483; Hancock v. Watson, 18 Cal. 137; Began v. O'Reilly, 32 Cal. 11; Patterson v. Evans, 91 Ga. 799, 18 S. E. 31; Broach v. O'Neal, 94 Ga. 474, 20 S. E. 113; Bybee v. Hageman, 66 Ill. 519; Mason v. Merrill, 129 Ill. 503, 21 N. E. 799; Casler v. Byers, 129 Ill. 657, 22 N. E. 507, affg. 28 Ill. App. 128; Richey v. Sinclair, 167 Ill. 184, 47 N. E. 364; English v. Roche, 6 Ind. 62; Blakemore v. Taber's Exr., 22 Ind. 466; Thomson v. Madison &c. Assn., 103 Ind. 279, 2 N. E. 735; Baker v. Bank of Louisiana, 2 La. Ann. 371; Bollinger v. McDowell, 99 Mo. 632, 13 S. W. 100; Morse v. Dewey, 3 N. H. 535; Boon v. Pierpont, 28 N. J. Eq. 7; Redfields v. Redfields (N. J.), 13 Atl. 600. In Connecticut it is declared to be the policy of the law with regard to mortgages that they shall give definite information as to the property mortgaged, and it is intimated that a description which would be sufficient in an absolute deed might not be sufficient in a mortgage. Herman v. Deming, 44 Conn. 124; North v. Belden, 13 Conn. 376, 35 Am. Dec. 83; De Wolf v. A. & W. Sprague Mfg. Co., 49 Conn. 282. It is doubtful if

description by reference to other deeds is sufficient.[13] A description by boundaries prevails as against the description by reference to other deeds;[14] and a description by metes and bounds prevails over a general description of the land as being "all" of a certain tract of which a person died seized.[15] If the mortgage clearly and unequivocally describes more land than is embraced in the deeds referred to, although the premises described are mentioned as "the same estate" mentioned in the deeds, the conveyance is not restricted by such reference to the premises described in the deeds referred to, but will also embrace the land described by metes and bounds.[16] The lines of ascertained boundaries generally control, rather than a description of a quantity of the land, unless it appears that the averment or covenant was intended to control.[17] A reference to the "same premises" may enlarge the terms of a specific description.[18]

Where the objection is merely to the indefiniteness of the description, it has been held that the mortgagor is estopped to say that he conveyed the property by a description so indefinite that no title could pass upon a foreclosure sale of the same.[19] When, however, the description is such that property may pass or be sold under the mortgage which the mortgagor did not intend to include, it is proper that he should ask to have it reformed. But very strong proof is required to support an allegation that by mistake a mortgage was made to embrace land that ought not to have been included; and the testimony of the mortgagor that he did not intend the mortgage should cover a portion of the premises described, which were in a condition to be mortgaged, has been held wholly insufficient to exclude such portion.[20] If the description of the property in the granting clause of the mortgage

these cases would be lawful anywhere else. Jones v. McKinney, 135 Ga. 60, 68 S. E. 788, 31 L. R. A. (N. S.) 900n.

[13] Wallace v. Furber, 62 Ind. 103. See Willard v. Moulton, 4 Greene (Maine) 14; Berry v. Derwart, 55 Md. 66.

[14] Steele v. Williams, 12 Ky. L. 770, 15 S. W. 49.

[15] Cummings v. Black, 65 Vt. 76, 25 Atl. 906; Spiller v. Scribner, 36 Vt. 245.

[16] Auburn Congregational Church v. Walker, 124 Mass. 69.

[17] Maguire v. Bissell, 119 Ind. 345, 21 N. E. 326; Doyle v. Mellen, 15 R. I. 523, 8 Atl. 709.

[18] Patterson v. Harlan, 124 Pa. St. 67, 16 Atl. 496

[19] Whitney v. Buckman, 13 Cal. 536.

[20] Shepard v. Shepard, 36 Mich. 173.

be inconsistent with a provision contained in the condition the former will control.[21]

Although, in some cases, a mortgage describing land by township and range, without stating in what county and state the land was situated, has been held void,[22] the courts will take judicial notice of government surveys and legal subdivisions, and, when the county and state are not named, will generally presume that the land is situated in the state where the parties reside.[23] A mortgage describing land as parts of different sections, without stating the township or range, has been held void.[24] But an error in the number of the range or in the omission of it will not affect the validity of the mortgage, if the property be otherwise described with such certainty as to clearly identify it.[25] A mortgage which does not name the town, county or state in which the land is situated may nevertheless be rendered certain in the description of the premises by reference to another deed, which contains a full and accurate description,[26] or to the land of the adjacent owners,[27] or by extrinsic evidence.[28] A deed which omits to name the county and state in which the land is situated, but purports to have been executed in a certain county and state, between parties residing therein, is presumed to be of the land situated in such county and state.[29] A mistake in the number of a lot may be rendered immaterial by the boundaries, which will control when fixed and certain.[30] An error in giving the number of a block is immaterial when the description is otherwise accurate, and could

[21] Donnan v. The Intelligencer Printing &c. Co., 70 Mo. 168.

[22] Cochran v. Utt, 42 Ind. 267; Murphy v. Hendricks, 57 Ind. 593.

[23] Smith v. Green, 41 Fed. 455; Bybee v. Hageman, 66 Ill. 519; Burton v. Ferguson, 69 Ind. 486; Russell v. Sweezey, 22 Mich. 235; Quinn v. Champagne, 38 Minn. 322, 37 N. W. 451.

[24] Boyd v. Ellis, 11 Iowa 97.

[25] White v. Hermann, 51 Ill. 243, 99 Am. Dec. 543; Kile v. Yellowhead, 80 Ill. 208; Thornhill v. Burthe, 29 La. Ann. 639; Gerald v. Gerald, 31 S. Car. 171, 9 S. E. 792. As to whether the meridian or county controls, see Sickmon v. Wood, 69 Ill. 329. As to definiteness of description of portions of sections, see Mettart v. Allen, 139 Ind. 644, 39 N. E. 239; Collins v. Dressler, 133 Ind. 290, 32 N. E. 883; Cook v. Gilchrist, 82 Iowa 277, 48 N. W. 84.

[26] Harding v. Strong, 42 Ill. 148, 89 Am. Dec. 415; Robinson v. Brennan, 115 Mass. 582; Slater v. Breese, 36 Mich. 77; Boon v. Pierpont, 32 N. J. Eq. 217.

[27] Johnson v. McKay, 119 Ga. 196, 45 S. E. 992, 100 Am. St. 166; Ells v. Sims, 2 La. Ann. 251.

[28] Slater v. Breese, 36 Mich. 77.

[29] Mann v. State, 116 Ind. 383, 19 N. E. 181; Dutch v. Boyd, 81 Ind. 146.

[30] Cooper v. Bigby, 13 Mich. 463.

apply only to the lot intended, and the names of the streets upon which the land is situated are correctly given.[31]

§ 4619. Description of debt—In general.—To constitute a mortgage there must necessarily be a debt which is the subject of the security. It is not necessary, however, that there be any personal liability to pay the debt, as in the case of a mortgage for future advances, where the mortgagee agrees to rely solely on the pledge of real estate for his security.[32] Literal exactness in describing the indebtedness is not required; it is sufficient if the description be correct as far as it goes, and full enough to direct attention to the sources of correct and full information in regard to it, and the language used is not liable to deceive or mislead as to the nature or amount of it.[33] It need not be so complete as to exclude extraneous inquiry concerning the liens on the property. But it must show with reasonable certainty what is the subject-matter of the mortgage, and must define the encumbrance so that a fraudulent mortgagor may not substitute other debts and shield himself from the demands of his creditors.[34] It is not essential that there be a note or bond or other obligation separate from the mortgage.[35] It is only necessary that there be a debt or a duty to be performed, either present or to arise in the future, and that this be recited in the mortgage.[36] This need not be evidenced by any writing. The nature and

[31] Sharp v. Thompson, 100 Ill. 447, 39 Am. Rep. 61; Rhodes v. Outcalt, 48 Mo. 367; Baker v. Bartlett, 18 Mont. 446, 45 Pac. 1084, 56 Am. St. 594; Cake v. Cake, 127 Pa. St. 400, 17 Atl. 984.

[32] South Sea Co. v. Duncomb, 2 Stra. 919; Hickox v. Lowe, 10 Cal. 197; Hodgdon v. Shannon, 44 N. H. 572,

[33] Curtis v. Flinn, 46 Ark. 70; Ricketson v. Richardson, 19 Cal. 330; Booth v. Barnum, 9 Conn. 286, 23 Am. Dec. 339; Gardner v. Cohn, 191 Ill. 553, 61 N. E. 492; Morris v. Murray, 82 Ky. 36, 5 Ky. L. 821; Sheafe v. Gerry, 18 N. H. 245; Gilman v. Moody, 43 N. H. 239; Hurd v. Robinson, 11 Ohio St. 232; Gill v. Pinney's Admr., 12 Ohio St. 38.

[34] Hubbard v. Savage, 8 Conn. 215; Pettibone v. Griswold, 4 Conn. 158, 10 Am. Dec. 106; Braunhall v. Flood, 41 Conn. 68; Stoughton v. Pasco, 5 Conn. 442, 13 Am. Dec. 72; Booth v. Barnum, 9 Conn. 286, 23 Am. Dec. 339; Crane v. Deming, 7 Conn. 387. The Connecticut cases are exceptionally strict in this matter, and are not followed elsewhere. Cazort v. Dunbar, 91 Ark. 400, 121 S. W. 270.

[35] O'Connor v. Nadel, 117 Ala. 595, 23 So. 532; Schierl v. Newberg, 102 Wis. 552, 78 N. W. 761.

[36] Knight v. Coleman, 117 Ala. 266, 22 So. 974; Stuyvesant v. Western Mortg. &c. Co., 22 Colo. 28, 43 Pac. 144; Brookings v. White, 49 Maine 479; Gassert v. Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240, affd. 149 U. S. 17, 37 L. ed. 631, 13 Sup. Ct. 738.

amount of the indebtedness secured may be expressed in terms so general that subsequent purchasers and attaching creditors must look beyond the deed to ascertain both the existence and the amount of the debt.[37] If the amount of the debt be left blank, this, it is held, may be supplied by parol evidence.[38] All the description required to be made of the debt is a general one, which will put those interested upon inquiry.[39]

§ 4620. Description of note.—The mortgage usually describes the note, stating the date, amount, the makers of it and the time when it is payable. Such description serves to identify the note.[40] It may describe the debt as well, and thus qualify the note.[41] Except in this way the mortgage notes constitute no part of the mortgage. They are not essential to its validity.[42] They need not be produced in evidence in order to establish the mortgage title and right to possession. The mortgage itself, with the conveyance of the estate and the recital in the condition of the notes secured, is an admission of their existence, and of the existence of the debt. For the purpose of establishing the title or right of possession, the mortgage alone, without the notes, is evidence of title and of the mortgage debt.[43] However, upon foreclosure, it has been held necessary to produce the note if there be one.[44] Parol evidence is admissible to identify the note intended to be secured.[45] When no note or bond accompanies the mort-

[37] Ricketson v. Richardson, 19 Cal. 330; Gardner v. Cohn, 191 Ill. 553, 61 N. E. 492; Burnett v. Write, 135 N. Y. 543, 32 N. E. 253; Keagy v. Trout, 85 Va. 390, 7 S. E. 329, 27 Cent. L. J. 407.

[38] Burnett v. Wright, 135 N. Y. 543, 32 N. E. 253.

[39] Curtis v. Flinn, 46 Ark. 70; Hubbard v. Savage, 8 Conn. 215; Bouton v. Doty, 69 Conn. 531, 37 Atl. 1064; Beach v. Osborne, 74 Conn. 405, 50 Atl. 1019, 1118; Bowen v. Ratcliff, 140 Ind. 393, 39 N. E. 860, 49 Am. St. 203; Williams v. Moniteau Nat. Bank, 72 Mo. 292; Winn v. Lippincott Inv. Co., 125 Mo. 528, 28 S. W. 998; Hodgdon v. Shannon, 44 N. H. 572; Patterson v. Johnston, 7 Ohio 225; Hurd v. Robinson, 11 Ohio St. 232; McDaniels v. Colvin, 16 Vt. 300, 42 Am. Dec. 512; Goff v. Price, 42 W. Va. 384, 26 S. E. 287.

[40] Webb v. Stone, 24 N. H. 282; Robertson v. Stark, 15 N. H. 109; Sheafe v. Gerry, 18 N. H. 245.

[41] Kennion v. Kelsey, 10 Iowa 443; Muzzy v. Knight, 8 Kans. 456; Meyer v. Graeber, 19 Kans. 165.

[42] O'Connor v. Nadel, 117 Ala. 595, 23 So. 532.

[43] Mathews v. Light, 40 Maine 394; Powers v. Patten, 71 Maine 583; Morse v. Stafford, 95 Maine 31, 49 Atl. 45; Smith v. Johns, 3 Gray (Mass.) 517.

[44] Jones v. Elliott, 4 La. Ann. 303.

[45] Duval's Heirs v. McLoskey, 1 Ala. 708; Stowe v. Merrill, 77 Maine 550, 1 Atl. 684; Johns v. Church, 12 Pick. (Mass.) 557, 23 Am. Dec. 651; Goddard v. Sawyer, 9 Allen (Mass.)

gage a recital of indebtedness is sufficient evidence of the debt in a suit to foreclose the mortgage.[46] The description of the note secured need not be made with the utmost particularity, but only so that it may be reasonably identified.[47] The recitals in a mortgage are competent against the mortgagor to prove the consideration of the note described in it.[48]

It is not necessary that all particulars of the note or other obligations secured by a mortgage should be specified in the conditions of it, in order to identify it as the note intended to be secured. If the paper offered in evidence agrees with the description contained in the mortgage, so far as that goes, only that this description is not complete, the possession and production of the instrument are prima facie evidence that it is the same mentioned in the condition. If, however, the description in the condition varies from the paper offered in evidence in certain particulars, then the mere possession of it might not even furnish prima facie evidence that it is the obligation intended to be secured.[49] It is only necessary that the mortgage should state correctly sufficient facts to identify the paper with reasonable certainty, and then, if some particulars of the description do not correspond precisely with the instrument produced, it is not material.[50] When a note agrees in some respects with the description, but varies in others, it may be proved by parol to be the one intended in the mortgage.[51] If, however, the note produced be

78; Hall v. Tay, 131 Mass. 192; Nazro v. Ware, 38 Minn. 43, 38 N. W. 359; Aull v. Lee, 61 Mo. 160; Melvin v. Fellows, 33 N. H. 401; Prescott v. Hayes, 43 N. H. 593; Bell v. Fleming's Exrs., 12 N. J. Eq. 13, affd. 12 N. J. Eq. 490; Jackson v. Bowen, 7 Cow. (N. Y.) 13; Jones v. Guaranty &c. Co., 101 U. S. 622, 25 L. ed. 1030.

[46] Whitney v. Buckman, 13 Cal. 536. See Eyster v. Gaff, 2 Colo. 228, affd. 91 U. S. 521, 23 L. ed. 403.

[47] Winchell v. Coney, 54 Conn. 24, 5 Atl. 354; Dunn v. Burke, 139 Ill. App. 2; Bowen v. Ratcliff, 140 Ind. 393, 39 N. E. 860, 49 Am. St. 203; Webb v. Stone, 24 N. H. 282.

[48] Warner v. Brooks, 14 Gray (Mass.) 107.

[49] Robertson v. Stark, 15 N. H. 109.

[50] Ogborn v. Eliason, 77 Ind. 393; Williams v. Hilton, 35 Maine 547, 58 Am. Dec. 729; Partridge v. Swazey, 46 Maine 414; Johns v. Church, 12 Pick. (Mass.) 557, 23 Am. Dec. 651; Boody v. Davis, 20 N. H. 140, 51 Am. Dec. 210, Whitney v. Hale, 67 N. H. 385, 30 Atl. 417; McKinster v. Babcock, 26 N. Y. 378; Harper v. Edwards, 115 N. Car. 246, 20 So. 392; Hurd v. Robinson, 11 Ohio St. 232; Paine v. Benton, 32 Wis. 491.

[51] Sweetser v. Lowell, 33 Maine 446; Williams v. Hilton, 35 Maine 547, 58 Am. Dec. 729; Melvin v. Fellows, 33 N. H. 401; Cushman v. Luther, 53 N. H. 562; Stanford v. Andrews, 12 Heisk. (Tenn.) 664.

totally variant from that described in the mortgage, such evidence is inadmissible in an action at law.[52] It is no objection to the validity of a mortgage that it does not state the names of the holders of the note secured, when they are otherwise identified; and such a mortgage, when duly recorded, gives notice to subsequent purchasers of the property of the existence of the note intended to be secured, and they are bound by the legal effects of the encumbrance.[53] The mortgage need not set forth a literal copy of the note secured by it. If the amount of the note is stated, it does not matter that other important particulars are omitted.[54] It is sufficient to describe its legal effect.[55]

§ 4621. **Specification of the amount of the debt.**—It is held in a few states that where the amount of the debt is ascertained it must be stated in the mortgage, in order to make it a valid security against subsequent encumbrances.[56] But in other states this degree of strictness is not required, and it is generally sufficient if it appears that a debt is secured, and that the amount of it may be ascertained by reference to other instruments or otherwise by inquiry.[57] It is not even necessary that the amount of the note should be specified in the mortgage, when it is otherwise fully and accurately described.[58] A mortgage to secure all the debts due from the grantor to the grantee, and all liabilities of the latter as surety for the former, is valid without a more particular description.[59] But when it is attempted to describe the debts se-

[52] Follett v. Heath, 15 Wis. 601.

[53] Boyd v. Parker, 43 Md. 182.

[54] King v. Kilbride, 58 Conn. 109, 19 Atl. 519.

[55] Aull v. Lee, 61 Mo. 160.

[56] Hart v. Chalker, 14 Conn. 77; Pettibone v. Griswold, 4 Conn. 158, 10 Am. Dec. 106; Crane v. Deming, 7 Conn. 387; Booth v. Barnum, 9 Conn. 286, 23 Am. Dec. 339; Bolles v. Chauncey, 8 Conn. 389; St. John v. Camp, 17 Conn. 222; Metropolitan Bank v. Godfrey, 23 Ill. 579; Battenhausen v. Bullock, 11 Ill. App. 665, affd. 108 Ill. 28; Bullock v. Battenhousen, 108 Ill. 28.

[57] Pike v. Collins, 33 Maine 38; Spedden v. Sykes, 51 Wash. 267, 98 Pac. 752.

[58] Somersworth Sav. Bank v. Roberts, 38 N. H. 22. A description of a mortgage note which gives its date, the names of the maker and payee, the date of its maturity, and the rate and time of payment of interest, though the amount of the note be not stated, is a sufficient description to identify the note, and the recording of the mortgage gives notice to a subsequent purchaser of the existence of a lien and the amount of it. Fetes v. O'Laughlin, 62 Iowa 532, 17 N. W. 764.

[59] Michigan Ins. Co. v. Brown, 11 Mich. 265; Vanmeter's Exrs. v. Vanmeters, 3 Grat. (Va.) 148.

cured, to entitle a debt to the benefit of the security, it must come fairly within the terms used in the mortgage. The debt described in the mortgage is the debt secured.[60] A reference to a larger amount in an unexecuted agreement between the parties cannot control the description in the mortgage.[61]

A mortgage to secure an unliquidated debt is good. It is only necessary to describe the debt in such a manner as to put subsequent purchasers upon inquiry, and to enable them to ascertain from such inquiry the amount actually secured.[62] The mortgage, being given to secure a certain debt, is valid only for that purpose; but whatever may be the form of the debt, if it can be traced, the security for it remains good.[63] The mortgagee cannot tack to his mortgage any debt not secured thereby, and require payment by the mortgagor as a condition to his right to redeem.[64] A mortgage executed to secure the payment of notes of a definite amount cannot, after the payment of the notes, be made available to secure further advances, unless it is so provided in the mortgage, or by a legal contract between the parties.[65] A verbal agreement is generally held insufficient for that purpose.[66] But when such was the purpose of the mortgage in the beginning, there is no objection that it secured an existing demand and also future advances.[67] The parties to a

[60] Flower v. O'Bannon, 43 La. Ann. 1042, 10 So. 376.

[61] Turnbull v. Thomas, 1 Hughes (U. S.) 172, Fed. Cas. No. 14243.

[62] Cook v. Bartholomew, 60 Conn. 24, 22 Atl. 444, 13 L. R. A. 452. In New Hampshire, where the statutes require that the debt shall be expressed in the mortgage, it cannot be made to cover unliquidated damages. Bethlehem v. Annis, 40 N. H. 34, 77 Am. Dec. 700.

[63] Briggs v. Steel, 91 Ark. 458, 121 S. W. 754; Van Wagner v. Van Wagner, 7 N. J. Eq. 27; Patterson v. Johnston, 7 Ohio 225. See Wilkerson v. Tillman, 66 Ala. 532; Deuser v. Walkup, 43 Mo. App. 625; Prescott v. Hayes, 43 N. H. 593; Jagger Iron Co. v. Walker, 76 N. Y. 521; Chapman v. Jenkins, 31 Barb. (N. Y.) 164; McCaughrin v. Williams, 15 S. Car. 505.

[64] Schiffer v. Feagan, 51 Ala. 335; Edwards v. Dwight, 68 Ala. 389; Barthell v. Syverson, 54 Iowa 160, 6 N. W. 178; Bacon v. Cottrell, 13 Gil. (Minn.) 183.

[65] Johnson v. Anderson, 30 Ark. 745; Brooks v. Brooks, 169 Mass. 38, 47 N. E. 488; Huntington v. Kneeland, 102 App. Div. (N. Y.) 284, 92 N. Y. S. 944, 16 N. Y. Ann. Cas. 13, affd. 187 N. Y. 563, 80 N. E. 1111.

[66] Hester v. Gairdner, 128 Ga. 531, 58 S. E. 165; Hayhurst v. Morin, 104 Maine 169, 71 Atl. 707; Lindsay v. Garvin, 31 S. Car. 259, 9 S. E. 862, 5 L. R. A. 219; O'Neill v. Bennett, 33 S. Car. 243, 11 S. E. 727; Levi v. Blackwell, 35 S. Car. 511, 15 S. E. 243.

[67] Carpenter v. Plagge, 192 Ill. 82, 61 N. E. 530; North v. Crowell, 11 N. H. 251.

mortgage cannot, as against subsequent purchasers or incumbrancers, stipulate by an unrecorded agreement for a higher rate of interest than that provided in the mortgage as recorded, nor can they by such means incorporate into the mortgage any additional indebtedness.[68] But a stipulation in the mortgage, that interest at a higher rate than that reserved upon making the loan shall be paid after a default in payment of the principal or interest, is binding and may be enforced.[69]

§ 4622. Determination of amount of debt—Construction. —The note and mortgage are construed together as if they were parts of one instrument when they were made at the same time and in relation to the same subject, as part of one transaction constituting one contract.[70] They explain each other so far as the indebtedness is concerned.[71] When there is any uncertainty as to the amount secured by the mortgage, the notes referred to in it are competent evidence to explain the language as against the mortgagor, or one who has purchased the equity of redemption with notice of the notes intended to be secured.[72] Where the note and mortgage are at variance in some particular it has been held that the terms of the note shall govern, inasmuch as the note is the principal obligation and the mortgage merely an incident there-

[68] Bunker v. Barron, 79 Maine 62, 8 Atl. 253, 1 Am. St. 282; Chancellor of New Jersey v. Hoxsey, 41 N. J. L. 217.

[69] Pawtucket Mut. Fire Ins. Co. v. Landers, 5 Kans. App. 623, 47 Pac. 621; Sheldon v. Pruessnor, 52 Kans. 579, 35 Pac. 201, 22 L. R. A. 709. But in Nebraska such a provision is regarded as being in the nature of a penalty, and will not be enforced. Connecticut Mut. Life Ins. Co. v. Westerhoff, 58 Nebr. 379, 78 N. W. 724, 79 N. W. 731, 76 Am. St. 101.

[70] Farnsworth v. Hoover, 66 Ark. 367, 50 S. W. 865; Meyer v. Weber, 133 Cal. 681, 65 Pac. 1110; Trinity County Bank v. Haas, 151 Cal. 553, 91 Pac. 385; Graham v. Fitts, 53 Fla. 1046, 43 So. 512; Tipton v. Ellsworth, 18 Idaho 207, 109 Pac. 134; Cabbell v. Knote, 2 Kans. App. 68, 43 Pac. 309; Kansas Loan & Trust Co. v. Gill, 2 Kans. App. 488, 43 Pac. 991; Lockrow v. Cline, 4 Kans. App. 716, 46 Pac. 720; Chick v. Willetts, 2 Kans. 384; Round v. Donnel, 5 Kans. 54; Phelps v. Lowell Inst. for Savings, 198 Mass. 179, 83 N. E. 989; Fletcher v. Daugherty, 13 Nebr. 224, 13 N. W. 207; Green v. Frick, 25 S. Dak. 342, 126 N. W. 579; Bell v. Engvolsen, 64 Wash. 33, 116 Pac. 456.

[71] McDonald v. Second Nat. Bank, 106 Iowa 517, 76 N. W. 1011; Evans v. Baker, 5 Kans. App. 68, 47 Pac. 314; Crafts v. Crafts, 13 Gray (Mass.) 360; Bassett v. Bassett, 10 N. H. 64; Boody v. Davis, 20 N. H. 140, 51 Am. Dec. 210; Somersworth Sav. Bank v. Roberts, 38 N. H. 22.

[72] McDonald v. Second Nat. Bank, 106 Iowa 517, 76 N. W. 1011; Baxter v. McIntire, 13 Gray (Mass.) 168; Crafts v. Crafts, 13 Gray (Mass.) 360; Moses v. Hatfield, 27 S. Car. 324, 3 S. E. 538.

to.[73] The note and mortgage may supplement each other in stating the debt secured,[74] as well as in other ways.[75] The notes secured are prima facie evidence of the amount of the mortgage debt.[76] The renewal of the original note of the mortgagor does not affect the security,[77] except by initiating a new period for the operation of the statute of limitations.[78]

§ 4623. **Increasing amount of debt.**—An apparent exception to the rule that the mortgage debt cannot, as against third persons, be increased after the execution of the mortgage is, that money paid by the mortgagee, to redeem the premises from a tax sale, or from any charge which is a paramount lien upon the property, becomes a part of the mortgage debt, and may be enforced by foreclosure.[79] The mortgage is usually so drawn that, in terms, it includes any payments under the security that may be made by the mortgagee in consequence of any default of the mort-

[73] Where a note drawing interest at seven per cent. provided that upon default in the payment of interest the entire principal should, at the option of the holder, become due, and twelve per cent. interest should be paid from that time, but the mortgage provided that on such default interest should be computed at twelve per cent. from the date of the note, it was held that the interest should be computed in accordance with the note. Keys v. Lardner, 55 Kans. 331, 40 Pac. 644.

[74] Chambers v. Marks, 93 Ala. 412, 9 So. 74; Hill v. Banks, 61 Conn. 25, 23 Atl. 712; Wheeler &c. Mfg. Co. v. Howard, 28 Fed. 741; Cleavenger v. Beath, 53 Ind. 172; Leedy v. Nash, 67 Ind. 311; Clayton v. Whitaker, 68 Iowa 412, 27 N. W. 296; Dean v. Ridgeway, 82 Iowa 757, 48 N. W. 923; Swearingen v. Lahner, 93 Iowa 147, 61 N. W. 431, 26 L. R. A. 765, 57 Am. St. 26; Stanclift v. Norton, 11 Kans. 218; Stowe v. Merrill, 77 Maine 550, 1 Atl. 684; Lantry v. French, 33 Nebr. 524, 50 N. W. 679; McCaughrin v. Williams, 15 S. Car. 505; Evenson v. Bates, 58 Wis. 24, 15 N. W. 837.

[75] Wheeler &c. Mfg. Co. v. Howard, 28 Fed. 741; Commercial Exch. Bank v. McLeod, 67 Iowa 718, 25 N. W. 894; Shores v. Doherty, 65 Wis. 153, 26 N. W. 577.

[76] Ording v. Barnet, 178 Ill. 28, 52 N. E. 851.

[77] Walters v. Walters, 73 Ind. 425; Hyman v. Devereux, 63 N. Car. 624; Kidder v. McIlhenny, 81 N. Car. 123; Bank of South Carolina v. Rose, 1 Strobh. Eq. (S. Car.) 257; Enston v. Friday, 2 Rich. L. (S. Car.) 427; McCaughrin v. Williams, 15 S. Car. 505; Lover v. Bessenger, 9 Baxt. (Tenn.) 393; Williams v. Starr, 5 Wis. 534.

[78] London & S. F. Bank v. Bandmann, 120 Cal. 220, 52 Pac. 583, 65 Am. St. 179; Southern Pac. Co. v. Prosser, 122 Cal. 413, 55 Pac. 145; Newhall v. Hatch, 134 Cal. 269, 66 Pac. 266, 55 L. R. A. 673; Wilcox v. Gregory, 135 Cal. 217, 67 Pac. 139.

[79] Hill v. Eldred, 49 Cal. 398; Mix v. Hotchkiss, 14 Conn. 32; Robinson v. Sulter, 85 Ga. 875, 11 S. E. 887; Wright v. Langley, 36 Ill. 381; Hall v. Gould, 79 Ill. 16; Parsons v. East St. Louis Gas Light &c. Co., 108 Ill. 380; Lawrence v. Lawrence, 145 Ky. 61, 140 S. W. 36; Skilton v. Roberts, 129 Mass. 306; Worcester v. Boston, 179 Mass. 41, 60 N. E. 410; G. F. Sanborn Co. v. Alston, 153 Mich. 463, 117 N. W. 625; Farmer v. Ward, 75 N. J. Eq. 33, 71 Atl. 401; Burr v. Veeder, 3 Wend. (N. Y.) 412; Faure v. Winans, 1 Hopk. Ch. (N. Y.) 283, 14 Am. Dec. 545;

gagor. But without any such provision, the payment by the mortgagee of charges which are a prior lien, and the removal of which is essential to his own protection and safety, gives him in equity not only a right to retain the amount paid out of the proceeds of the land when sold upon foreclosure, as against the mortgagor,[80] but also a preference by way of subrogation over even prior encumbrancers who have been protected by such payment.[81] In addition to the mortgage debt the mortgage may be made to secure the payment of a reasonable fee of an attorney in case of a foreclosure of the mortgage.[82] The amount of such fee may be specified in the mortgage or left to the discretion of the court.[83] The stipulation may be enforced as well against subsequent purchasers and encumbrancers as against the mortgagor himself.[84] Such fee is presumed to be in addition to the taxable costs allowed by law.[85] Such a stipulation, if not unreasonable in amount, has been regarded as imposing a penalty, rather than as giving compensation to the mortgagee for expenses incurred in consequence of the mortgagor's default.[86] A mortgage for a specific sum cannot be enlarged or extended to cover other debts or further advances, as against others who have acquired rights in the property.[87]

Kortright v. Cady, 23 Barb. (N. Y.) 490, 5 Abb. Pr. (N. Y.) 358, revd. 21 N. Y. 343, 78 Am. Dec. 145; Robinson v. Ryan, 25 N. Y. 320; Stone v. Tilley (Tex.), 95 S. W. 718, revd. 100 Tex. 487, 101 S. W. 201, 10 L. R. A. (N. S.) 678; Ferguson v. Dickinson (Tex. Civ. App.), 138 S. W. 221; Windett v. Mutual Ins. Co., 144 U. S. 581, 36 L. ed. 551, 12 Sup. Ct. 751; James v. Brainard-Jackson & Co., 64 Wash. 175, 116 Pac. 633. An agreement to pay taxes before they become delinquent is not fulfilled by paying them on the day they become delinquent. National Life Ins. Co. v. Butler, 61 Nebr. 449, 85 N. W. 437, 87 Am. St. 462.

[80] Silver Lake Bank v. North, 4 Johns. Ch. (N. Y.) 370; Rapelye v. Prince, 4 Hill (N. Y.) 119, 40 Am. Dec. 267; Dale v. McEvers, 2 Cow. (N. Y.) 118. Contra, Savage v. Scott, 45 Iowa 130. But see Barthell v. Syverson, 54 Iowa 160, 6 N. W. 178.

[81] Cook v. Kraft, 3 Lans. (N. Y.) 512, 60 Barb. (N. Y.) 409, 41 How. Pr. (N. Y.) 279; contra, Manning v. Tuthill, 30 N. J. Eq. 29, 7 Reporter 212.

[82] Hewitt v. Dean, 91 Cal. 5, 27 Pac. 423; Bronson v. La Crosse &c. R. Co., 2 Wall. (U. S.) 283, 17 L. ed. 725; Rice v. Cribb, 12 Wis. 179; Hitchcock v. Merrick, 15 Wis. 522. See, however, Sage v. Riggs, 12 Mich. 313.

[83] It is held in some jurisdictions to be in the discretion of the court to make a reasonable and just allowance, without regard to the amount specified in the mortgage. Moran v. Gardemeyer, 82 Cal. 96, 23 Pac. 6.

[84] Pierce v. Kneeland, 16 Wis. 672, 84 Am. Dec. 726.

[85] Hitchcock v. Merrick, 15 Wis. 522.

[86] Daly v. Maitland, 88 Pa. St. 384, 32 Am. Rep. 457, overruling Robinson v. Loomis, 51 Pa. St. 78. See also, Renshaw v. Richards, 30 La. Ann. 398.

[87] Large v. Van Doren, 14 N. J. Eq. 208; Stoddard v. Hart, 23 N. Y. 556; Townsend v. Empire &c. Co., 6 Duer

Neither can the mortgagor, as against them, increase the charge against the land by confessing judgment, and thus compounding the interest,[88] or by increasing the rate of interest.[89]

§ 4624. **Habendum.—The** office of the habendum is to define the estate conveyed, to explain how long the grantee is to hold it, and whether in an absolute or qualified manner. To create an absolute and unqualified estate in the grantee, at common law the habendum should be to him and his heirs. A mortgage to one "his executors, administrators, and assigns" without naming his heirs,[90] or a mortgage to an individual, "his successors and assigns forever," without the word "heirs," conveys only a life estate, where the rule is not changed by statute, and the executor of the mortgagee cannot maintain a writ of entry to foreclose the mortgage because it terminated with the mortgagee's life.[91] A power of sale in such a mortgage, authorizing the mortgagee, upon default, to sell the land and execute a conveyance in fee simple, if not executed does not operate to enlarge the estate. But it is held that a fee simple may be created without the use of the word "heirs" when the intention to create such an estate is clear.[92] And where a mortgage is not a conveyance, but merely a lien, the word "heirs" is not necessary to create a lien on the fee-simple estate of the mortgagor.[93] In a mortgage to a corporation it is usual to make the habendum to it and its "successors and assigns;" but neither word is necessary to give the corporation all the estate it can take in the land conveyed. There is an implied condition in every conveyance to a corporation, that, upon the civil death of the corporation while retaining the land, it shall revert to the original grantor and his heirs.[94]

(N. Y.) 208. See Tunno v. Robert, 16 Fla. 738; Lewter v. Price, 25 Fla. 574, 6 So. 439; Perrin v. Kellogg, 38 Mich. 720; Beekman Fire Ins. Co. v. First M. E. Church, 29 Barb. (N. Y.) 658, 18 How. Pr. (N. Y.) 431.

[88] McGready v. McGready, 17 Mo. 597.

[89] Burchard v. Frazer, 23 Mich. 224.

[90] Clearwater v. Rose, 1 Blackf. (Ind.) 137.

[91] Allendorff v. Gaugengigl, 146 Mass. 542, 16 N. E. 283; Sedgwick v. Laflin, 10 Allen (Mass.) 430.

[92] Gould v. Lamb, 11 Metc. (Mass.) 84, 45 Am. Dec. 187.

[93] Kidd v. Teeple, 22 Cal. 255; Purser v. Eagle Lake &c. Co., 111 Cal. 139, 43 Pac. 523; Bredenberg v. Landrum, 32 S. Car. 215, 10 S. E. 956; Bartlett Estate Co. v. Fairhaven Land Co., 49 Wash. 58, 94 Pac. 900, 15 L. R. A. (N. S.) 590n, 126 Am. St. 856.

[94] 2 Kent Comm. (14th ed.) 282, 307; Chancellor v. Bell, 45 N. J. Eq. 538, 17 Atl. 684.

§ 4625. **Defeasance.**—A defeasance is an essential requisite of every mortgage. It may be in the instrument of conveyance, or in a separate writing, or it may exist in parol merely; but it must, nevertheless, exist in some form. The grantor must have a conditional right to have the property restored to him. There must be a valid and binding agreement of some sort on the part of the grantee to yield up the property received by him, when the conditions upon which the conveyance was made have been performed, else there is lacking an element indispensable to a mortgage. The defeasance must be in favor of the grantor himself, and not in favor of any third person. It does not avail anything that the conveyance contains a condition for a reconveyance, if the reconveyance is to be made to some one other than the grantor; whatever else such an instrument may be, it is not a mortgage.[95] In equity the rule is different, and the transaction is a mortgage although the defeasance be to some one other than the grantor; thus, for instance, it may be in the form of an agreement by one person to purchase property at a foreclosure sale, or other public sale, and to hold it until the purchase-money be repaid by the party who receives the agreement.[96] At law, to constitute a mortgage the conveyance must be made by the mortgagor, and the defeasance by the mortgagee. The usual proviso in a legal mortgage is, that upon the payment of the debt or performance of the duty named, "then this deed shall be null and void." But any equivalent expression may be used.[97]

[95] Micou v. Ashurst, 55 Ala. 607; Low v. Henry, 9 Cal. 538; Carr v. Rising, 62 Ill. 14; Stephenson v. Thompson, 13 Ill. 186; Magnusson v. Johnson, 73 Ill. 156; Treat v. Strickland, 23 Maine 234; Warren v. Lovis, 53 Maine 463; Shaw v. Erskine, 43 Maine 371; Flagg v. Mann, 14 Pick. Mass.) 467; Bickford v. Daniels, 2 N. H. 71; Hill v. Grant, 46 N. Y. 496; Payne's Admr. v. Patterson's Admrs., 77 Pa. St. 134; Pennsylvania Life Ins. Co. v. Austin, 42 Pa. St. 257; Marvin v. Titsworth, 10 Wis. 320.

[96] Martin v. Pond, 30 Fed. 15; First Nat. Bank v. Ashmead, 23 Fla. 379, 2 So. 657, 665; Lindsay v. Matthews, 17 Fla. 575; Reigard v. McNeil, 38 Ill. 400; Stinchfield v. Milliken, 71 Maine 567; Jeffery v. Hursh, 58 Mich. 246, 25 N. W. 176, 27 N. W. 7; Weed v. Stevenson, Clarke (N. Y.) 166; Umfreville v. Keeler, 1 Thomp. & C. (N. Y.) 456; Barton v. May, 3 Sandf. Ch. (N. Y.) 450; Sahler v. Signer, 37 Barb. (N. Y.) 329, 44 Barb. (N. Y.) 606; McBurney v. Wellman, 42 Barb. (N. Y.) 390, affd. 1 Abb. Dec. (N. Y.) 512, 43 How. Pr. (N. Y.) 427; Spicer v. Hunter, 14 Abb. Pr. (N. Y.) 4; Ryan v. Dox, 34 N. Y. 307, 90 Am. Dec. 696.

[97] Bernstein v. Humes, 71 Ala. 260; Adams v. Stevens, 49 Maine 362. In Miskelly v. Pitts, 9 Baxt. (Tenn.) 193, the following clause, in a deed, "Nevertheless, this deed of conveyance is null and void and of no ef-

If it appear from the whole instrument that it was intended to be a security for the payment of a debt or the performance of a duty, it is a mortgage, although there be no express provision that upon the fulfilment of the condition the deed shall be void.[98] The substance and not the form of the expression is chiefly to be regarded; and an enlarged and liberal view is taken to ascertain and carry into effect the intention of the parties. If there be in the deed itself, or in any separate deed executed at the same time, and constituting with the conveyance one transaction, a provision that the estate shall be reconveyed upon the payment of the debt, such stipulation constitutes a defeasance as much as if the words "on condition," or "provided, however," were used.[99]

The condition of defeasance need not necessarily be inserted in the body of the deed. It has the same effect when added underneath in such a way as to be part of the deed, as when executed separately.[1] It is not necessary that the condition of the mortgage should be so certain as to preclude the necessity of extraneous inquiry as to what it really is and whether it has been performed.[2] But unless it appears upon what

fect until all the purchase money is paid, then of full force and effect," constitutes such deed a lien merely to secure the unpaid purchase money and the deed does not become void absolutely upon the noncompliance with the condition. Wisconsin &c. R. Co. v. Wisconsin &c. Land Co., 71 Wis. 94, 36 N. W. 837; Hoyt v. Fass, 64 Wis. 273, 25 N. W. 45. In Kramer v. Brown, 114 Ala. 612, 21 So. 817, it was held that a stipulation that the grantor will restore the deed if the money with interest shall be paid within a time named is a sufficient proviso or defeasance. Adams v. Stevens, 49 Maine 362; Cowles v. Marble, 37 Mich. 158; Pearce v. Wilson, 111 Pa. St. 14, 2 Atl. 99, 56 Am. Rep. 243.

[98] Hull v. Burr, 58 Fla. 432, 50 So. 754; Snyder v. Bunnell, 64 Ind. 403; Steel v. Steel, 4 Allen (Mass.) 417; Lanfair v. Lanfair, 18 Pick. (Mass.) 299; Austin v. First Nat. Bank, 100 Mich. 613, 59 N. W. 597; Doescher v. Spratt, 61 Minn. 326, 63 N. W. 736; Heburn v. Reynolds, 73 Misc. (N. Y.) 73, 132 N. Y. S. 460; Pearce v. Wilson, 111 Pa. St. 14, 2 Atl. 99, 56 Am. Rep. 243; McCamant v. Roberts, 80 Tex. 316, 15 S. W. 580, 1054.

[99] See Ferguson v. Miller, 4 Cal. 97; Whitcomb v. Sutherland, 18 Ill. 578; Oldham v. Halley, 2 J. J. Marsh. (Ky.) 113; Steel v. Steel, 4 Allen (Mass.) 417; Lanfair v. Lanfair, 18 Pick. (Mass.) 299; Taylor v. Weld, 5 Mass. 109; Scott v. McFarland, 13 Mass. 309; Burnett v. Wright, 135 N. Y. 543, 32 N. E. 253; Skinner v. Cox, 4 Dev. L. (N. Car.) 59; National Bank v. Tennessee Coal, Iron & R. Co., 62 Ohio St. 564, 57 N. E. 450; McCamant v. Roberts, 80 Tex. 316, 15 S. W. 580, 1054; Austin v. Downer, 25 Vt. 558. The instrument is not a mortgage at law unless equivalent words are used. Goddard v. Coe, 55 Maine 385.

[1] Kent v. Allbritain, 4 How. (Miss.) 317; Baldwin v. Jenkins, 23 Miss. 206; Perkins' Lessee v. Dibble, 10 Ohio 433, 36 Am. Dec. 97.

[2] Youngs v. Wilson, 27 N. Y. 351.

event the deed is to become void, or that it is to become void or ineffective in some event, it is not in itself a mortgage.[3] If the defeasance clause leaves blank the amount of the debt intended to be secured, the defect may be supplied by parol evidence.[4] The condition of the mortgage must give reasonable notice of the encumbrance on the land mortgaged in order to affect the creditors of the mortgagor who have no notice of the real encumbrance.[5] The defeasance must also be absolute. A contract which gives the grantee the option to reconvey or pay a sum of money is not a defeasance which, in connection with the deed, will constitute a mortgage. The fee is absolute in the grantee if he so elect.[6] If the defeasance expresses a condition that is illegal or contrary to public policy, the legal estate having once vested in the grantee, it cannot be divested by his failure to perform the illegal stipulation, but the deed to him becomes and remains absolute.[7]

§ 4626. **Covenants—In general.**—The covenants of a mortgage are usually those of a warranty deed and have the same effect and construction. If, however, a mortgage with covenants be given for the purchase-money of land conveyed to the mortgagor by a deed having like covenants, and the mortgagor is evicted, he may recover damages in an action for breach of the covenant and the vendor who holds the mortgage is not allowed to set up the covenants in the mortgage deed as a defense by way of rebutter, especially when he holds the mortgagor's promissory notes secured by the mortgage.[8] And one having the mortgagee's rights after foreclosure is not allowed to recover for a breach of the covenant which existed at the time of the conveyance by the mortgagee, for the effect of such recovery would be to obtain all that he parted with in the conveyance, and the value of the encumbrance, which he is relieved from removing by the fore-

[3] Goddard v. Coe, 55 Maine 385; Freeman's Bank v. Vose, 23 Maine 98; Adams v. Stevens, 49 Maine 362.

[4] Burnett v. Wright, 135 N. Y. 543, 32 N. E. 253.

[5] Bacon v. Brown, 19 Conn. 29; Stoughton v. Pasco, 5 Conn. 442, 13 Am. Dec. 72; Merrills v. Swift, 18 Conn. 257, 46 Am. Dec. 315.

[6] Thompson v. People's Bldg. &c. Co., 114 Iowa 481, 87 N. W. 438; Bigler v. Jack, 114 Iowa 667, 87 N. W. 700; Fuller v. Pratt, 10 Maine 197.

[7] Patterson v. Donner, 48 Cal. 369.

[8] Hubbard v. Norton, 10 Conn. 422; Smith v. Cannell, 32 Maine 123; Sumner v. Barnard, 12 Metc. (Mass.) 459; Haynes v. Stevens, 11 N. H. 28.

closure.[9] Where the mortgagor has no title or an imperfect one at the time of making the mortgage, covenants of warranty will operate by way of estoppel or rebutter, so that the after-acquired title inures to the benefit of the holder of the mortgage. Except in this way the ordinary covenants are of little use in a mortgage, because the damages for a breach of them would only entitle the holder of the mortgage to recover the amount due him on the mortgage, and this he can more readily recover by suit for the mortgage debt upon the note or bond, or upon the covenant for the payment of it sometimes contained in the mortgage.[10] However, a covenant in a mortgage may amount to an easement and run with the land and in such case it does not cease with the discharge of the mortgage but continues in favor of the persons for whom it was given and its violation will be restrained by injunction.[11]

§ 4627. **Covenant for payment of debt.**—It is not essential that the mortgage contain a covenant to pay the debt,[12] nor is it necessary that there should be any collateral or personal security for the debt secured, such as a note or bond.[13] The mortgages in common use refer to the debt only in the condition and there merely by way of recital of the event upon which the deed is to be void. It is comparatively seldom that any express promise is made by the debtor in the mortgage to pay the debt; and no promise can be implied from the recital in the conditions. In several states it is provided by statute that no such promise shall be implied in the mortgage.[14] But when it is not forbidden and there is an express covenant in the mortgage for the payment

[9] Brown v. Staples, 28 Maine 497, 48 Am. Dec. 504; Smith v. Cannell, 32 Maine 123; Hardy v. Nelson, 27 Maine 525; Connor v. Eddy, 25 Mo. 72; Geyer v. Girard, 22 Mo. 159. See also, Cross v. Robinson, 21 Conn. 379; Hancock v. Carlton, 6 Gray (Mass.) 39; Lot v. Thomas, 2 N. J. L. 407, 2 Am. Dec. 354; Kellogg v. Wood, 4 Paige (N. Y.) 578.

[10] Todd v. Johnson, 51 Iowa 192, 1 N. W. 498.

[11] Brown v. O'Brien, 168 Mass. 484, 47 N. E. 195.

[12] Evans v. Holman, 244 Ill. 596, 91 N. E. 723; Dougherty v. McColgan, 6 Gill & J. (Md.) 275. See also, Hickox v. Lowe, 10 Cal. 197.

[13] Mitchell v. Burnham, 44 Maine 286; Smith v. People's Bank, 24 Maine 185; Brookings v. White, 49 Maine 479.

[14] 1 Jones Mort. (6th ed.), § 678.

of the debt, the mortgagee may maintain an action upon it and is not confined to his remedy by foreclosure suit.[15]

§ 4628. **Interest.**—The rate and time of payment of interest should be accurately stated in the mortgage.[16] But where the debt is made payable with interest without naming the rate, it bears interest at the rate fixed by law at the place of performance;[17] and the law in force at the date of the instrument governs.[18] If the time when the interest shall be paid is not specified but the language is such that some periodical payment is intended, it may be proved by parol evidence when the payment was to be made.[19] "The proof of the periods at which the interest is payable does not alter the instrument, but merely supplies what was omitted, and is necessary to its proper interpretation."[20] When the time of payment of the mortgage debt is definitely fixed and the amount of it as well, interest is allowed from the date of the default, although not stipulated for in the note or mortgage accompanying it. Interest follows in such case as an invariable legal incident of the principal debt.[21]

§ 4629. **Taxes.**—Where the mortgage contains a covenant that the mortgagor shall pay all taxes and assessments levied against the mortgaged property it becomes as obligatory upon him as the payment of the mortgage debt, and upon his failure to pay them, the mortgagee may pay them and have the amount included in any judgment that he may afterward obtain upon the mortgage. Sometimes the mortgage provides that such taxes, when paid by the mortgagee, shall become a part of the mortgage debt; but without such provision, the amount so paid in fact becomes a lien under the mortgage.[22] In like manner, if the mortgagee redeems the mortgaged land from a tax sale, he is entitled to have the amount paid by him to redeem the land treated as a part of

[15] Newbury v. Rutter, 38 Iowa 179; Brown v. Cascaden, 43 Iowa 103.

[16] 1 Jones Mort. (6th ed.), §§ 73, 633.

[17] Hayes v. Southern Home Building & Loan Assn., 124 Ala. 663, 26 So. 527.

[18] Ackens v. Winston, 22 N. J. Eq. 444.

[19] Ackens v. Winston, 22 N. J. Eq. 444.

[20] 1 Jones Mort. (6th ed.), § 74.

[21] Spencer v. Pierce, 5 R. I. 63.

[22] Stanclift v. Norton, 11 Kans. 218; Sharp v. Barker, 11 Kans. 381; Green v. Grant, 134 Mich. 462, 96 N. W. 583.

the mortgage debt.[23] A provision that the mortgagee may retain from the proceeds of a sale under the mortgage, all charges and expenses incurred by reason of any failure of the mortgagor to perform the condition and covenant of the mortgage, includes payments for taxes. A stipulation in the mortgage that upon a failure to pay the taxes levied upon the premises, the principal debt shall become immediately due and payable, is valid.[24] This covenant cannot be enforced after the debt is discharged. It expires with the mortgage. The effect upon the covenant is the same whether the mortgagor voluntarily pays the mortgage debt, or whether it is paid by the mortgagee's buying in the mortgaged premises at a foreclosure sale. If, therefore, the mortgagee purchase at the sale for less than the debt, and the deficiency be paid by the mortgagor, he cannot afterward be compelled to pay the mortgagee the amount the latter has been obliged to pay to redeem the premises from sales for taxes while the mortgage was in force. The covenant to pay taxes being part and parcel of the mortgage expires with it.[25]

§ 4630. **Insurance.**—If the mortgage contains a condition that the mortgagor shall keep the buildings upon the premises insured against loss for the benefit of the mortgagee, as the latter may direct, a breach of this condition is as effectual in giving the mortgagee a right to enforce his mortgage as is a breach of the condition to pay an instalment of interest or principal or the whole principal debt.[26]

§ 4631. **Time of payment of debt.**—It is important that the time of payment of a debt be fixed and certain so that it may be known when a default occurs. If no time of payment be fixed the debt is payable on demand and suit may be brought to enforce both the debt and mortgage immediately.[27] When the time of payment is fixed by the mortgage or the note secured by it, the mortgagor is not entitled to any notice of it.[28] A stipulation that the whole sum shall become due and payable upon any default in

[23] Worcester v. Boston, 179 Mass. 41, 60 N. E. 410; Skilton v. Roberts, 129 Mass. 306; Windett v. Union &c. Ins. Co., 144 U. S. 581, 36 L. ed. 551, 12 Sup. Ct. 751.

[24] Stanclift v. Norton, 11 Kans. 218.

[25] Hitchcock v. Merrick, 18 Wis. 375.

[26] 1 Jones Mort. (6th ed.), § 78.

[27] 1 Jones Mort. (6th ed.), § 75.

[28] Ing v. Cromwell, 4 Md. 31.

the payment of the principal or interest is universally held to be legal and valid and is not objectionable as being in the nature of a penalty or forfeiture.[29] If the provision be that the mortgagee may, upon default, or after the default has continued a certain time, elect that the whole amount of the debt become payable, the mortgagee, after the happening of this contingency, cannot be compelled to accept interest or instalments due and yield his claim for the whole amount.[30] In such case courts of equity have no power to relieve against the default and its consequences.[31] It is not essential that the interest clause or option clause should be contained in the note or bond as well as the mortgage to make it effectual inasmuch as both instruments are to be construed together.[32]

§ 4632. **Execution.**—Sealing is an essential formality to the execution of any conveyance of real estate,[33] and a mortgage executed without a seal, except in a few states where it is not required, is not a legal mortgage. In equity it amounts to a compact for a mortgage, and as such creates no lien as against purchasers from the mortgagor or as against his creditors or even against an assignee under a general assignment for the benefit of creditors.[34] Signing is, of course, the act which imparts life to the deed. A mortgagor is bound by signature of his name made by

[29] Steel v. Bradfield, 4 Taunt. 227; James v. Thomas, 5 Barn. & Ad. 40; Houston v. Curran, 101 Ill. App. 203, affd. 201 Ill. 442, 66 N. E. 228; Ottawa Northern Plank Road Co. v. Murray, 15 Ill. 336; Kramer v. Rebman, 9 Iowa 114; First Nat. Bank v. Peck, 8 Kans. 660; Stanclift v. Norton, 11 Kans. 218; Schooley v. Romain, 31 Md. 574, 100 Am. Dec. 87; Mobray v. Leckie, 42 Md. 474; Hawkinson v. Banaghan, 203 Mass. 591, 89 N. E. 1054; Caldwell v. Kimbrough, 91 Miss. 877, 45 So. 7; Crane v. Ward, Clarke Ch. (N. Y.) 393; Valentine v. Van Wagner, 37 Barb. (N. Y.) 60, 23 How. Pr. (N. Y.) 400; Ferris v. Ferris, 28 Barb. (N. Y.) 29, 16 How. Pr. (N. Y.) 102; Noyes v. Clark, 7 Paige (N. Y.) 179, 32 Am. Dec. 620; Hale v. Gouverneur, 4 Edw. Ch. (N. Y.) 207; Rubens v. Prindle, 44 Barb. (N. Y.) 336; Robinson v. Loomis, 51 Pa. St. 78.

[30] 1 Jones on Mort. (6th ed.), §§ 1179-1186.

[31] Broderick v. Smith, 26 Barb. (N. Y.) 539, 15 How. Pr. (N. Y.) 434; Rubens v. Prindle, 44 Barb. (N. Y.) 336; Malcolm v. Allen, 49 N. Y. 448; Bennett v. Stevenson, 53 N. Y. 508; Ferris v. Ferris, 28 Barb. (N. Y.) 29, 16 How. Pr. (N. Y.) 102; Hale v. Gouverneur, 4 Edw. Ch. (N. Y.) 207; Valentine v. Van Wagner, 37 Barb. (N. Y.) 60, 23 How. Pr. (N. Y.) 400.

[32] Schoonmaker v. Taylor, 14 Wis. 313.

[33] See 4 Kent's Comm. (14th ed.) 452, 453, on the use of scroll instead of seal.

[34] Heburn v. Raynolds, 73 Misc. (N. Y.) 73, 132 N. Y. S. 460; Erwin v. Shuey, 8 Ohio St. 509; Bloom v. Noggle, 4 Ohio St. 45.

another person in his presence and by his direction. If his name is subscribed by another in his absence he may adopt the signature as his own.[35] His acknowledgment of the deed is a sufficient recognition of it.[36] It has been held, however, that a forged signature of a mortgagor can be ratified by him only by executing a new mortgage though he be willing to acquiesce in its enforcement; and no ratification by him can affect intervening parties.[37] Some of the states provide by statute that mortgages of real estate shall be attested by witnesses, two being required in some states, one in others, and in still others none at all;[38] but this requirement, like that for the acknowledgment of deeds, has reference chiefly to the recording of them, and does not in most jurisdictions affect their validity as between the parties if not observed.[39] Although a mortgage defectively executed in this respect is not a legal mortgage, it may be enforced in equity.[40] An acknowledgment is essential in order to admit a mortgage to record but is not otherwise necessary as between the parties.[41] But before the deed is acknowledged the execution of it must be complete in every other respect.[42] The acknowledgment is the final act before the delivery of the deed, and must be made of a completed deed. There can be no valid acknowledgment of a mortgage until all material parts of the instrument are written in, such, for instance, as the name of the grantee and the amount of the lien.[43]

[35] Fouch v. Wilson, 59 Ind. 93; Zann v. Haller, 71 Ind. 136, 36 Am. Rep. 193; American Sav. Bank & Trust Co. v. Helgesen, 64 Wash. 54, 116 Pac. 837.

[36] Bartlett v. Drake, 100 Mass. 174, 97 Am. Dec. 92, 1 Am. Rep. 101.

[37] Finley v. Babb, 144 Mo. 403, 46 S. W. 165.

[38] 1 Jones Mort. (6th ed.), §§ 82, 494.

[39] Gardner v. Moore, 51 Ga. 268; Marable v. Mayer, 78 Ga. 60; Benton v. Baxley, 90 Ga. 296, 15 S. E. 820; Carrico v. Farmers' &c. Bank, 33 Md. 235; Baker v. Clark, 52 Mich. 22, 17 N. W. 225; Jubb v. Thorpe, 1 Wyo. 356. The rule is different in Alabama. See Dugger v. Collins, 69 Ala. 324. See also, Hawes v. Glover, 126 Ga. 305, 55 S. E. 62; Pulliam v. Hudson, 117 Ga. 127, 43 S. E. 407.

[40] Lake v. Doud, 10 Ohio 415.

[41] Johnson v. Graham Bros. Co., 98 Ark. 274, 135 S. W. 853; Ross v. Harney, 139 Ill. App. 513; Gray v. Ulrich, 8 Kans. 112; Arn v. Matthews, 39 Kans. 272, 18 Pac. 65; Munger v. Baldridge, 41 Kans. 236, 21 Pac. 159, 13 Am. St. 273; Wilson v. Kimmell 109 Mo. 260, 19 S. W. 24; Hannah v. Davis, 112 Mo. 599, 20 S. W. 686; Hess v. Trigg, 8 Okla. 286, 57 Pac. 159; American Sav. Bank & Trust Co. v. Helgesen, 64 Wash. 54, 116 Pac. 837; Lynch v. Cade, 41 Wash. 216, 83 Pac. 118.

[42] 1 Jones Mort. (6th ed.), §§ 83, 495.

[43] Drury v. Foster, 2 Wall. (U. S.) 24, 17 L. ed. 780.

§ 4633. Date.—A mortgage is not invalid although it is not dated or has a false date, or even an impossible one. Being no part of the substance of the deed it may be contradicted and the true date or time of execution may be shown by parol evidence in contradiction of the date as it appears by the mortgage or by record.[44] Although there is a presumption that a mortgage was executed and delivered on the day of its date, arising from due execution, acknowledgment and record of it, the date of the acknowledgment, together with other circumstances appearing upon the face of the deed, may be sufficient to rebut this inference.[45] If the date of the mortgage be later than that of the acknowledgment, it may be shown that the date of the acknowledgment is erroneous, and that the mortgage was not acknowledged until after it was executed.[46]

§ 4634. Filling in blanks.—The blank form of mortgage signed and acknowledged, and afterward filled up in the signer's absence by another person without written authority, so as to make it a mortgage on land owned by the person signing the paper is not a deed in writing valid to pass an estate in land under the statute of frauds. The rule that written authority is requisite for the filling up of material blanks in a mortgage obtains in a majority of the states.[47] Authority to make an instrument under seal, or to affix a seal to it, must be given by an instrument of equal

[44] McFall v. Murray, 4 Kans. App. 554, 45 Pac. 1100; Parke v. Neeley, 90 Pa. St. 52.

[45] Lyon v. McIlvaine, 24 Iowa 9; Savery v. Browning, 18 Iowa 246; Parke v. Neeley, 90 Pa. St. 52.

[46] Hoit v. Russell, 56 N. H. 559.

[47] Nelson v. McDonald, 80 Wis. 605, 50 N. W. 893, 27 Am. St. 71; Vliet v. Camp, 13 Wis. 198; Van Etta v. Evanson, 28 Wis. 33, 9 Am. Rep. 486. See also, Wallace v. Harmstad, 15 Pa. St. 462, 53 Am. Dec. 603. Contra, Gourdin v. Commander, 6 Rich. L. (S. Car.) 497; Duncan v. Hodges, 4 McCord (S. Car.) 239, 17 Am. Dec. 734; Mosby v. Arkansas, 4 Sneed. (Tenn.) 324; Gilbert v. Anthony, 1 Yerg. (Tenn.) 69, 24 Am. Dec. 439; Preston v. Hull, 33 Grat. (Va.) 600, 12 Am. L. Reg. (O. S.) 699, 14 Am. Rep. 153. See also, Cross v. State Bank, 5 Ark. 525; Upton v. Archer, 41 Cal. 85, 10 Am. Rep. 266; Ingram v. Little, 14 Ga. 173, 58 Am. Dec. 549; People v. Organ, 27 Ill. 27, 79 Am. Dec. 391; Chase v. Palmer, 29 Ill. 306; Whitaker v. Miller, 83 Ill. 381; Wilson v. South Park, 70 Ill. 46; McNab v. Young, 81 Ill. 11; Richmond Mfg. Co. v. Davis, 7 Blackf. (Ind.) 412; Ayres v. Probasco, 14 Kans. 175; Cummins v. Cassily, 5 B. Mon. (Ky.) 74; South Berwick v. Huntress, 53 Maine 89, 87 Am. Dec. 535; Byers v. McClanohan, 6 Gill & J. (Md.) 250; Burns v. Lynde, 6 Allen (Mass.) 305; Stebbins v. Watson, 71 Mich. 467, 39 N. W. 721; Williams v. Chutcher, 5 How. (Miss.) 71, 35 Am. Dec. 422; Graham v. Holt, 3 Ired. L. (N. Car.) 300, 40 Am. Dec. 408; Ayres v. Harness, 1 Ohio 368, 13 Am. Dec. 629;

authority.[48] It has been held that the name of the grantee or mortgagee cannot be properly filled in after the execution of the instrument, except, perhaps, by the officer taking the acknowledgment of the mortgage before the delivery of it to the mortgagee.[49] The mortgagor may, however, be estopped from taking advantage of the irregular execution through the filling of blanks by some one not authorized in writing, by his acts in relation to the transaction. But it is held that the mere fact that he has enjoyed the benefit of the money obtained upon it or a portion of the money is not by itself a sufficient ground to found an equitable estoppel.[50] Objection that a deed was executed in blank, and the name of the grantee inserted after delivery, can only be taken by the grantor or by some one claiming through him or in his right.[51] A mortgagee invoking the aid of an estoppel must show that he has been vigilant and careful in the protection of his own right and interest. No protection will be given him against his own negligence and folly.[52] To avail himself of the acts or admissions of the mortgagor, he must have been ignorant of the irregularity in the execution of the mortgage, and must have taken it with good reason to suppose it was properly executed. The subsequent acts of the mortgagor are no admission or ratification of the giving of the mortgage unless the facts of the transaction be known to him.[53]

§ 4635. **Delivery and acceptance.**—A delivery and acceptance of the mortgage are essential,[54] and without delivery there is no mortgage.[55] It takes effect only from the date of its deliv-

Shirley v. Burch, 16 Ore. 83, 18 Pac. 351, 8 Am. St. 273.

[48] Upton v. Archer, 41 Cal. 85, 10 Am. Rep. 266; Preston v. Hull, 23 Grat. (Va.) 600, 12 Am. L. Reg. (O. S.) 699, 14 Am. Rep. 153. In Iowa it is held that a deed executed in blank as to the grantee confers authority on a real or intended grantee to fill in his own name. Logan v. Miller, 106 Iowa 511, 76 N. W. 1005; McClain v. McClain, 52 Iowa 272, 3 N. W. 60. See generally, Vol. 3, § 2010.

[49] McNab v. Young, 81 Ill. 11.

[50] Knaggs v. Mastin, 9 Kans. 532.

[51] McNab v. Young, 81 Ill. 11.

[52] Ayres v. Probasco, 14 Kans. 175.

[53] 1 Jones Mort. (6th ed.) 93.

[54] Van Valkenburgh v. Oldham, 12 Cal. App. 572, 108 Pac. 42; Gadsden v. Thrush, 56 Nebr. 565, 76 N. W. 1060, 45 L. R. A. 654, affd. 58 Nebr. 340, 78 N. W. 632, 45 L. R. A. 654.

[55] Freeman v. Peay, 23 Ark. 439; Houfes v. Schultze, 2 Ill. App. 196; Fitch v. Miller, 200 Ill. 170, 65 N. E. 650; Hoadley v. Hadley, 48 Ind. 452; Gadsden v. Thrush, 56 Nebr. 565, 76 N. W. 1060, 45 L. R. A. 654, affd. 58 Nebr. 340, 78 N. W. 632, 45 L. R. A. 654; Hoagland v. Green, 54 Nebr. 164, 74 N. W. 424; Shirley v. Burch, 16 Ore. 83, 18 Pac.

ery.[56] While an actual delivery is not necessary, there must be some act in legal contemplation equivalent thereto.[57] Delivery may be made to an agent.[58] If not delivered directly to a mortgagee or his agent but to a third person not authorized to act for him, it is essential to show the subsequent acceptance of it by the mortgagee or else to show notice to him of the existence of the mortgage and such additional circumstances as will afford a reasonable presumption of his acceptance of it.[59] Such presumption, as against others who may acquire an interest in the property, does not arise merely from the fact that the mortgage would be beneficial to him.[60] Until there be something more to show the grantee's acceptance, the presumption of it exists only for his benefit as against the grantor, his heirs, devisees and ordinary creditors.[61] The possession of the mortgage by the mortgagee is presumptive evidence of his acceptance of it,[62] and proceedings by him to enforce the title, or his release of it, are conclusive of his acceptance.[63]

The fact of delivery may be shown by other writings of the parties, in which reference is made to the mortgage as an existing security, or by their subsequent acts with reference to it.[64] If a mortgage be so disposed of as to evince clearly the intention of the parties that it should take effect as such, there is a sufficient delivery.[65] The fact that the mortgage and note are in the hands of the mortgagee is sufficient, in the absence of any evidence to the contrary, to warrant a finding by the court that the same had been

351, 8 Am. St. 273; Clymer v. Groff. 220 Pa. 580, 69 Atl. 1119; Gorham's Admr. v. Meacham's Admr., 63 Vt. 231, 22 Atl. 572, 13 L. R. A. 676; Croft v. Bunster, 9 Wis. 503.

[56] Milliken v. Ham, 36 Ind. 166.

[57] Foley v. Howard, 8 Iowa 56.

[58] Lydia Pinkham Med. Co. v. Gibbs, 108 Ga. 138, 33 S. E. 945; Lampkin v. First Nat. Bank, 96 Ga. 487, 23 S. E. 390; Greene v. Conant, 151 Mass. 223, 24 N. E. 44.

[59] Bailey v. Gilliland, 2 Kans. App. 558, 44 Pac. 747.

[60] Freeman v. Peay, 23 Ark. 439; Ruckman v. Ruckman, 6 Fed. 225; Evans v. White, 53 Ind. 1; Moody v. Dryden, 72 Iowa 461, 34 N. W. 210; Bell v. Farmers' Bank, 11 Bush (Ky.) 34, 21 Am. Rep. 205; Tuttle v. Turner, 28 Tex. 759.

[61] Bell v. Farmers' Bank, 11 Bush (Ky.) 34, 21 Am. Rep. 205.

[62] Ray v. Hallenbeck, 42 Fed. 381; Wolverton v. Collins, 34 Iowa 238; Chandler v. Temple, 4 Cush. (Mass.) 285; Preston v. Albee, 120 App. Div. (N. Y.) 89, 105 N. Y. S. 33.

[63] Ely v. Stannard, 44 Conn. 528; Crocker v. Lowenthal, 83 Ill. 579.

[64] Renken v. Bellmer, 55 Cal. 466; Truman v. McCollum, 20 Wis. 360.

[65] Rhea v. Planters' Mut. Ins. Co., 77 Ark. 57, 90 S. W. 850; Nazro v. Ware, 38 Minn. 443, 38 N. W. 359; Herman v. Clark (Tenn.), 39 S. W. 873.

delivered by the mortgagor.[66] A subsequent acceptance by the mortgagee of a mortgage delivered to the recording officer or to an authorized third person, gives effect to it from the time of the first delivery, as between the parties to it; but as to persons who have acquired title to the property, or an interest in it, or a lien upon it, through or under the mortgagor before the time of the actual acceptance of the deed by the mortgagee, the subsequent acceptance gives effect to the mortgage only from the time of acceptance.[67] The acceptance cannot relate back so as to defeat the intervening lien.[68] It is sufficient proof of the delivery of a mortgage that it was filed for record by the mortgagor, and was afterward found in the mortgagee's possession.[69] A mortgage made to a person who is entirely ignorant of the transaction and who never ratified it nor claimed any interest in it, the money being advanced by a person who at the time had no authority to act for the nominal mortgagee, is fictitious and void in law and cannot be foreclosed in equity.[70] A delivery in escrow is sufficient and the fact that the depositary was at the time an agent of the mortgagee, or where the mortgagee is a corporation, the fact that he was then a director of it, does not prevent his holding in escrow.[71]

§ 4636. **Alteration of mortgage.**—A material alteration of a mortgage made without the consent of the mortgagor by the holder of it, or by any one after delivery, and while in the possession or custody of the rightful owner, destroys and annuls the instrument as between the parties to it.[72] An alteration by a mere stranger without the knowledge or consent of the holder, and

[66] Schallehn v. Hibbard, 64 Kans. 601, 68 Pac. 61.

[67] Hibberd v. Smith, 67 Cal. 547, 4 Pac. 473, 8 Pac. 46, 56 Am. Rep. 726; Clark v. National Bank, 66 Fed. 404, 13 C. C. A. 545; Moody v. Dryden, 72 Iowa 461, 34 N. W. 210; Parmelee v. Simpson, 5 Wall. (U. S.) 81, 18 L. ed. 542.

[68] Goodsell v. Stinson, 7 Blackf. (Ind.) 437.

[69] Haskill v. Sevier, 25 Ark. 152; Carnall v. Duvall, 22 Ark. 136; Sessions v. Sherwood, 78 Mich. 234, 44 N. W. 263.

[70] Shirley v. Burch, 16 Ore. 83, 18 Pac. 351, 8 Am. St. 273.

[71] Andrews v. Thayer, 30 Wis. 228.

[72] In re Pigot's Case, 11 Coke 26b; Russell v. Reed, 36 Minn. 376, 31 N. W. 452; Marcy v. Dunlap, 5 Lans. (N. Y.) 365; Meyer v. Huneke, 55 N. Y. 412; Waring v. Smyth, 2 Barb. Ch. (N. Y.) 119, 47 Am. Dec. 299; McIntyre v. Velte, 153 Pa. St. 350, 25 Atl. 739.

while it is out of his custody, does not have this effect.[73] A material alteration of a promissory note secured by a mortgage cancels the debt and discharges the mortgage. The note is not merely vitiated but the debt is discharged, and with the discharge of the debt goes a discharge of the mortgage.[74] This rule, however, rendering void an instrument altered while in the custody of the rightful holder, has in many courts given place to the more equitable rule that the instrument is not rendered void if the alteration was made by mistake or without any fraudulent intent.[75] Where an alteration or erasure is apparent upon the face of the instrument, the presumption of law in many jurisdictions is that it was made prior to its execution and the burden is upon the maker to show that it was altered after delivery.[75a] The question of when an alteration was made, by whom it was made, and with what intent, is usually one of fact, however, to be submitted to the jury upon the whole evidence.[76] If the evidence in regard to the fact of an alteration is conflicting and evenly balanced, the presumption that the mortgage had not been altered must prevail.[77] An alteration of an instrument that does not change its legal effect does not in law amount to an alteration and does not invalidate it either at law or in equity.[78] An altera-

[73] Marcy v. Dunlap, 5 Lans. (N. Y.) 365. See also, Vol 3, § 2007.

[74] Warder v. Willyard, 46 Minn. 531, 49 N. W. 300, 24 Am. St. 250; Whitmer v. Frye, 10 Mo. 348; Walton Plow Co. v. Campbell, 35 Nebr. 173, 52 N. W. 883, 16 L. R. A. 468; Smith v. Mace, 44 N. H. 553; Martendale v. Follet, 1 N. H. 95; Bigelow v. Stilphen, 35 Vt. 521; Newell v. Mayberry, 3 Leigh (Va.) 250, 23 Am. Dec. 261.

[75] Harding v. Des Moines Nat. Bank, 81 Iowa 499, 46 N. W. 1071; Mathias v. Leathers, 99 Iowa 18, 68 N. W. 449; Kime v. Jesse, 52 Nebr. 606, 72 N. W. 1050; McClure v. Little, 15 Utah 379, 49 Pac. 298, 62 Am. St. 938.

[75a] See Vol. 3, § 2016, where the subject is treated and conflicting rules and decisions in different jurisdictions are considered.

[76] Wilson v. Hayes, 40 Minn. 531, 42 N. W. 467, 4 L. R. A. 196, 12 Am. St. 754; Rodriguez v. Haynes, 76 Tex. 225, 13 S. W. 296.

[77] Vogle v. Ripper, 34 Ill. 100, 85 Am. Dec. 298; Harding v. Des Moines Nat. Bank, 81 Iowa 499, 46 N. W. 1071; Des Moines Nat. Bank v. Harding, 86 Iowa 153, 53 N. W. 99; Foote v. Hambrick, 70 Miss. 157, 11 So. 567, 35 Am. St. 631; State Savings Bank v. Shaffer, 9 Nebr. 1, 1 N. W. 980, 31 Am. Rep. 394.

[78] Montgomery v. Crossthwait, 90 Ala. 553, 8 So. 498, 12 L. R. A. 140, 24 Am. St. 832; Hill v. Nelms, 86 Ala. 442, 5 So. 796; Hart v. Sharpston, 124 Ala. 638, 27 So. 450; Goodenow v. Curtis, 33 Mich. 505. As to burden of proof to show whether an interlineation was made before or after execution, see Cox v. Palmer, 1 McCrary (U. S.) 431.

tion which does not change the legal effect of a mortgage may be made at any time by consent of both parties to it.[79]

§ 4637. Reformation.—Whenever there has been a material omission or mistake in the mortgage, so that it fails to express what the parties intended, a court of equity may, as between the parties, reform and correct it in accordance with the transaction as it was actually agreed upon.[80] When a mistake is clearly shown, a claim by the adverse party of misapprehension on his part will not be regarded.[81] But the fact of mistake must be clearly shown,[82] as must, also, what the parties really intended.[83] The mistake, to be the subject of reformation, must be not merely the oversight of one of the parties, but such that the deed fails to express what was intended and agreed upon by both parties.[84] The court will not reform a deed so as to add to it a new condition not contemplated by one of the parties; nor will it make it include what was intended by one party, unless it appears that the other party at the time had the same intention, or unless the other party fraudulently induced him to believe the mortgage contained what he asks to have it made to include.[85] The right to have a deed reformed may be lost by laches.[86]

§ 4638. Evidence to vary terms of mortgage.—The terms of a mortgage cannot be varied by any verbal agreement or understanding of a party anterior to the execution of it. It cannot rest partially in writing and partly in parol. The general rule is that no evidence of the acts or conversation of the parties

[79] Harshey v. Blackmarr, 20 Iowa 161, 89 Am. Dec. 520.

[80] Bright v. Buckman, 39 Fed. 243; Phillips v. Roquemore, 96 Ga. 719, 23 S. E. 855; Kirchner v. Frazier, 106 Ga. 437, 32 S. E. 351; Loomis v. Hudson, 18 Iowa 416; Lear v. Prather, 89 Ky. 501, 11 Ky. L. 699, 12 S. W. 946; Mendenhall v. Steckel, 47 Md. 453, 28 Am. Rep. 481; Anderson v. Baughman, 7 Mich. 69, 74 Am. Dec. 699; McMillan v. New York Water Proof Paper Co., 29 N. J. Eq. 610; Dietrich v. Hutchinson, 73 Vt. 134, 50 Atl. 810, 87 Am. St. 698.

[81] Wooden v. Haviland, 18 Conn. 101.

[82] Hervey v. Savery, 48 Iowa 313; Bodwell v. Heaton, 40 Kans. 36, 18 Pac. 901.

[83] Alexander v. Caldwell, 55 Ala. 517; Turner v. Hart, 1 Fed. 295; Marcy v. Dunlap, 5 Lans. (N. Y.) 365.

[84] Baker v. Harlan, 3 Lea (Tenn.) 505. See further upon the general subject, Vol. 3, ch. 52.

[85] Hart v. Hart, 23 Iowa 599; De Peyster v. Hasbrouck, 11 N. Y. 582; Rider v. Powell, 28 N. Y. 310, 4 Abb. Dec. (N. Y.) 63.

[86] See First Nat. Bank v. Gough, 61 Ind. 147; Paulison v. Van Iderstine, 29 N. J. Eq. 594.

prior to the execution of the mortgage, or at the time of it, can be admitted to contradict or vary the instrument.[87] The fact that a mortgagor, before the signing of a mortgage, objected to its terms and desired to reserve a certain portion of the property included in it, cannot be received to vary its effects.[88] Even an agreement of the parties, at the time of the execution of the mortgage, that it should not be a lien upon certain portions of the property included in it, would have no effect against its terms.[89] The terms of the mortgage may, however, be varied by a written agreement executed at the time of the mortgage. Such an agreement then becomes in fact a part of the mortgage, and the two instruments must be construed together.[90]

§ 4639. **Construction.**—It is a rule of construction applicable to mortgages that, as the mortgagor is supposed to make his own selection of words and terms in drawing the deed, whenever the language is equivocal or ambiguous it is construed more strongly against him, and in such manner as to make it a valid and binding security for the mortgagee.[91] Another principle is that the intention of the parties as gathered from the instrument is to govern, if the intention be such that it can be legally enforced. To arrive at this intention the situation of the parties and the nature and object of their transactions may be inquired into. But it is not the business of construction to look outside of the instrument for the intention of the parties, and then carry out that intention when the instrument contains language sufficient to express it; the sole duty of construction is to find out what was meant by the language of the instrument.[92]

§ 4640. **Recording.**—In most of the states mortgages are recorded in the same manner and with the same effect as other conveyances of real property. In general, the statutes provide that

[87] Quartermous v. Kennedy, 29 Ark. 544; Vol. 2, § 1621, et seq.
[88] Patterson v. Taylor, 15 Fla. 336.
[89] 1 Jones Mort. (6th ed.), § 96.
[90] Pitzer v. Burns, 7 W. Va. 63. See also, Vol. 1, §§ 1629, 1633, et seq.
[91] Jerome v. Hopkins, 2 Mich. 96; Stuart v. Worden, 42 Mich. 154, 3 N. W. 876.
[92] Weinstein v. Sinel, 133 App. Div. (N. Y.) 441, 117 N. Y. S. 346; Farmers' Loan & Trust Co. v. Commercial Bank, 15 Wis. 424, 82 Am. Dec. 689.

such conveyance shall not be valid as against persons other than the grantor, his heirs and devisees, and persons having notice thereof, unless they are recorded in the registry of deeds for the county in which the land is situated.[93] In somewhat different terms, but with like effect, the statutes in some states provide that conveyances shall be void as to subsequent purchasers and creditors in good faith, and for a valuable consideration without notice, until and except they are recorded or left for record in the proper registry of deeds. Everywhere a record properly made is constructive and absolute notice of the conveyance as recorded.[94] Priority of record, as a general rule, gives priority of title; and this priority dates from the time the instrument is delivered to the recorder for record.[95] A mortgage is a conveyance with a condition, and the mortgagee is a purchaser. In most of the states there are no special provisions in relation to recording mortgages, but the general provisions as to record apply as well to mortgages.[96] It is a general rule, however, that a failure to record the mortgage does not affect the parties themselves or others holding under them.[97]

§ 4641. **Mortgages to secure future advances.**—Mortgages to secure future advances were formally regarded with jealousy, but their validity is now fully recognized and established in this country both by the early and recent cases.[98] It does not matter

[93] Steiner v. Clisby, 95 Ala. 91, 10 So. 240, 11 So. 294.

[94] Beach v. Osborne, 74 Conn. 405, 50 Atl. 1019, 1118.

[95] Burrows v. Hoveland, 40 Nebr. 464, 58 N. W. 947; Quinnerly v. Quinnerly, 114 N. Car. 145, 19 S. E. 99; Allen v. Bolen, 114 N. Car. 560, 18 S. E. 964; Covington v. Fisher, 22 Okla. 207, 97 Pac. 615.

[96] 1 Jones on Mortgages (6th ed.), § 456; Huitink v. Thompson, 95 Minn. 392, 104 N. W. 237; Cornish v. Woolverton, 32 Mont. 456, 81 Pac. 4, 108 Am. St. 598.

[97] Rhea v. Planters' Mut. Ins. Co., 77 Ark. 57, 90 S. W. 850; Hawes v. Glover, 126 Ga. 305, 55 S. E. 62; McKenzie v. Beaumont, 70 Nebr. 179, 97 N. W. 225; Girard Trust Co. v. Baird, 212 Pa. 41, 61 Atl. 507, 1 L. R. A. (N. S.) 405.

[98] Forsyth v. Preer, 62 Ala. 443; Hendon v. Morris, 110 Ala. 106, 20 So. 27; Jarrard v. McDaniel, 32 Ark. 598; Brewster v. Clamfit, 33 Ark. 72; Moore v. Terry, 66 Ark. 393, 50 S. W. 998; London & S. F. Bank v. Bandmann, 120 Cal. 220, 52 Pac. 583, 65 Am. St. 179; Hubbard v. Savage, 8 Conn. 215; Collins v. Carlile, 13 Ill. 254; Louisville Banking Co. v. Leonard, 90 Ky. 106, 11 Ky. L. 917, 13 S. W. 521; Straeffer v. Rodman, 146 Ky. 1, 141 S. W. 742; Perkins & Manning Co. v. Drew & Landrum's Assignee (Ky.), 122 S. W. 526; Doyle v. White, 26 Maine 341, 45 Am. Dec. 110; Bunker v. Barron, 93 Maine 87, 44 Atl. 372; Brooks v. Lester, 36 Md. 65; Commercial Bank v. Cunningham, 24 Pick. (Mass.) 270, 35 Am. Dec. 322; Goddard v. Sawyer, 9 Allen (Mass.) 78; Hall v. Tay, 131

that the future advances are to be made to a third person, or for his benefit at the request of the mortgagor.[99] Neither is the validity of a mortgage to secure future advances affected by the fact that the advances are to be made in materials for buildings instead of money.[1] Nor is a mortgage fraudulent because it is given for a larger amount than the actual loan made at the time, with a view to its covering future loans up to the amount of a mortgage.[2] Future liabilities intended to be secured should be described with certainty. If the nature and amount of the encumbrance is so described that it can be ascertained by the exercise of ordinary discretion and diligence, this is all that is required.[3] A mortgage for future advances may be made a continuing security for advances made any time, so that when advances have been made for the amount limited by the mortgage, and these are paid wholly or in part, the mortgage will continue as a security for new ad-

Mass. 192; Taft v. Stoddard, 142 Mass. 545, 8 N. E. 586; Brackett v. Sears, 15 Mich. 244; Newkirk v. Newkirk, 56 Mich. 525, 23 N. W. 206; Dummer v. Smedley, 110 Mich. 466, 68 N. W. 260, 38 L. R. A. 490; Citizens' Sav. Bank v. Kock, 117 Mich. 225, 75 N. W. 458; Madigan v. Mead, 31 Minn. 94, 16 N. W. 539; Foster v. Reynolds, 38 Mo. 553; Griffin v. New Jersey Oil Co., 11 N. J. Eq. 49; Reeves v. Evans (N. J. Eq.), 34 Atl. 477; James v. Morey, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475n; Brinckerhoff v. Lansing, 4 Johns. Ch. (N. Y.) 65, 8 Am. Dec. 538; Truscott v. King, 6 N. Y. 147; Fasset v. Smith, 23 N. Y. 252; Ackerman v. Hunsicker, 85 N. Y. 43, 39 Am. Rep. 621; Union National Bank v. Moline, Milburn Stoddard & Co., 7 N. Dak. 201, 73 N. W. 527; Hendrix v. Gore, 8 Ore. 406; Garber v. Henry, 6 Watts (Pa.) 57; Farabee v. McKerrihan, 172 Pa. St. 234, 33 Atl. 583, 51 Am. St. 734; Seaman v. Fleming, 7 Rich. Eq. (S. Car.) 283; Klein v. Glass, 53 Tex. 37; Schuelenburg v. Martin, 1 McCrary (U. S.) 348; Ripley v. Harris, 3 Biss. (U. S.) 199, Fed. Cas. No. 11853; Schulze v. Bolting, 8 Biss. (U. S.) 174, Fed. Cas. No. 12489; Leeds v. Cameron, 3 Sumn. (U. S.) 488, Fed. Cas. No. 8206; United States v. Hooe, 3 Cranch (U. S.) 73, 2 L. ed. 370; Shirras v. Caig, 7 Cranch (U. S.) 34, 3 L. ed. 260; Lawrence v. Tucker, 23 How. (U. S.) 14, 16 L. ed. 474; Jones v. Guaranty &c. Co., 101 U. S. 622, 25 L. ed. 1030; National Bank v. Whitney, 103 U. S. 99, 26 L. ed. 443; New Orleans Nat. Banking Assn. v. Le Breton, 120 U. S. 765, 30 L. ed. 821, 7 Sup. Ct. 772; McDaniels v. Colvin, 16 Vt. 300, 42 Am. Dec. 512; Keyes v. Bump's Admr., 59 Vt. 391, 9 Atl. 598; McCarty v. Chalfant, 14 W. Va. 531.

[99] Maffitt's Admr. v. Rynd, 69 Pa. St. 380.

[1] Tapia v. Demartini, 77 Cal. 383, 19 Pac. 641, 11 Am. St. 288; Doyle v. White, 26 Maine 341, 45 Am. Dec. 110; Brooks v. Lester, 36 Md. 65.

[2] Allen v. Fuget, 42 Kans. 672, 22 Pac. 725.

[3] Hubbard v. Savage, 8 Conn. 215; Bouton v. Doty, 69 Conn. 531, 37 Atl. 1064; Beach v. Osborne, 74 Conn. 405, 50 Atl. 1019, 1118; United States v. Sturges, 1 Paine (U. S.) 525, Fed. Cas. No. 16414; United States v. Hooe, 3 Cranch (U. S.) 73, 2 L. ed. 370; Shirras v. Caig, 7 Cranch (U. S.) 34, 3 L. ed. 260. This case did away with the doubt with which such mortgages were spoken of in the earlier cases of Pettibone v. Griswold, 4 Conn. 158, 10 Am. Dec. 106; Stoughton v. Pasco, 5 Conn. 442, 13 Am.

vances within the limit named.[4] Parol evidence is admissible to identify the future advances intended to be secured by a mortgage. Though the mortgage on its face is for the payment of a specific sum of money, parol evidence is admissible to show that it was really intended to secure future advances to be made from time to time.[5]

An absolute conveyance may be used to secure future advances, or to secure an existing debt and also future advances. The agreement to reconvey when the advances are repaid is sufficient, although it exists in parol only.[6] The agreement under which advances to a certain amount are to be made need not be in writing, in order to be binding and effectual against subsequent liens when it has been acted upon.[7] The agreement for the advances must be contemporaneous; a mortgage cannot be made available to secure future advances by any subsequent parol agreement in preference to the lien of a junior encumbrance.[8] The

Dec. 72; Shepard v. Shepard, 6 Conn. 37. Also, Collier v. Faulk, 69 Ala. 58; Brewster v. Clamfit, 33 Ark. 72; First Nat. Bank v. Morsell, 1 MacArthur (8 D. C.) 155, revd. 91 U. S. 357, 23 L. ed. 436; Louisville Banking Co. v. Leonard, 90 Ky. 106, 13 S. W. 521, 11 Ky. L. 917.

[4] Jones on Chattel Mortgages (5th ed.), § 94; Courier-Journal Job Printing Co. v. Schaefer-Meyer Brew. Co., 101 Fed. 699, 41 C. C. A. 614; Robinson v. Williams, 22 N. Y. 380; Brown v. Kiefer, 71 N. Y. 610; Huntington v. Kneeland, 187 N. Y. 563, 80 N. E. 1111, affg. 102 App. Div. (N. Y.) 284, 92 N. Y. S. 944, 16 N. Y. Ann. Cas. 13; Kramer v. Farmers' &c. Bank, 15 Ohio 253; United States v. Hooe, 3 Cranch (U. S.) 73, 2 L. ed. 370; Shirras v. Caig, 7 Cranch (U. S.) 34, 3 L. ed. 260; Douglass v. Reynolds, 7 Pet. (U. S.) 113, 8 L. ed. 626; Lawrence v. Tucker, 23 How. (U. S.) 14, 16 L. ed. 474; Shores v. Doherty, 65 Wis. 153, 26 N. W. 577.

[5] Wilkerson v. Tillman, 66 Ala. 532; Louisville Banking Co. v. Leonard, 90 Ky. 106, 11 Ky. L. 917, 13 S. W. 521; McKinster v. Babcock, 26 N. Y. 378; Shirras v. Caig, 7 Cranch (U. S.) 34, 3 L. ed. 260.

[6] Metropolitan Bank v. Godfrey, 23 Ill. 579; Kellum v. Smith, 33 Pa. St. 158; Rhines v. Baird, 41 Pa. St. 256; In re Myers' Appeal, 42 Pa. St. 518; In re Harper's Appeal, 64 Pa. St. 315; In re Fessler's Appeal, 75 Pa. St. 483.

[7] Tison v. People's Sav. Loan Assn., 57 Ala. 323; Forsyth v. Preer, 62 Ala. 443; Wilkerson v. Tillman, 66 Ala. 532; Hendon v. Morris, 110 Ala. 106, 20 So. 27; Tapia v. Demartini, 77 Cal. 383, 19 Pac. 641, 11 Am. St. 288. But it has been held that, as against the wife's right of homestead, a mortgage executed by her with her husband to secure an existing debt, and future advances to the husband orally agreed for, is not valid to cover such future advances. The incumbrance for future advances, being a mere oral agreement, constitutes a power in another to incumber the homestead at will, and is not a conveyance executed and acknowledged by husband and wife, as required by statute, and is not enforcible. Merced Bank v. Rosenthal, 99 Cal. 39, 31 Pac. 849, 33 Pac. 732.

[8] Ahern v. White, 39 Md. 409; Truscott v. King, 6 N. Y. 147; Walker v. Snediker, Hoff. (N. Y.) 144; Hall v. Crouse, 13 Hun (N. Y.) 557.

omission to state on the face of the mortgage the time when the first advances are to be made is not material. It is sufficient that they are to be made from time to time, as the mortgagor may desire, during a specified period.[9] The amount of the several advances, the times when they were actually made, and the object of the mortgage may be shown by extrinsic proof, for in such a case the proof does not contradict the mortgage or alter its legal operation and effect in any way.[10] Although the deed purports to be in consideration of a definite sum in hand paid at the time, it may be shown by parol evidence that the deed was made to secure advances made and to be made to that extent.[11] If the mortgagee advance only a part of the sum contemplated in the mortgage, it is a valid security for so much as he does advance, and for so much only.[12] If the mortgagee fails or refuses to make any advances according to his agreement, and retains possession of the land under an absolute deed intended as a mortgage, it is held that the mortgagor cannot recover the amount of the promised advances. He can recover such special damages as have resulted from the mortgagee's refusal to make the advances; but in case no special damages are shown, the mortgagor can recover only nominal damages.[13]

§ 4642. Mortgages to secure future advances—Effect of record.—A prior mortgagee is affected only by actual notice of a subsequent mortgage, and not by constructive notice from recording the mortgage; and for all advances made by such mortgagee before receiving such notice of a subsequent encumbrance, his mortgage is a valid security.[14] The recording acts give notice

[9] Wilson v. Russell, 13 Md. 494, 71 Am. Dec. 645.

[10] Hall v. Crouse, 13 Hun (N. Y.) 557.

[11] Huckaba v. Abbott, 87 Ala. 409, 6 So. 48; Tapia v. Demartini, 77 Cal. 383, 19 Pac. 641, 11 Am. St. 288; Du Bois v. First Nat. Bank, 43 Colo. 400, 96 Pac. 169; Cole v. Albers, 1 Gill (Md.) 412; Foster v. Reynolds, 38 Mo. 553; Moses v. Hatfield, 27 S. Car. 324, 3 S. E. 538; Openshaw v. Dean (Tex. Civ. App.), 125 S. W. 989.

[12] Forsyth v. Preer, 62 Ala. 443; Walker v. Carleton, 97 Ill. 582; Morris v. Cain's Exrs., 39 La. Ann. 712, 1 So. 797, 2 So. 418; Coleman v. Galbreath, 53 Miss. 303; Watts v. Bonner, 66 Miss. 629, 6 So. 187; Dart v. McAdam, 27 Barb. (N. Y.) 187; Freeman v. Auld, 44 Barb. (N. Y.) 14, revd. 44 N. Y. 50.

[13] Turpie v. Lowe, 114 Ind. 37, 15 N. E. 834; Watts v. Bonner, 66 Miss. 629, 6 So. 187.

[14] Tapia v. Demartini, 77 Cal. 383, 19 Pac. 641, 11 Am. St. 288; Rowan v. Sharps' Rifle Mfg. Co., 29 Conn. 282; Brinkmeyer v. Brownel-

to subsequent purchasers and encumbrancers, and do not affect those whose rights are already fixed by the previous record of their own deeds.[15] There are some authorities, however, which hold that the mortgagee has constructive notice of the second mortgage from the time of the recording of it.[16] When there is no obligation upon the mortgagee to make the advances, and the amount of them and the time when they are to be made are not agreed upon, some authorities hold that the mortgage is a lien, as against intervening encumbrances, only from the time the advances upon it are made, and not from the time of the execution of the mortgage.[17] But the better authorities are against this view. A mortgage to secure future advances is a conveyance within the recording acts, and the record is notice to subsequent purchasers and encumbrancers who are thereby put upon inquiry as to the extent of the advances made and to be made. The mortgage is a potential lien for the full amount of the advances contemplated, and through the record subsequent purchasers and encumbrancers have notice of the extent and purpose of the mortgage.[18] The better rule seems to be, by reason and authority, that a mortgage to secure future advances, which on its face gives information enough as to the extent and purpose of the contract, so that any one interested may by ordinary diligence ascertain the extent of the encumbrance, whether the extent of the contemplated advances be limited or not, and whether the mortgagee be

ler, 55 Ind. 487; Schmidt v. Zahrndt, 148 Ind. 447, 47 N. E. 335; Nelson's Heirs v. Boyce, 7 J. J. Marsh. (Ky.) 401, 23 Am. Dec. 411; Bunker v. Barron, 93 Maine 87, 44 Atl. 372; Wilson v. Russell, 13 Md. 494, 71 Am. Dec. 645; Ward v. Cooke, 17 N. J. Eq. 93; Central Trust Co. v. Continental Iron Works, 51 N. J. Eq. 605, 28 Atl. 595, 40 Am. St. 539; Truscott v. King, 6 Barb. (N. Y.) 346, 6 N. Y. 147; Livingston v. M'Inlay, 16 Johns. (N. Y.) 165; Robinson v. Williams, 22 N. Y. 380; Ackerman v. Hunsicker, 85 N. Y. 44, 39 Am. Rep. 621; Union Nat. Bank v. Moline, 7 N. Dak. 201, 73 N. W. 527; McDaniels v. Colvin, 16 Vt. 300, 42 Am. Dec. 512.

[15] 1 Jones on Mortgages (6th ed.), § 372.

[16] Boswell v. Goodwin, 31 Conn. 74 81 Am. Dec. 169; Frye v. Bank of Illinois, 11 Ill. 367; Ladue v. Detroit & M. R. Co., 13 Mich. 380, 87 Am. Dec. 759; Stone v. Welling, 15 Mich. 514; Gillam v. Barnes, 123 Mich. 119, 82 N. W. 38; Griffin v. New Jersey Oil Co., 11 N. J. Eq. 49; Spader v. Lawler, 17 Ohio 371, 49 Am. Dec. 461; Ketcham v. Wood, 22 Hun (N. Y.) 64; Bank of Montgomery County's Appeal, 36 Pa. St. 170; Parker v. Jacoby, 3 Grant Cas. (Pa.) 300; Ter-Hoven v. Kerns, 2 Pa. St. 96.

[17] Nicklin v. Betts Spring Co., 11 Ore. 406, 5 Pac. 51, 50 Am. Rep. 477.

[18] Ackerman v. Hunsicker, 85 N. Y. 43, 39 Am. Rep. 621.

bound to make the advances or not, will prevail over the supervening claims or creditors, as to all advances made within the terms of such advances, whether made before or after the claims of such purchasers or creditors arose, or before or after the mortgagee has notice of them. If the mortgage contains enough to show a contract between the parties that it is to stand as a security to the mortgagee for such indebtedness as may arise from the future dealings between the parties, it is sufficient to put a purchaser or encumbrancer on inquiry, and if he fails to make it he is not entitled to protection as a bona fide purchaser.[19] Such a mortgage is considered good against subsequent encumbrances to the full amount of the advances provided for, or even verbally agreed for; and the mortgagee is held to have a right to rely upon it and to make such advances, without regard to whatever encumbrances may afterward have been put upon the property.[20]

§ 4643. Mortgages to secure future advances—Priority.—Advances made after notice of subsequent liens, upon the same premises, according to some authorities, create a lien subordinate to such subsequent liens.[21] This general rule, however, is subject to qualifications. Advances covered by a mortgage have preference over the claims of junior encumbrancers, who have become such with notice of an agreement under the mortgages for the advances.[22] Mortgages to secure future advances or liabilities are valid and fixed securities against subsequent purchasers or attaching creditors of the mortgagor, although the advances are made or the liabilities assumed after the record of such later deeds or attachments, and although it is optional with the mortgagee

[19] Tapia v. Demartini, 77 Cal. 383, 19 Pac. 641, 11 Am. St. 288; Ackerman v. Hunsicker, 85 N. Y. 43, 39 Am. Rep. 621.

[20] Lovelace v. Webb, 62 Ala. 271; Tapia v. Demartini, 77 Cal. 383, 19 Pac. 641, 11 Am. St. 288; Lewis v. Hartford Silk Mfg. Co., 56 Conn. 25, 12 Atl. 637; Louisville Banking Co. v. Leonard, 90 Ky. 106, 11 Ky. L. 917, 13 S. W. 521; Witczinski v. Everman, 51 Miss. 841, 845; Gray v. Helm, 60 Miss. 131; Ackerman v. Hunsicker, 85 N. Y. 43, 39 Am. Rep. 621; Freiberg v. Magale, 70 Tex. 116, 7 S. W. 684; Keyes v. Bump's Admr., 59 Vt. 391, 9 Atl. 598.

[21] Frye v. Bank of Illinois, 11 Ill. 367; Hughes v. Worley, 1 Bibb (Ky.) 200; Bell v. Fleming, 12 N. J. Eq. 13, affd. 12 N. J. Eq. 490; Hall v. Crouse, 13 Hun (N. Y.) 557; Todd v. Outlaw, 79 N. Car. 235; Merchants' State Bank v. Tufts, 14 N. Dak. 238, 103 N. W. 760, 116 Am. St. 682; Spader v. Lawler, 17 Ohio 371, 49 Am. Dec. 461.

[22] Truscott v. King, 6 N. Y. 147; Kramer v. Farmers' &c. Bank, 15 Ohio 253.

whether he will make such advancement or assume such liabilities or not, if they are made or assumed in good faith, and without notice of any subsequent intervening encumbrance.[23] But where the mortgagee is not bound to make the advances or assume the liabilities, and he has actual notice of a later encumbrance upon the property for an existing debt or liability, such later encumbrance will take precedence of the mortgage as to all advances made after such notice.[24] If by the terms of the mortgage an obligation is imposed upon the mortgagee to make the advances, the mortgage will remain security for all the advances he is required to make, although other encumbrances may be put upon the property before they are made, and he has knowledge of such encumbrances.[25]

§ 4644. Limitation of amount of future advances.—Although the record must show the existence of the mortgage in order to avail anything as a notice, yet it is generally conceded

[23] Crane v. Deming, 7 Conn. 387; Schmidt v. Zahrndt, 148 Ind. 447, 47 N. E. 335; Anderson v. Liston, 69 Minn. 82, 72 N. W. 52; Ward v. Cook, 17 N. J. Eq. 93; Sayre v. Hewes, 32 N. J. Eq. 652, revd., 33 N. J. Eq. 552; Williams v. Gilbert, 37 N. J. Eq. 84; Truscott v. King, 6 Barb. (N. Y.) 346, revd., 6 N. Y. 147; Union Nat. Bank v. Milburn & Stoddard Co., 7 N. Dak. 201, 73 N. W. 527; Merchants' State Bank v. Tufts, 14 N. Dak. 238, 103 N. W. 760, 116 Am. St. 682; Conrad v. Atlantic Ins. Co., 1 Pet. (U. S.) 386, 7 L. ed. 189; Shirras v. Caig, 7 Cranch (U. S.) 34, 3 L. ed. 260; McDaniels v. Colvin, 16 Vt. 300, 42 Am. Dec. 512.

[24] Tapia v. Demartini, 77 Cal. 383, 19 Pac. 641, 11 Am. St. 288; Boswell v. Goodwin, 31 Conn. 74, 81 Am. Dec. 169; Brinkmeyer v. Browneller, 55 Ind. 487; Schmidt v. Zahrndt, 148 Ind. 447, 47 N. E. 335; Ladue v. Detroit & M. R. Co., 13 Mich. 380, 87 Am. Dec. 759; Omaha Coal, Coke & Lime Co. v. Suess, 54 Nebr. 379, 74 N. W. 620; Sayre v. Hewes, 32 N. J. Eq. 652, revd., 33 N. J. Eq. 552; Williams v. Gilbert, 37 N. J. Eq. 84; Schmidt v. Hedden (N. J. Eq.), 38 Atl. 843; Ackerman v. Hunsicker, 85 N. Y. 43, 39 Am. Rep. 621; Union Nat. Bank v. Milburn & Stoddard Co., 7 N. Dak. 201, 73 N. W. 527; Seaman v. Fleming, 7 Rich. Eq. (S. Car.) 283; National Bank v. Gunhouse, 17 S. Car. 489; Ripley v. Harris, 3 Biss. (U. S.) 199, Fed. Cas. No. 11853; McDaniels v. Colvin, 16 Vt. 300, 42 Am. Dec. 512; Home Sav. & L. Assn. v. Burton, 20 Wash. 688, 56 Pac. 940.

[25] Nelson v. Iowa Eastern R. Co,, 8 Am. Ry. 82; Lovelace v. Webb, 62 Ala. 271; Crane v. Deming, 7 Conn. 387; Rowan v. Sharps' Rifle Mfg. Co., 29 Conn. 282; Boswell v. Goodwin, 31 Conn. 74, 81 Am. Dec. 169; Richards v. Waldron, 9 Mackey (D. C.) 585; Brinkmeyer v. Browneller, 55 Ind. 487; Brinkmeyer v. Helbling, 57 Ind. 435; Schmidt v. Zahrndt, 148 Ind. 447, 47 N. E. 335; Wilson v. Russell, 13 Md. 494, 71 Am. Dec. 645; Commercial Bank v. Cunningham, 24 Pick. (Mass.) 270, 35 Am. Dec. 322; Griffin v. Burtnett, 4 Edw. Ch. (N. Y.) 673; Ackerman v. Hunsicker, 21 Hun (N. Y.) 53, 85 N. Y. 43, 39 Am. Rep. 621; Lyle v. Duncomb, 5 Bin. (Pa.) 585; In re Moroney's Appeal, 24 Pa. St. 372.

that it need not show the exact amount of the encumbrance. But while, according to some authorities, the limit of these advances should be named, so that an inquirer may know that the encumbrance cannot exceed a certain amount,[26] according to others there is no necessity for limiting the amount of the intended advances in any way, if the mortgage shows that future advances are covered by it.[27] It is not necessary that the mortgage should express on its face that it is given to secure future advances. It may be given for a specific sum, and it will then be security for a debt for that amount.[28] This definite sum will then limit the extent of the lien. There must be some limit to the amount which the mortgage is to secure, either by express limitation or by stating generally the object of the security. If the limit be not defined in any way it can be good only for the advances made at the time, and such others as may afterward be made before any encumbrances are made upon the property mortgaged.[29] The sum expressed by the mortgage may cover a present indebtedness as well as future advances, and it is not necessary that the one should be separated from the other on the face of the mortgage.[30] The sum or amount named as the consideration of the mortgage is of no moment, as the mortgage stands as security for the amount of liability or indebtedness incurred under the contract, for advances set forth in the condition of the mortgage. It is not essential that any sum be named in the consideration clause.[31] The consideration named in the mortgage does not limit the amount for which it may be security, if from the whole instrument it appears that it was intended to secure a future indebtedness beyond this amount.[32] Although a mortgage made in good faith to secure future debts expected to be contracted, or advances to be

[26] In re Young's Estate, 3 Md. Ch. 461; Bell v. Fleming's Exrs., 12 N. J. Eq. 13, affd. 12 N. J. Eq. 490; Beekman v. Frost, 18 Johns. (N. Y.) 544, 9 Am. Dec. 246.

[27] Lovelace v. Webb, 62 Ala. 271; Tapia v. Demartini, 77 Cal. 383, 19 Pac. 641, 11 Am. St. 288; Witczinski v. Everman, 51 Miss. 841; Ackerman v. Hunsicker, 85 N. Y. 43, 39 Am. Rep. 621.

[28] Forsyth v. Preer, 62 Ala. 443; Huckaba v. Abbott, 87 Ala. 409, 6 So. 48.

[29] Robinson v. Williams, 22 N. Y. 380; Fassett v. Smith, 23 N. Y. 252.

[30] Tully v. Harloe, 35 Cal. 302, 95 Am. Dec. 102; Summers v. Roos, 42 Miss. 749, 2 Am. Rep. 653; Hendrix v. Gore, 8 Ore. 406; Evenson v. Bates, 58 Wis. 24, 15 N. W. 837.

[31] Keyes v. Bump's Admr., 59 Vt. 391, 9 Atl. 598.

[32] Citizens' Sav. Bank v. Kock, 117 Mich. 225, 75 N. W. 458.

made in the course of dealings between the parties, is a good and valid security,[33] yet, if limited by the terms of the mortgage, either as to amount or the time within which the advances are to be made, or the nature of them, the limitation must be strictly observed.[34] As a general rule, advances in excess of the amount of a mortgage are not secured by it.[35]

§ 4645. **Mortgage of indemnity.**—While mortgages of indemnity may be given to secure the mortgagee for liabilities already incurred, they are more frequently given as security for liabilities to be incurred in the future, and they are to this extent mortgages to secure future advances. Such mortgages generally declare the purpose for which they are given, and set out particularly the liabilities incurred or to be incurred by the mortgagee. But this is not essential. A mortgage given for a definite sum, without specifying the liabilities secured, may be shown by parol evidence to have been given to indemnify the mortgagee against his liability as an indorser or surety for the mortgagor.[36] Although it is desirable that the true consideration be stated, yet when this is not done it may be explained by extrinsic evidence.[37] A general description of the liability is sufficient. Thus, a mortgage to indemnify an indorser for liability on notes to be indorsed within a specified time from the date of the mortgage, to an amount not exceeding a certain sum at any one time, was sustained against the mortgagee.[38] A mortgage conditioned to save the mortgagee harmless for indorsing notes of the mortgagor, to

[33] Commercial Bank v. Cunningham, 24 Pick. (Mass.) 270, 35 Am. Dec. 322; James v. Morey, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475n; Brinkerhoff v. Lansing, 4 Johns. Ch. (N. Y.) 65, 8 Am. Dec. 538; Bank of Utica v. Finch 3 Barb. Ch. (N. Y.) 293, 49 Am. Dec. 175; Walker v. Snediker, Hoff. (N. Y.) 144; Yelverton v. Sheldon, 2 Sandf. Ch. (N. Y.) 481; United States v. Hooe, 3 Cranch (U. S.) 73, 2 L. ed. 370; Shirras v. Caig, 7 Cranch (U. S.) 34, 3 L. ed. 260.

[34] Miller v. Whittier, 36 Maine 577; Burt v. Gamble, 98 Mich. 402, 57 N. W. 261.

[35] McComb v. Barcelona Apartment Assn., 16 Hun (N. Y.) 644, 31 N. Y. St. 325, 10 N. Y. S. 546, affd. 134 N. Y. 598, 4 Silvernail Ct. App. (N. Y.) 582, 31 N. E. 613.

[36] Hubbard v. Savage, 8 Conn. 215; Simpson v. Robert, 35 Ga. 180; Bank of Utica v. Finch, 3 Barb. Ch. (N. Y. 293, 49 Am. Dec. 175; McKinster v. Babcock, 26 N. Y. 378; Shirras v. Caig, 7 Cranch (U. S.) 34, 3 L. ed. 260; Lawrence v. Tucker, 23 How. (U. S.) 14, 16 L. ed. 474.

[37] Gardner v. Webber, 17 Pick. (Mass.) 407; Commercial Bank v. Cunningham, 24 Pick. (Mass.) 270, 35 Am. Dec. 322; Cutler v. Steele, 93 Mich. 204, 53 N. W. 521; McKinster v. Babcock, 26 N. Y. 378.

[38] Utley v. Smith, 24 Conn. 290, 63 Am. Dec. 163.

a specified amount, when thereafter requested, and also renewal notes, is not invalid for uncertainty as against subsequent encumbrances.[39] If the sum for which the mortgage of indemnity is given be limited, the security cannot be extended beyond that amount. In order to create a liability upon a mortgage made to guarantee a contemplated loan to another, the loan must correspond with the recital of it in the mortgage.[40]

A mortgage given to indemnify an indorser or surety on a note is a continuing security for all renewals of such notes until it is finally paid.[41] So long as the liability continues the security continues also.[42] When given to indemnify a surety it is a lien from the time of its execution and delivery, and not merely from the time when the mortgagee pays the debt on which he is surety;[43] and therefore it takes precedence of a conveyance made by the mortgagor, or of a judgment rendered against him, after the execution of the mortgage and before the mortgagee has paid the debt, so as to become entitled to enforce the security.[44] It is held by some courts that a mortgage, given to secure one who is expected to make, endorse or accept negotiable paper for the accommodation of another, is a lien from the time such liability is incurred.[45] But whenever there is a legal obligation to incur the liability the mortgage is a lien from the time of its delivery.[46] When there is no obligation to incur such future liabilities, the mortgage constitutes a lien from the time the liability is incurred, and is breferable to a judgment

[39] Ketchum v. Jauncey, 23 Conn. 123. See also, Brander v. Bowmar, 16 La. 370; Linton v. Purdon, 9 Rob. (La.) 482; Kramer v. Farmers' &c. Bank, 15 Ohio 253.

[40] Thomas v. Olney, 16 Ill. 53; Ryan v. Shawneetown, 14 Ill. 20; Townsend v. Empire &c. Co., 6 Duer (N. Y.) 208; In re Griffiths, 1 Lowell (U. S.) 431, Fed. Cas. No. 3540.

[41] Chapman v. Jenkins, 31 Barb. (N. Y.) 164; Brinckerhoff v. Lansing, 4 Johns. Ch. (N. Y.) 65, 8 Am. Dec. 538; Babcock v. Morse, 19 Barb. (N. Y.) 140; Nesbit v. Worts, 37 Ohio St. 378.

[42] Hawkins v. May, 12 Ala. 673; Courier-Journal &c. Co. v. Schaeffer &c. Brewing Co., 101 Fed. 699, 41 C. C. A. 614; Mayer v. Grottendick, 68 Ind. 1; Hyland v. Habich, 150 Mass. 112, 22 N. E. 765, 6 L. R. A. 383, 15 Am. St. 174.

[43] Krutsinger v. Brown, 72 Ind. 466.

[44] Burdett v. Clay, 8 B. Mon. (Ky.) 287; Watson v. Dickens, 12 Sm. & M. (Miss.) 608; State v. Hemingway, 69 Miss. 491, 10 So. 575.

[45] Choteau v. Thompson, 2 Ohio St. 114; In re Bank of Montgomery County's Appeal, 36 Pa. St. 170; In re Bank of Commerce's Appeal, 44 Pa. St. 423.

[46] Taylor v. Cornelius, 60 Pa. St. 187; Lyle v. Ducomb, 5 Bin. (Pa.) 585.

rendered afterward, but not to encumbrances made before advances, of which the mortgagee had notice at the time of the advances.[47] Parol evidence is admissible to show the true character of a mortgage, and for what purpose and what consideration it was given. Although it was for a definite sum and secured the payment of notes for definite amounts, it may be shown that it is simply one of indemnity.[48] When the object is simply to indemnify the mortgagee for a liability he has incurred or may incur, the amount of the mortgage or of the mortgage notes serves merely to limit the extent of the security. Upon the foreclosure of such a mortgage the amount for which judgment is to be rendered is the amount the mortgagee has been compelled to pay under the liability for which he was secured, with interest from the date of the payment. The amount and date of the mortgage note are wholly disregarded in ascertaining this sum.[49]

§ 4646. Mortgages for support.—It was formerly questioned whether a deed conditioned for the support and maintenance of a person, the damages for a breach of which are unliquidated, can be regarded as strictly a mortgage. Early definitions of mortgages are found by which no conditional conveyances are mortgages except such as are made for the security of a loan of money. Others include all conveyances made as security for any debt, while the later doctrine generally is that a conveyance conditioned for the performance of any contract is a mortgage.[50] But the courts generally treat as mortgages, conveyances conditioned for the support and maintenance of the mortgagees. They are generally in such terms that the court can, by an award of damages, compensate the mortgagees for a nonperformance of the per-

[47] Kramer v. Farmers' &c. Bank, 15 Ohio 253; Hartley v. Kirlin, 45 Pa. St. 49.

[48] Bishop v. Warner, 19 Conn. 460; Stearns v. Porter, 46 Conn. 313; Mayer v. Grottendick, 68 Ind. 1; Simmons Hardware Co. v. Thomas, 147 Ind. 313, 46 N. E. 645; Price v. Gover, 40 Md. 102; Agawam Bank v. Strever, 18 N. Y. 502; Merchants' Nat. Bank v. Hall, 83 N. Y. 338, 38 Am. Rep. 434; Simons v. First Nat. Bank, 93 N. Y. 269; Farr v. Doxtater, 29 N. Y. St. 531, 9 N. Y. S. 141; Moses v. Hatfield, 27 S. Car. 324, 3 S. E. 538; Jones v. Guaranty &c. Co., 101 U. S. 622, 25 L. ed. 1030; United States v. Sturges, 1 Paine (U. S.) 525, Fed. Cas. No. 16414.

[49] Vogan v. Caminetti, 65 Cal. 438, 4 Pac. 435; Athol Sav. Bank v. Pomroy, 115 Mass. 573. See further on the general subject, Vol. 4, § 4008.

[50] Cook v. Bartholomew, 60 Conn. 24, 22 Atl. 444, 13 L. R. A. 452; Bethlehem v. Annis, 40 N. H. 34, 77 Am. Dec. 700.

sonal services;[51] but it is said to rest in the sound discretion of the court whether a forfeiture shall be relieved in this way.[52] Such a mortgage is not void for uncertainty in not defining the support to be furnished, for this will be construed to be such support as is proper and suitable for the person to be supported according to his station in life; and the amount required for such support can be ascertained with reasonable certainty.[53] Generally, when land has been conveyed to the mortgagor by the mortgagee, who has taken a mortgage of the same, conditioned for his support, there is a necessary implication, nothing appearing to the contrary, that the mortgagee is not to enter until there is a breach of the condition. The possession of the property is generally essential to the mortgagor to enable him to perform the condition. The mortgagee cannot, then, maintain an action for a possession until there has been a breach of condition.[54] When no place is stipulated where the mortgagee is to receive support, it is held that he has a right to be supported wherever he may choose to live, provided he does not create any needless expense to the mortgagor.[55] As a mortgage for support is in its nature a contract for personal services, and, especially when by its terms the condition is to be performed by the mortgagor, his heirs, executors or administrators, the duty cannot be transferred to a third person. Upon the death of the mortgagor, the condition must be kept by his heirs, executors or administrators, and the mortgaged property subject to this duty cannot be disposed of by the administrator for the payment of the mortgagor's debt;[56] and a creditor of the mortgagor can-

[51] Hiatt v. Parker, 29 Kans. 765; Hoyt v. Bradley, 27 Maine 242; Borst v. Crommie, 19 Hun (N. Y.) 209; Austin v. Austin, 9 Vt. 420; Davis v. Davis, 81 Vt. 259, 69 Atl. 876, 130 Am. St. 1035n; Abbott v. Sanders, 80 Vt. 179, 66 Atl. 1032, 13 L. R. A. (N. S.) 725n, 130 Am. St. 974; Simpson v. Edmiston, 23 W. Va. 675.

[52] Henry v. Tupper, 29 Vt. 358.

[53] Simpson v. Edmiston, 23 W. Va. 675.

[54] Brown v. Leach, 35 Maine 39; Bryant v. Erskine, 55 Maine 153; Abele v. McGuigan, 78 Mich. 415, 44 N. W. 393; Dearborn v. Dearborn, 9 N. H. 117; Flanders v. Lamphear, 9 N. H. 201; Rhoades v. Parker, 10 N. H. 83.

[55] Rowell v. Jewett, 69 Maine 293; Thayer v. Richards, 19 Pick. (Mass.) 398; Wilder v. Whittemore, 15 Mass. 262; Flanders v. Lamphear, 9 N. H. 201; Borst v. Crommie, 19 Hun (N. Y.) 209; Young v. Young, 59 Vt. 342, 10 Atl. 528.

[56] Bryant v. Erskine, 55 Maine 153; Ridley v. Ridley, 87 Maine 445, 32 Atl. 1005; Eastman v. Batchelder, 36 N. H. 141, 72 Am. Dec. 295; Bethlehem v. Annis, 40 N. H. 34, 77 Am. Dec. 700.

not levy upon the land and eject the mortgagor because he cannot perform the condition.[57]

B. Absolute Deed as Mortgage.

§ 4647. In general.—At law an absolute deed and separate absolute defeasance or agreement to reconvey, executed at the same time as security for a debt amount to a mortgage.[58] Although there has been considerable objection by the courts to separate defeasances as tending to encourage fraud, yet a deed absolute

[57] Ridley v. Ridley, 87 Maine 445, 32 Atl. 1005; Greenleaf v. Grounder, 86 Maine 298, 29 Atl. 1082.

[58] Cosby v. Buchanan, 81 Ala. 574, 1 So. 898; Sims v. Gaines, 64 Ala. 392; Freeman v. Baldwin, 13 Ala. 246; Smith v. Smith, 153 Ala. 504, 45 So. 168; Sherrer v. Harris (Ark.), 13 S. W. 730; Booth v. Hoskins, 75 Cal. 271, 17 Pac. 225; Smith v. Smith, 80 Cal. 323, 21 Pac. 4, 22 Pac. 186; Malone v. Roy, 94 Cal. 341, 29 Pac. 712; Rogers v. Jones, 92 Cal. 80, 28 Pac. 97; Walker v. Tiffin Min. Co., 2 Colo. 89; McClure v. Smith, 14 Colo. 297, 23 Pac. 786; In re Gunn's Appeal, 55 Conn. 149, 10 Atl. 498; Waters v. Williamson, 10 Mackey (D. C.) 24; Wylly-Gabbett Co. v. Williams, 53 Fla. 872, 42 So. 910; Jones v. Wight, 8 Hawaii 614; Duell v. Leslie, 207 Mo. 658, 106 S. W. 489; Mutual Life Ins. Co. of New York v. Nicholas, 144 App. Div. (N. Y.) 95, 128 N. Y. S. 902; Adams v. McIntyre (N. Dak.), 133 N. W. 915; Eldriedge v. Hoefer, 52 Ore. 241, 93 Pac. 246, 94 Pac. 563, 96 Pac. 1105; Teal v. Walker, 111 U. S. 242, 28 L. ed. 415, 4 Sup. Ct. 420; Dow v. Chamberlin, 5 McLean (U. S.) 281, Fed. Cas. No. 4037; Lanahan v. Sears, 102 U. S. 318, 26 L. ed. 180; Dudley v. Buckley, 68 W. Va. 630, 70 S. E. 376; Wolf v. Theresa Village Mut. Fire Ins. Co., 115 Wis. 402, 91 N. W. 1014. For construction of this provision, see Pirkle v. Equitable Mortg. Co., 99 Ga. 524, 28 S. E. 34; Marshall v. Hodgkins, 99 Ga. 592, 27 S. E. 748; Burckhalter v. Planters' &c. Bank, 100 Ga. 428, 28 S. E. 236; Broach v. Smith, 75 Ga. 159. Under this statute a deed given to secure a debt may be foreclosed by the grantee as a mortgage, notwithstanding a provision therein that it is to be construed as a deed passing title, and not as a mortgage, such provision being for the benefit of the grantee who may waive it at his election. Merrihew v. Fort, 98 Fed. 899. And see Ray v. Tatum, 72 Fed. 112, 18 C. C. A. 464; Kelly v. Leachman, 3 Idaho 392, 29 Pac. 849; Wilson v. Thompson, 4 Idaho 678, 43 Pac. 557; Pritchard v. Butler, 4 Idaho 518, 43 Pac. 73; Preschbaker v. Feaman's Heirs, 32 Ill. 475; Ewart v. Walling, 42 Ill. 453; Bearss v. Ford, 108 Ill. 16; Jackson v. Lynch, 129 Ill. 72, 21 N. E. 580, 22 N. E. 246; Helbreg v. Schurmann, 150 Ill. 12, 37 N. E. 99, 41 Am. St. 339; Harbison v. Lemon, 3 Blackf. (Ind.) 51, 23 Am. Dec. 376; Watkins v. Gregory, 6 Blackf. (Ind.) 113; Crassen v. Swoveland, 22 Ind. 427; Lentz v. Martin, 75 Ind. 228; Lowe v. Turpie, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233; Bigler v. Jack, 114 Iowa 667, 87 N. W. 700; Thompson v. People's Bldg. &c. Co., 114 Iowa 481, 87 N. W. 438; Haggerty v. Brower, 105 Iowa 395, 75 N. W. 321; Chase v. Abbott, 20 Iowa 154; Vennum v. Babcock, 13 Iowa 194; Scott v. Newhirter, 49 Iowa 487; Caruthers' Admr. v. Hunt, 18 Iowa 576; Radford v. Folsom, 58 Iowa 473, 12 N. W. 536; Overstreet v. Baxter, 30 Kans. 55, 1 Pac. 825; Ogden v. Grant, 6 Dana (Ky.) 473; Edrington v. Harper, 3 J. J. Marsh. (Ky.) 353; 20 Am. Dec. 145; Honore v. Hutchings, 8 Bush (Ky.) 687; Frey v. Campbell, 8 Ky. L. (abstract) 772, 3 S. W. 368; Shaw v. Erskine, 43 Maine 371; Warren v.

in form, intended to operate as a security, if given in good faith to secure an actual indebtedness, is not constructively fraudulent as to the grantor's other creditors.[59] Such a deed and agreement to reconvey the estate upon payment of a certain sum of money, or upon the performance of some other condition, have

Lovis, 53 Maine 463; Blaney v. Bearce, 2 Greenl. (Maine) 132; Mills v. Darling, 43 Maine 565; Clement v. Bennett, 70 Maine 207; Bunker v. Barron, 79 Maine 62, 8 Atl. 253, 1 Am. St. 282; Stowe v. Merrill, 77 Maine 550, 1 Atl. 684; Knight v. Dyer, 57 Maine 174, 99 Am. Dec. 765; Snow v. Pressey, 82 Maine 552, 20 Atl. 78, 85 Maine 408, 27 Atl. 272; Gaither v. Clarke, 67 Md. 18, 8 Atl. 740; Bayley v. Bailey, 5 Gray (Mass.) 505; Judd v. Flint, 4 Gray (Mass.) 557; Murphy v. Calley, 1 Allen (Mass.) 107; Short v. Caldwell, 155 Mass. 57, 28 N. E. 1124; Jeffery v. Hursh, 58 Mich. 246, 25 N. W. 176, 27 N. W. 7; Clark v. Landon, 90 Mich. 83, 51 N. W. 357; Enos v. Sutherland, 11 Mich. 538; Ferris v. Wilcox, 51 Mich. 105, 16 N. W. 252, 47 Am. Rep. 551; Hill v. Edwards, 11 Minn. 22; Benton v. Nicoll, 24 Minn. 221; Archambau v. Green, 21 Minn. 520. See also, Martin v. Pond, 30 Fed. 15; Butman v. James, 34 Minn. 547, 27 N. W. 66; Sharkey v. Sharkey, 47 Mo. 543; Copeland v. Yoakum's Admr., 38 Mo. 349; Connolly v. Giddings, 24 Nebr. 131, 37 N. W. 939; Nelson v. Atkinson, 37 Nebr. 577, 56 N. W. 313; Names v. Names, 48 Nebr. 701, 67 N. W. 751; Riley v. Starr, 48 Nebr. 243, 67 N. W. 187; First Nat. Bank v. Kreig, 21 Nev. 404, 32 Pac. 641; Essex County Nat. Bank v. Harrison, 57 N. J. Eq. 91, 40 Atl. 209; Vliet v. Young, 34 N. J. Eq. 15; Decker v. Leonard, 6 Lans. (N. Y.) 264; Lane v. Shears, 1 Wend. (N. Y.) 433; Peterson v. Clark, 15 Johns. (N. Y.) 205; Clark v. Henry, 2 Cow. (N. Y.) 324; Henry v. Davis, 7 Johns. Ch. (N. Y.) 40, affd. 2 Cow. (N. Y.) 324; Brown v. Dean, 3 Wend. (N. Y.) 208; Hall v. Van Cleve, 11 N. Y. Leg. Obs. 281; Weed v. Stevenson, Clarke (N. Y.) 166; Draper v. Draper, 71 Hun (N. Y.) 349, 55 N. Y. St. 11, 24 N. Y. S. 1127; Robinson v. Willoughby, 65 N. Car. 520; Mason v. Hearne, 45 N. Car. 88; Marshall v. Stewart, 17 Ohio 356; Sun Fire Office v. Clark, 53 Ohio St. 414, 42 N. E. 248, 38 L. R. A. 562n; Weiseham v. Hocker, 7 Okla. 250, 54 Pac. 464; Friedley v. Hamilton, 17 Serg. & R. (Pa.) 70, 17 Am. Dec. 638; Manufacturers' & Mechanics' Bank v. Bank of Pa., 7 Watts & S. (Pa.) 335, 42 Am. Dec. 240; Guthrie v. Kahle, 46 Pa. St. 331; Houser v. Lamont, 55 Pa. St. 311, 93 Am. Dec. 755; Kerr v. Gilmore, 6 Watts (Pa.) 405; Colwell v. Woods, 3 Watts (Pa.) 188, 27 Am. Dec. 345; Stoever v. Stoever, 9 S. & R. (Pa.) 434; Johnston v. Gray, 16 Serg. & R. (Pa.) 361, 16 Am. Dec. 577; Jaques v. Weeks, 7 Watts (Pa.) 261; Wilson v. Shoenberger, 31 Pa. St. 295; Hammonds v. Hopkins, 3 Yerg. (Tenn.) 525; Blizzard v. Craigmiles, 7 Lea (Tenn.) 693; Baxter v. Dear, 24 Tex. 17, 76 Am. Dec. 89; Moores v. Wills, 69 Tex. 109, 5 S. W. 675; Williams v. Chambers (Tex. Civ. App.), 26 S. W. 270; Reynolds v. Scott, Brayton (Vt.) 75; Thorne v. Joy, 15 Wash. 83, 45 Pac. 642; Hoffman v. Ryan, 21 W. Va. 415; Plato v. Roe, 14 Wis. 453; Second Ward Bank v. Uppman, 12 Wis. 499; Knowlton v. Walker, 13 Wis. 264; Brinkman v. Jones, 44 Wis. 498. In Georgia a conveyance by deed to secure any debt, the grantor taking a bond for reconveyance upon the payment of such debt, upon the payment of the debt passes the title to the property till the debt is repaid and shall be held to be an absolute conveyance, with the right reserved by the vendor to have said property reconveyed to him upon the payment of the debt on debts intended to be secured agreeably to the terms of the contract and not a mortgage. Code (1895), § 2771.

[59] McClure v. Smith, 14 Colo. 297, 23 Pac. 786; Jefferson County Bank v. Hummel, 11 Colo. App. 337, 53 Pac. 286.

always been held to constitute a legal mortgage if the instruments are of the same date, or were executed and delivered at the same time and as one transaction.[60] As between the parties themselves, the relation is the same as if the mortgage had been in the ordinary form.[61] The fact that possession of the property is given to the grantee by the contract for reconveyance does not affect the character of the transaction.[62] The instrument of defeasance must be of as high character as the deed itself; and consequently a written agreement to reconvey not under seal, though made at the same time with the deed, does not, at law, constitute a mortgage.[63] If not under seal, the agreement will constitute a mortgage only in equity.[64]

If the deed and defeasance do not on their face show that the transaction is a security for debt, the instruments do not, as a matter of law, constitute a mortgage, though they may be proved to be such by extrinsic evidence.[65] The absolute deed may secure advances to be made, and in that case the mortgage becomes effectual when the advances are made.[66] It is not material that there should be any note or bond or other written evidence of debt, nor is it material that the indebtedness should have arisen in any particular manner. It is only

[60] Nugent v. Riley, 1 Metc. (Mass.) 117, 35 Am. Dec. 355; Erskine v. Townsend, 2 Mass. 493, 3 Am. Dec. 71; Taylor v. Weld, 5 Mass. 109; Scott v. McFarland, 13 Mass. 309; Newhall v. Burt, 7 Pick. (Mass.) 157; Stocking v. Fairchild, 5 Pick. (Mass.) 181; Eaton v. Whiting, 3 Pick. (Mass.) 484; Lanfair v. Lanfair, 18 Pick. (Mass.) 299; Clark v. Landon, 90 Mich. 83, 51 N. W. 357.

[61] Short v. Caldwell, 155 Mass. 57, 28 N. E. 1124; Tilden v. Greenwood, 149 Mass. 567, 22 N. E. 45.

[62] Clark v. Landon, 90 Mich. 83, 51 N. W. 357.

[63] Jewett v. Bailey, 5 Greenl. (Maine) 87; French v. Sturdivant, 8 Greenl. (Maine) 246; Warren v. Lovis, 53 Maine 463; Murphy v. Calley, 1 Allen (Mass.) 107; Kelleran v. Brown, 4 Mass. 443; Flint v. Sheldon, 13 Mass. 443, 7 Am. Dec. 162; Cutler v. Dickinson, 8 Pick. (Mass.) 386; Flagg v. Mann, 14 Pick. (Mass.) 467; Scituate v. Hanover, 16 Pick. (Mass.) 222. See however, Harrison v. Phillips Academy, 12 Mass. 456; Runlet v. Otis, 2 N. H. 167.

[64] Flagg v. Mann, 14 Pick. (Mass.) 467; Eaton v. Green, 22 Pick. (Mass.) 526; Cutler v. Dickinson, 8 Pick. (Mass.) 386; Kelleran v. Brown, 4 Mass. 443; Phelan v. Fitzpatrick, 84 Wis. 240, 54 N. W. 614. See also, West v. Reed, 55 Ill. 242; Green v. Capps, 142 Ill. 286, 31 N. E. 597; Fitch v. Miller, 200 Ill. 170, 65 N. E. 650.

[65] Teale v. Walker, 111 U. S. 242, 28 L. ed. 415, 4 Sup. Ct. 420; Wallace v. Johnstone, 129 U. S. 58, 32 L. ed. 619, 9 Sup. Ct. 243. See also, Carroll v. Tomlinson, 192 Ill. 398, 61 N. E. 484, 85 Am. St. 344; Bogk v. Gassert, 149 U. S. 17, 37 L. ed. 631, 13 Sup. Ct. 738.

[66] Bull v. Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. 235.

material that there should be a bona fide debt.[67] Whenever a debt is recognized by the parties or established by the evidence, an agreement to reconvey serves to make a mortgage of the reconveyance.[68] But a debt either pre-existing or created at the time, or contracted to be created, is essential.[69] And if an absolute deed was intended as security, it is a mortgage, though the bond for reconveyance makes time the essence of the contract.[70] No agreement or intention of the parties, whether at the time of the transaction or subsequently, can change the redeemable character of a mortgage.[71] In some states, although the mortgage is by a deed absolute in form, the grantee acquires no legal title to the land. The deed is a mere security, just as a formal mortgage is in the same states.[72] But in other states, in

[67] Overstreet v. Baxter, 30 Kans. 55, 1 Pac. 825. "In determining whether a contract is to be treated as a mortgage, or a conditional sale, or a conveyance in fee, courts have commented upon the presence or absence of various particulars which commonly accompany mortgages, but the essential feature necessary to create a mortgage is that it should be a conveyance intended as a security. Such evidently was the purpose of the contract before us, but the plaintiff calls attention to the absence of a covenant to pay the amount of the indebtedness. It was agreed that interest should be paid on the full amount; that, after sale should be made, the proceeds should be applied in reduction of the amount of the then existing obligation; and that the firm would pay the difference if any should remain. So that, while there was not an agreement in terms to pay the entire indebtedness, such may be said to have been the purpose and effect of the agreement; in any event the absence of such a covenant is not conclusive, but is a circumstance to be considered in construing the contract." Kraemer v. Adelsberger, 122 N. Y. 467, 25 N. E. 859; Krug v. Kautz, 21 S. Dak. 461, 113 N. W. 623.

[68] Thomas v. Livingston, 155 Ala. 546, 46 So. 851; Wilson v. Rehm, 117 Ill. App. 473; Voss v. Eller, 109 Ind. 260, 10 N. E. 74; Henninger v. McGuire, 146 Iowa 270, 125 N. W. 180; Fuson v. Chestnut, 33 Ky. L. 249, 109 S. W. 1192; Reed v. Reed, 75 Maine 264; White v. Walsh, 62 Misc. (N. Y.) 423, 114 N. Y. S. 1015; Kinney v. Smith, 58 Ore. 158, 113 Pac. 854; Alstin's Exr. v. Cundiff, 52 Tex. 453; Hart v. Eppstein, 71 Tex. 752, 10 S. W. 85.

[69] Bridges v. Linder, 60 Iowa 190, 14 N. W. 217; Chandler v. Chandler, 76 Iowa 574, 41 N. W. 319; McNamara v. Culver, 22 Kans. 661.

[70] Jackson v. Lynch, 129 Ill. 72, 21 N. E. 580, 22 N. E. 246; Tennery v. Nicholson, 87 Ill. 464; Voss v. Eller, 109 Ind. 260, 10 N. E. 74; Buse v. Page, 32 Minn. 111, 19 N. W. 736, 20 N. W. 95; Duell v. Leslie, 207 Mo. 658, 106 S. W. 489; Alstin's Exr. v. Cundiff, 52 Tex. 453.

[71] Woods v. Wallace, 22 Pa. St. 171; Colwell v. Woods, 3 Watts (Pa.) 188, 27 Am. Dec. 345; Kunkle v. Wolfersberger, 6 Watts (Pa.) 126; Reitenbaugh v. Ludwick, 31 Pa. St. 131; Brown v. Nickle, 6 Pa. St. 390, revd. 41 Pa. St. 364; Hart v. Eppstein, 71 Tex. 752, 10 S. W. 85; Wing v. Cooper, 37 Vt. 169.

[72] Smith v. Smith, 80 Cal. 323, 21 Pac. 4, 22 Pac. 186, 549; Hall v. Arnott, 80 Cal. 348, 22 Pac. 200; Booth v. Hoskins, 75 Cal. 271, 17 Pac. 225; Raynor v. Drew, 72 Cal. 307, 13 Pac. 866; Healy v. O'Brien, 66 Cal. 517, 6 Pac. 386; Taylor v. McLain, 64 Cal. 513, 2 Pac. 399; Mur-

which a formal mortgage is held not to pass the legal title, a deed absolute in form intended to operate as a mortgage does pass such title.[73]

§ 4648. Deed and defeasance—Time of execution.—At law the deed and defeasance must be part of the same transaction and must take effect at the same time.[74] It is sufficient, however, that the deed and defeasance are substantially contemporaneous and were manifestly meant to constitute a mortgage.[75] When the deed and defeasance are executed at the same time, or are agreed upon at the same time, it is a conclusion of law that they constitute a legal mortgage.[76] A subsequent defeasance cannot be allowed to affect the prior conveyance. The transaction must be a mortgage at its inception, and cannot become so afterward. The defeasance must be such that it may be considered as if it were annexed to, or inserted in the same deed, and construed as containing the condition upon the performance of which the estate may

dock v. Clark, 90 Cal. 427, 27 Pac. 275. When an absolute deed is declared to be a mortgage, the mortgagor's equity can not be cut off by a decree divesting him of it unless he shall pay the sum found due within a time limit, but the title remains in him until divested by foreclosure and sale. Byrne v. Hudson, 127 Cal. 254, 59 Pac. 597. Anglo-Californian Bank v. Cerf, 147 Cal. 384, 81 Pac. 1077; First Nat. Bank v. Ashmead, 23 Fla. 379, 2 So. 657, 665; First Nat. Bank v. Kreig, 21 Nev. 404, 32 Pac. 641; Odell v. Montross, 68 N. Y. 499; Adair v. Adair, 22 Ore. 115, 29 Pac. 193; Kinney v. Smith, 58 Ore. 158, 113 Pac. 854; Clambey v. Copland, 52 Wash. 580, 100 Pac. 1031; Brinkman v. Jones, 44 Wis. 498; Howe v. Carpenter, 49 Wis. 697, 6 N. W. 357.

[73] Thaxton v. Roberts, 66 Ga. 704; McLaren v. Clark, 80 Ga. 423, 7 S. E. 230; Woodson v. Veal, 60 Ga. 562; Lackey v. Bostwick, 54 Ga. 45; Woodward v. Jewell, 140 U. S. 247, 35 L. ed. 478, 11 Sup. Ct. 784. When a deed absolute is declared to be a mortgage, a special judgment may be extended subjecting the property to the payment of the debt. Jewell v. Walker, 109 Ga. 241, 34 S. E. 337. See also, Hughes v. Davis, 40 Cal. 117; Thaxton v. Roberts, 66 Ga. 704; McLaren v. Clark, 80 Ga. 423, 7 S. E. 230; Jay v. Welchel, 78 Ga. 786, 3 S. E. 906; Richards v. Crawford, 50 Iowa 494; Burdick v. Wentworth, 42 Iowa 440; Farley v. Goocher, 11 Iowa 570; Haggerty v. Brower, 105 Iowa 395, 75 N. W. 321; Jeffery v. Hursh, 42 Mich. 563, 4 N. W. 303; Gallagher v. Giddings, 33 Nebr. 222, 49 N. W. 1126; First Nat. Bank v. Tighe, 49 Nebr. 299, 68 N. W. 490; Baird v. Kirtland, 8 Ohio 21; Kemper v. Campbell, 44 Ohio St. 210. It is otherwise in California and Florida. Moisant v. McPhee, 92 Cal. 76, 28 Pac. 46; First Nat. Bank v. Ashmead, 23 Fla. 379, 2 So. 657, 665; Frazer v. Seureau (Tex. Civ. App.), 128 S. W. 649.

[74] Bennock v. Whipple, 12 Maine 346, 28 Am. Dec. 186; McLaughlin v. Shepherd, 32 Maine 143, 52 Am. Dec. 649; Waters v. Crabtree, 105 N. Car. 394, 11 S. E. 240.

[75] Sebree v. Thompson, 31 Ky. L. 1146, 104 S. W. 781; Jeffery v. Hursh, 58 Mich. 246, 25 N. W. 176, 27 N. W. 7.

[76] Thomas v. Livingston, 155 Ala. 546, 46 So. 851; Jeffery v. Hursh, 58 Mich. 246, 25 N. W. 176, 27 N. W. 7;

be defeated.[77] If, at the time of executing an absolute deed, the parties verbally agree that a defeasance shall be executed subsequently on request, it has been held that such defeasance, when executed, will relate back to the deed and make it a mortgage.[78] But, in the absence of such an agreement connecting the defeasance with the original transaction, there is not a mortgage even in equity, but only an agreement to reconvey.[79] It is not necessary that the deed and bond of defeasance should both bear the same date.[80] Where the defeasance is of a different date from the deed, parol evidence is admissible to prove that they were delivered at the same time and are part of the same transaction.[81] It is not necessary that the deed and defeasance should in terms refer to each other. Their connection may be established by parol evidence.[82] The defeasance must be delivered at the same time with the deed to which it refers; although it is not material that the instruments should bear the same date, it is essential that they be delivered at the same time.[83] In equity, however, it is immaterial that the deeds and the agreement to reconvey be executed at different times;[84] and it is immaterial that there be any bond or agreement to reconvey, parol evidence being sufficient to prove the transaction to be

Clark v. Landon, 90 Mich. 83, 51 N. W. 357; Waters v. Crabtree, 105 N. Car. 394, 11 So. 240; Wilson v. Shoenberger, 31 Pa. St. 295; Reitenbaugh v. Ludwick, 31 Pa. St. 131.

[77] Murphy v. Calley, 1 Allen (Mass.) 107.

[78] Lovering v. Fogg, 18 Pick. (Mass.) 540. See Scott v. Henry, 13 Ark. 112. Contra, Cosby v. Buchanan, 81 Ala. 574, 1 So. 898; Lund v. Lund, 1 N. H. 39, 8 Am. Dec. 29; Waters v. Crabtree, 105 N. Car. 394, 11 S. E. 240.

[79] "Neither courts of law nor courts of equity can make or modify a valid contract. They can only determine what they are, and give them effect. Courts of equity can only give effect to and administer rights created by and growing out of them that courts of law cannot, by reason of their peculiar organization and rigorous methods of procedure. Nor has a court of equity authority to change the settled nature of an instrument, and make it different from, and serve a purpose different from, that contemplated by the parties when they made it." Waters v. Crabtree, 105 N. Car. 394, 11 S. E. 240.

[80] Harrison v. Phillips Academy, 12 Mass. 456; Newhall v. Burt, 7 Pick. (Mass.) 157.

[81] Brown v. Holyoke, 53 Maine 9; Waters v. Crabtree, 105 N. Car. 394, 11 S. E. 240.

[82] Preschbaker v. Feaman's Heirs, 32 Ill. 475.

[83] Cotton v. McKee, 68 Maine 486; Kelleran v. Brown, 4 Mass. 443; Kraemer v. Adelsberger, 122 N. Y. 467, 25 N. E. 859; Kelly v. Thompson, 7 Watts (Pa.) 401; Haines v. Thomson, 70 Pa. St. 434.

[84] Williams v. Chadwick, 74 Conn. 252, 50 Atl. 720; Mills v. Mills, 26 Conn. 213.

a mortgage.[85] When made subsequently, it must be based on a sufficient consideration, unless it be professedly executed in explanation of the intention of the parties at the time of the conveyance and of the true character of the instrument. A mere voluntary agreement to reconvey cannot be enforced.[86] If the agreement to reconvey be delivered as an escrow to be delivered to the obligee upon the repayment of the money within a certain time, it is not considered executed and delivered at the same time with the deed, so as to constitute part of the same transaction, and therefore it seems that the transaction is not a mortgage.[87]

§ 4649. **Cancelation of defeasance.**—A deed of defeasance made at the same time with an absolute deed may afterward, upon sufficient consideration, be canceled, so as to give an absolute title to the mortgagee, if no rights of third parties have intervened;[88] but no agreement can be made at the time of creating the mortgage that will entitle the mortgagee, at his election, to hold the estate free from condition, and not subject to redemption.[89] If the bond or defeasance, which was given at the time of taking the deed, be surrendered and destroyed at the expiration of the time limited, and a new bond be given upon a consideration partly new, by which the grantee agrees to reconvey the premises upon payment, within an additional time, of a larger sum, the grantor thereby surrenders his title as mortgagor, and the grantee becomes the owner in fee of the land.[90] When once the defeasance has been delivered up for a valid consideration to be canceled, and the original transaction is thus confirmed as a sale, and is treated as such by the grantor, it cannot afterward be treated as a mortgage and foreclosed.[91] But in states where a mortgage, whatever its form may be, creates merely a lien in the mortgagee while the legal

[85] Scott v. Henry, 13 Ark. 112; Walker v. Tiffin Min. Co., 2 Colo. 89; Brinkman v. Jones, 44 Wis. 498.

[86] Vasser v. Vasser, 23 Miss. 378.

[87] See Exton v. Scott, 6 Sim. 31; Bodwell v. Webster, 13 Pick. (Mass.) 411.

[88] Cramer v. Wilson, 202 Ill. 83, 66 N. E. 869, affd. 195 U. S. 408, 49 L. ed. 256, 25 Sup. Ct. 94; Deadman v. Yantis, 230 Ill. 243, 82 N. E. 592, 120 Am. St. 291; Haggerty v. Brower, 105 Iowa 395, 75 N. W. 321; Seawell v. Hendricks, 4 Okla. 435, 46 Pac. 577.

[89] Trull v. Skinner, 17 Pick. (Mass.) 213; Harrison v. Phillips Academy, 12 Mass. 456.

[90] Maxfield v. Patchen, 29 Ill. 39; Carpenter v. Carpenter, 70 Ill. 457; Falis v. Conway Mut. Fire Ins. Co., 7 Allen (Mass.) 46; Rice v. Rice, 4 Pick. (Mass.) 349.

[91] Shubert v. Stanby, 52 Ind. 46.

title remains in the mortgagor, the surrender or cancelation of the defeasance is insufficient to restore the title to the mortgagee.[92] If the contract for reconveyance be surrendered upon the express agreement of the grantee to reconvey upon the grantor's paying a certain sum then found to be due, the surrender will not prevent the mortgagor's redeeming upon the terms agreed upon.[93] In several states it is provided by statute that a bond of defeasance shall not defeat an absolute estate against any one other than the maker, his heirs, devisees or persons having actual notice thereof, unless it be recorded.[94] If the bond be not recorded, the person having no knowledge may, of course, purchase the property, or attach it as belonging absolutely to the grantee; but if he has actual notice of the bond as constituting part of the transaction of the conveyance, any right he acquires in the property is subject to the mortgage created by the bond.[95] The recording of the defeasance is not necessary in order to give it full effect as between the parties themselves, but only as against other persons;[96] and as against them it may not be necessary when the conveyance on its face does not purport to be absolute.[97]

§ 4650. Absolute deed as mortgage or conditional sale—Facts considered.—The true character of the conveyance will be inquired into and effect given to the intention of the parties, which may, in a proper case, be ascertained by their conduct and declarations at the time and subsequently.[98] Thus,

[92] Brinkman v. Jones, 44 Wis. 498.

[93] Clark v. Finlon, 90 Ill. 245.

[94] 1 Jones Mort. (6th ed.), § 513.

[95] Purrington v. Pierce, 38 Maine 447; Newhall v. Pierce, 5 Pick. (Mass.) 450; Newhall v. Burt, 7 Pick. (Mass.) 157; Tufts v. Tapley, 129 Mass. 380; Butman v. James, 34 Minn. 547, 27 N. W. 66; Friedley v. Hamilton, 17 Serg. & R. (Pa.) 70, 17 Am. Dec. 638; Manufacturers' & Mechanics' Bank v. Bank of Pa., 7 Watts & S. (Pa.) 335, 42 Am. Dec. 240; Corpman v. Baccastow, 84 Pa. St. 363; Catlin v. Bennatt, 47 Tex. 165.

[96] Jackson v. Ford, 40 Maine 381; Harrison v. Morton, 87 Md. 671, 40 Atl. 897; Bayley v. Bailey, 5 Gray (Mass.) 505; Short v. Caldwell, 155 Mass. 57, 28 N. E. 1124; Bryan v. Traders Ins. Co., 145 Mass. 389, 14 N. E. 454.

[97] Russell v. Waite, Walk Ch. (Mich.) 31.

[98] Vincent v. Walker, 86 Ala. 333, 5 So. 465; Rose v. Gandy, 137 Ala. 329, 34 So. 239; Eiland v. Radford, 7 Ala. 724, 42 Am. Dec. 610; Parmer's Admr. v. Parmer, 88 Ala. 545, 7 So. 657; Hodgkins v. Wright, 127 Cal. 688, 60 Pac. 431; Brandt v. Thompson, 91 Cal. 458, 27 Pac. 763; Daubenspeck v. Platt, 22 Cal. 330; Lodge v. Turman, 24 Cal. 385; Montgomery v. Spect, 55 Cal. 352; Manasee v. Dinkelspiel, 68 Cal. 404, 9 Pac. 547; Hall v. Arnot, 80 Cal. 348, 22 Pac. 200; Reavis v. Reavis, 103 Fed. 813; Belinski v. National Brew-

a statement in a deed or a verbal agreement made at the time of the conveyance, that it shall operate as security for a loan of money or as indemnity to a surety, if clearly proved, is decisive of the character of the transaction.[99] And so is an agreement that the deed shall stand only as security for a debt, and that in case of a sale by the grantee the excess of the proceeds over the debt shall be paid to the grantor. Such an agreement and deed constitute a mortgage; and therefore the agreement is not void as an attempt to create a trust by parol.[1] The intent at the time of the delivery of the deed governs.[2] But the secret intention of either party to an absolute conveyance as to the purpose of it is without effect in determining its character.[3] The debt may not be evidenced by any bond or note, or covenant to pay it; so that the facts and circumstances of the transaction must be inquired into in order to ascertain whether the considera-

ing Co., 124 Ill. 45; Purviance v. Holt, 3 Gilm. (Ill.) 394; Reigard v. McNeil, 38 Ill. 400; Whitcomb v. Sutherland, 18 Ill. 578; Williams v. Bishop, 15 Ill. 553; Workman v. Greening, 115 Ill. 477, 4 N. E. 385; Darst v. Murphy, 119 Ill. 343, 9 N. E. 887; Loeb v. McAllister, 15 Ind. App. 643, 41 N. E. 1061, 44 N. E. 378; Zimmerman v. Marchland, 23 Ind. 474; Ingalls v. Atwood, 53 Iowa 283, 5 N. W. 160; Reed v. Reed, 75 Maine 264; Bradley v. Merrill, 88 Maine 319, 34 Atl. 160; Libby v. Clark, 88 Maine 32, 33 Atl. 657; Ferris v. Wilcox, 51 Mich. 105, 16 N. W. 252, 47 Am. Rep. 551; Freeman v. Wilson, 51 Miss. 329; Prewett v. Dobbs, 13 Sm. & M. (Miss.) 431; Cobb v. Day, 106 Mo. 278, 17 S. W. 323; Tibeau v. Tibeau, 22 Mo. 77; Kemp v. Small, 32 Nebr. 318, 49 N. W. 169; Sanders v. Ayres, 63 Nebr. 271, 88 N. W. 526; Crane v. Bonnell, 2 N. J. Eq. 264; Mooney v. Byrne, 163 N. Y. 86, 57 N. E. 163; Lane v. Shears, 1 Wend. (N. Y.) 433; Cole v. Bolard, 22 Pa. St. 431; Null v. Fries, 110 Pa. St. 521; 1 Atl. 551; Overton v. Bigelow, 3 Yerg. (Tenn.) 513; Carter v. Carter, 5 Tex. 93; Loving v. Milliken, 59 Tex. 423; Ruffier v. Womack, 30 Tex. 332; Gazley v. Herring (Tex.), 17 S. W. 17; Russell v. Southard, 12 How. (U. S.) 139, 13 L. ed. 927; Duerden v. Solomon, 33 Utah 468, 94 Pac. 978; Batchelder v. Randolph, 112 Va. 296, 71 S. E. 533; Rockwell v. Humphrey, 57 Wis. 410, 15 N. W. 394; Cumps v. Kiyo, 104 Wis. 656, 80 N. W. 937.

[99] Dotham Guano Co. v. Ward, 132 Ala. 380, 31 So. 748; Anthony v. Anthony, 25 Ark. 479; First Nat. Bank v. Ashmead, 23 Fla. 379, 2 So. 657, 665; Hibernian Banking Assn. v. Commercial Nat. Bank, 157 Ill. 524, 41 N. E. 919; Ashton v. Shepherd, 120 Ind. 69, 22 N. E. 98; Anding v. Davis, 38 Mich. 574, 77 Am. Dec. 658; Wolf v. Theresa &c. Ins. Co., 115 Wis. 402, 191 N. W. 1014.

[1] Crane v. Buchanan, 29 Ind. 570; Tower v. Fetz, 26 Nebr. 706, 42 N. W. 884, 18 Am. St. 795.

[2] Sanders v. Ayres, 63 Nebr. 271, 89 N. W. 526; Harmon v. Grants Pass Banking & Trust Co., 60 Ore. 69, 118 Pac. 188; Johnson v. National Bank of Commerce, 65 Wash. 261, 118 Pac. 21. See also, Irwin v. Coleman, 173 Ala. 175, 55 So. 492; Borders v. Allen, 33 Ky. L. 194, 110 S. W. 240; Clambey v. Copland, 52 Wash. 580, 100 Pac. 1031; Froidevaux v. Jordan, 64 W. Va. 388, 62 S. E. 686, 131 Am. St. 911n.

[3] Haney v. Clark, 65 Tex. 93.

tion of the deed was really a debt or loan; if not one or the other, the deed can hardly be a mortgage.[4] Where there is no debt and no loan, an agreement to resell will not change an absolute deed into a mortgage.[5]

When it is doubtful whether the transaction is a mortgage or a conditional sale, it will generally be treated as a mortgage,[6] although it is sometimes said that the transaction, appearing upon its face to be a conditional sale, will be held to be such when no circumstances appear showing an intention that it should be considered a mortgage.[7] But generally the courts of equity incline against conditional sales, and give the benefit of any doubt arising upon the evidence in favor of the grantor's right to redeem.[8] A declaration of trust made by one to whom a

[4] Henley v. Hotaling, 41 Cal. 22; Galt v. Jackson, 9 Ga. 151; Reed v. Reed, 75 Maine 264; Flagg v. Mann, 14 Pick. (Mass.) 467; Lund v. Lund, 1 N. H. 39, 8 Am. Dec. 29; Conway v. Alexander, 7 Cranch (U. S.) 218, 3 L. ed. 321.

[5] Vincent v. Walker, 86 Ala. 333, 5 So. 465; Rue v. Dole, 107 Ill. 275; Meehan v. Forrester, 52 N. Y. 277; Glover v. Payn, 19 Wend. (N. Y.) 518; Odell v. Montrass, 68 N. Y. 499; Barry v. Hamburg-Bremen Fire Ins. Co., 110 N. Y. 1, 17 N. E. 405; McAuley v. Smith, 132 N. Y. 524, 30 N. E. 997; Mooney v. Byrne, 163 N. Y. 86, 57 N. E. 163; McGuin v. Lee, 10 N. Dak. 160, 86 N. E. 714.

[6] Vincent v. Walker, 86 Ala. 333, 5 So. 465; Cosby v. Buchanan, 81 Ala. 574, 1 So. 898; Bacon v. Brown, 19 Conn. 29; Connor v. Connor, 59 Fla. 467, 52 So. 727; Heath v. Williams, 30 Ind. 495; Trucks v. Lindsey, 18 Iowa 504; Rester v. Powell, 120 La. 406, 45 So. 372; Baugher v. Merryman, 32 Md. 185; Klein v. McNamara, 54 Miss. 90; O'Neill v. Capelle, 62 Mo. 202; Turner v. Kerr, 44 Mo. 429; Brant v. Robertson, 16 Mo. 129; Desloge v. Ranger, 7 Mo. 327; Donovan v. Boeck, 217 Mo. 70, 116 S. W. 543; Stephens v. Allen, 11 Ore. 188, 3 Pac. 168; Elliott v. Bozorth, 52 Ore. 391, 97 Pac. 632; De Bruhl v. Maas, 54 Tex. 464; Russell v. Southard, 12 How. (U. S.) 139, 13 L. ed. 927; Duerden v. Solomon, 33 Utah 468, 94 Pac. 978; Suavely v. Pickle, 21 Grat. (Va.) 27; Gilchrist v. Beswick, 33 W. Va. 168, 10 S. E. 371.

[7] Swetland v. Swetland, 3 Mich. 482; Minneapolis Threshing Mach. Co. v. Jones, 95 Minn. 127, 103 N. W. 1017; Robinson v. Cropsey, 2 Edw. Ch. (N. Y.) 138, affd. 6 Paige (N. Y.) 480.

[8] Fee v. Cobine, 11 Ir. Eq. 406; Turnipseed v. Cunningham, 16 Ala. 501, 50 Am. Dec. 190; McNeill v. Norsworthy, 39 Ala. 156; Locke's Exr. v. Palmer, 26 Ala. 312; Mobile Bldg. & Loan Assn. v. Robertson, 65 Ala. 382; Crews v. Threadgill, 35 Ala. 334; Turner v. Wilkinson, 72 Ala. 361; Reeves v. Abercrombie, 108 Ala. 535, 19 So. 41; Cosby v. Buchanan, 81 Ala. 574, 1 So. 898; Williams v. Reggans, 111 Ala. 621, 20 So. 614; Daniels v. Lowery, 92 Ala. 519, 8 So. 352; Peagler v. Stabler, 91 Ala. 308, 9 So. 157; Scott v. Henry, 13 Ark. 112; Hickox v. Lowe, 10 Cal. 196; Pensoneau v. Pulliam, 47 Ill. 58; Miller v. Thomas, 14 Ill. 428; Bishop v. Williams, 18 Ill. 101; Williams v. Bishop, 15 Ill. 553; Heath v. Williams, 30 Ind. 495; Baird v. Reininghaus, 87 Iowa 167, 54 N. W. 148; Barthell v. Syverson, 54 Iowa 160, 6 N. W. 178; Scott v. Newhirter, 49 Iowa 487; Hughes v. Sheaff, 19 Iowa 335; Trucks v. Lindsay, 18 Iowa 504; Jenkins v. Stewart, 13 Ky. L. 112, 16 S. W. 356; Mooney v. Byrne, 163 N. Y. 86, 57 N. E. 163; Brown v. Dewey, 2 Barb. (N. Y.) 28; Horn

conveyance was made upon his advancing money for the benefit of one having an agreement for the purchase of land, may be treated, in connection with the conveyance, as a mortgage rather than a trust.[9] But a conveyance expressly in trust to pay debts, and after the debts are paid, in trust for one of the grantors, is held not to be a mortgage.[10] The continued possession of the grantor is a circumstance tending to show that the agreement for repurchase, in connection with the deed, constitutes a mortgage rather than a conditional sale.[11] If the transaction creates no debt or loan, but only a right to repurchase, it is immaterial whether the consideration for the conveyance is fixed at the same price paid for the conveyance or at an advanced price.[12] When the transaction is otherwise a conditional conveyance and not a mortgage, the latter character is not imparted to it by the mere fact that the instrument is recorded as a mortgage,[13] and the fact that the grantor understood the transaction to be a mortgage is not alone sufficient to prove it to be so.[14] The acts or declarations of one party in reference to the transaction afterward will not change its character. The transaction remains what the parties

v. Keteltas, 46 N. Y. 605, 42 How. Pr. (N. Y.) 138; Matthews v. Sheehan, 69 N. Y. 585; Robinson v. Cropsey, 6 Paige (N. Y.) 480; Glover v. Payn, 19 Wend. (N. Y.) 518; Poindexter v. McCammon, 16 N. Car. 373, 18 Am. Dec. 591; Reed v. Reed, 75 Maine 264; Baugher v. Merryman, 32 Md. 185; Arty v. Grove, 21 Md. 456; Dougherty v. McColgan, 6 Gill & J. (Md.) 275; Cornell v. Hall, 22 Mich. 377; McKinney v. Miller, 19 Mich. 142; Holton v. Meighen, 15 Minn. 69; Freeman v. Wilson, 51 Miss. 329; King v. Greves, 42 Mo. App. 168; Gassert v. Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240, affd. 149 U. S. 17, 37 L. ed. 631, 13 Sup. Ct. 738.

[9] Stewart v. Fellows, 128 Ill. 480, 20 N. E. 657; Brumfield v. Boutall, 24 Hun (N. Y.) 451; Stephens v. Allen, 11 Ore. 188, 3 Pac. 168.

[10] Charles v. Claggett, 3 Md. 82; McMenomy v. Murray, 3 Johns. Ch. (N. Y.) 435; Ladd v. Johnson, 32 Ore. 195, 49 Pac. 756; Marvin v. Titsworth, 10 Wis. 320.

[11] Clark v. Finlon, 90 Ill. 245; Gibson v. Eller, 13 Ind. 124; Gray v. Shelby, 83 Tex. 405, 18 S. W. 809; Richmond v. Richmond, Fed. Cas. No. 11801; Ransone v. Frayser's Exrs., 10 Leigh (Va.) 592; Hoffman v. Ryan, 21 W. Va. 415.

[12] West v. Hendrix, 28 Ala. 226; Pitts v. Cable, 44 Ill. 103; French v. Sturdivant, 8 Greenl. (Maine) 246; Glover v. Payn, 19 Wend. (N. Y.) 518.

[13] Jackson v. Richards, 6 Cow. (N. Y.) 617; Morrison v. Brand, 5 Daly (N. Y.) 40, affd. 56 N. Y. 657.

[14] Douglass v. Moody, 80 Ala. 61; Reeder v. Gorsuch, 55 Kans. 553, 40 Pac. 897; Phœnix v. Gardner, 13 Gil. (Minn.) 396; Holmes v. Fresh, 9 Mo. 201; Jones v. Jones, 17 N. Y. S. 905; Wilson v. Parshall, 129 N. Y. 223, 29 N. E. 297; Jones v. Brittan, 1 Woods (U. S.) 667, Fed. Cas. No. 7455; Andrews v. Hyde, 3 Cliff. (U. S.) 516, Fed. Cas. No. 377; Harrison v. Hogue (Tex. Civ. App.), 136 S. W. 118.

made it in the beginning until by mutual agreement they change it. The treatment of an absolute deed as conditional by the grantee cannot make it a mortgage. If it was a mortgage in the beginning, his admission of the fact only relieves the mortgagor from proving it. If it was not a mortgage in the beginning, his treating it as such has no effect unless the mortgagor concurs in so treating it, so that in fact, by mutual agreement, the character of the instrument is changed.[15] Where one induces a third person to purchase land from him, and the purchaser agrees to reconvey the land to the grantor if certain payments are made to him within a specified time, in default of payment there is no right of redemption afterward.[16]

An agreement that the grantee may buy the property absolutely, after a specified time, is regarded as a circumstance tending to show that the transaction is a conditional sale.[17] On the other hand, an agreement that the grantee may sell all the property for the best possible price and retain from the proceeds the amount due him, paying the residue to the grantor, shows or at least tends to show that the transaction is a mortgage,[18] until the power of sale is executed.[19] In case the land should sell for a less sum than the debt, the grantee is entitled to recover the deficiency.[20] A conveyance to a trustee with power to sell the land, pay the creditors from the proceeds and deliver the balance to the grantor on his failure to pay the debt, is a mortgage, and

[15] Thomaston Bank v. Stimpson, 21 Maine 195. See Holmes v. Fresh, 9 Mo. 201; Nichols v. Reynolds, 1 R. I. 30, 36 Am. Dec. 238.

[16] Stephenson v. Thompson, 13 Ill. 186; Roberts v. McMahan, 4 G. Greene (Iowa) 34; Hull v. McCall, 13 Iowa 467; Hill v. Grant, 46 N. Y. 496; Becker v. Howard, 75 Wis. 415, 44 N. W. 755.

[17] Cadman v. Peter, 12 Fed. 363, affd. 118 U. S. 73, 30 L. ed. 78, 6 Sup. Ct. 957; Daniels v. Johnson, 24 Mich. 430; Baker v. Thrasher, 4 Denio (N. Y.) 493; McCaulay v. Porter, 71 N. Y. 173.

[18] Beckman v. Wilson, 61 Colo. 335; Kidd v. Teeple, 22 Cal. 255; Crane v. Buchanan, 29 Ind. 570; Truman v. Truman, 79 Iowa 506, 44 N. W. 721; Ogden v. Grant, 6 Dana (Ky.) 473; Haghthorp v. Hook, Admrs., 1 Gill & J. (Md.) 270; Curtiss v. Sheldon, 47 Mich. 262, 11 N. W. 151; Lawrence v. Farmers Loan & Tr. Co., 13 N. Y. 200, 642; Gillis v. Martin, 2 Dev. Eq. (N. Car.) 470, 25 Am. Dec. 729; Stephens v. Allen, 11 Ore. 188, 3 Pac. 168; Ruffners v. Putney, 12 Grat. (Va.) 541; Hoffman v. Ryan, 21 W. Va. 415. See, however, to the effect that such agreement is not alone sufficient to convert the deed into a mortgage, Rogers v. Beach, 115 Ind. 413, 17 N. E. 609.

[19] Eaton v. Whiting, 3 Pick. (Mass.) 484; DuClos v. Walton, 21 Ore. 323, 28 Pac. 1.

[20] Palmer v. Gurnsey, 7 Wend. (N. Y.) 248; Baker v. Thrasher, 4 Denio (N. Y.) 493; McAulay v. Porter, 71 N. Y. 173.

subject to the provisions of a registry law relating to mortgages.[21] The fact that there is no collateral undertaking by the grantor for the payment of money, or the performance of any obligation is by no means conclusive of the nature of the transaction. This is only one circumstance to be regarded in ascertaining whether it is to be treated as a mortgage or a sale with a contract for repurchase.[22] The continued possession of the grantor is also evidence tending to show that the conveyance was a mortgage.[23] An assignment of a contract of purchase as security is regarded as a mortgage, and when the assignee has completed the payments, and taken a conveyance to himself, the relation of the parties remains the same. Under the principle, "once a mortgage always a mortgage," the transaction retains that character until it is either foreclosed or redeemed.[24]

§ 4651. **Existence of debt.**—If the relation of debtor and creditor is not created between the parties, the transaction is not a mortgage, but a conditional sale.[25] If, however, the money paid by the purchaser was intended to be in fact a loan, the deed will be regarded as a mortgage rather than an absolute sale.[26] No

[21] Walsh v. Brennan, 52 Ill. 193; Woodruff v. Robb, 19 Ohio 212. See Irwin's Heirs v. Longworth, 20 Ohio 581; Allegheny R. & Coal Co. v. Casey, 79 Pa. St. 84.

[22] Murphy v. Calley, 1 Allen (Mass.) 107; Flagg v. Mann, 14 Pick. (Mass.) 467; Rice v. Rice, 4 Pick. (Mass.) 349; Bodwell v. Webster, 13 Pick. (Mass.) 411; Flint v. Sheldon, 13 Mass. 443, 7 Am. Dec. 162; Kelly v. Beers, 12 Mass. 387; Brant v. Robertson, 16 Mo. 129; Brown v. Dewey, 1 Sandf. Ch. (N. Y.) 56, 2 Barb. (N. Y.) 28; Stephens v. Allen, 11 Ore. 188, 3 Pac. 168.

[23] Cotterell v. Purchase, Cas. Temp. Talbot 61; Lincoln v. Wright, 4 De Gex & J. 16; Crews v. Threadgill, 35 Ala. 334; Daubenspeck v. Platt, 22 Cal. 330; Strong v. Shea, 83 Ill. 575; Thompson v. Banks, 2 Md. Ch. 430; Campbell v. Dearborn, 109 Mass. 130, 12 Am. Rep. 671; Kemp v. Earp, 7 Ired. Eq. (N. Car.) 167; Sellers v. Stalcup, 7 Ired. Eq. (N. Car.) 13; Streator v. Jones, 10 N. Car. 423; Steel v. Black, 56 N. Car. 427; O'Toole v. Omlie, 8 N. Dak. 444, 79 N. W. 849; Ruffner v. Womack, 30 Tex. 332; Wright v. Bates, 13 Vt. 341; Edwards v. Wall, 79 Va. 321; Gilchrist v. Beswick, 33 W. Va. 168, 10 S. E. 371; Kerr v. Hill, 27 W. Va. 576; Matheny v. Sandford, 26 W. Va. 386; Vangilder v. Hoffman, 22 W. Va. 1; Hoffman v. Ryan, 21 W. Va. 415; Lawrence v. DuBois, 16 W. Va. 443; Davis v. Demming, 12 W. Va. 246.

[24] Smith v. Cremer, 71 Ill. 185; Taut v. Guess, 35 S. Car. 605, 14 S. E. 391.

[25] Galt v. Jackson, 9 Ga. 151; Chapman v. Ogden, 30 Ill. 515; Humphreys v. Snyder, Morris (Iowa) 263; McLaughlin v. Royce, 108 Iowa 254, 78 N. W. 1105.

[26] Harrington v. Foley, 108 Iowa 287, 79 N. W. 64; Jenkins v. Stewart, 13 Ky. L. 112, 16 S. W. 356; Sebree v. Thompson, 31 Ky. L. 1146, 104 S. W. 781.

conveyance can be a mortgage unless made for the purpose of securing the payment of a debt, or the performance of a duty either existing or created at the time, or else to be created or to arise in the future. But it is not necessary that the debt or duty should be evidenced by any express covenant, or by any separate written security.[27] It is a question of fact, for the determination of which equity allows a wide range of inquiry into the relations of the parties and the circumstances of the case; and from the fact the law deduces the inference, either that there was a sale absolutely or upon condition, or else that the transaction was a mortgage.[28] Where there is no continuing debt, it is a strong circumstance to show that the transaction is a contract for repurchase. If the proof established that the consideration money was a loan, and the party receiving it was personally liable for its repayment, that constitutes it a debt; it does not require a writing to make it such, nor is it extinguished by or merged in a mortgage taken for security.[29] Unless the relation of debtor and creditor existed between the parties in the beginning in reference to the consideration of the conveyance, and the relation continues so that the grantee would have the right to call upon the grantor to supply any deficiency that might arise in a case of a foreclosure and sale of the premises, the agreement to reconvey in connection with the deed constitutes a conditional sale.[30] If

[27] Nelson v. Wadsworth, 171 Ala. 603, 55 So. 120; Smith v. Smith (Ala.), 45 So. 168; Fisk v. Stewart, 24 Minn. 97; Brant v. Robertson, 16 Mo. 129; Donovan v. Boeck, 217 Mo. 70, 116 S. W. 543; Bascombe v. Marshall, 129 App. Div. (N. Y.) 516, 113 N. Y. S. 991, affd. 198 N. Y. 538, 92 N. E. 1077; Hall v. Jennings (Tex. Civ. App.), 104 S. W. 489; Bachrach v. Bachrach, 111 Va. 232, 68 S. E. 985.

[28] Micou v. Ashurst, 55 Ala. 607; Baker v. Fireman's Fund Ins. Co., 79 Cal. 34, 21 Pac. 357; Stinchfield v. Milliken, 71 Maine 567; Rice v. Rice, 4 Pick. (Mass.) 349; Turner v. Kerr, 44 Mo. 429; McNees v. Swaney, 50 Mo. 388; Henry v. Davis, 7 Johns. Ch. (N. Y.) 40, affd. 2 Cow. (N. Y.) 324; Bascombe v. Marshall, 129 App. Div. (N. Y.) 516, 113 N. Y. S. 991, affd. 198 N. Y. 538, 92 N. E. 1077; Robinson v. Willoughby, 65 N. Car. 520; Devore v. Woodruff, 1 N. Dak. 143, 45 N. W. 701; In re Sweetzer's Appeal, 71 Pa. St. 264; Todd v. Campbell, 32 Pa. St. 250; Hiester v. Maderia, 3 Watts & S. (Pa.) 384; Goulding v. Bunster, 9 Wis. 513.

[29] Phillips v. Hulszier, 20 N. J. Eq. 308. See also, Porter v. Clements, 3 Ark. 364; Farmer v. Grose, 42 Cal. 169.

[30] Johnson's Exr. v. Clark, 5 Ark. 321; Blakemore v. Byrnside, 7 Ark. 505; Hoopes v. Bailey, 28 Miss. 328; Slowey v. McMurray, 27 Mo. 113, 72 Am. Dec. 251; Duell v. Leslie, 207 Mo. 658, 106 S. W. 489; Gassert v. Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240, affd. 149 N. S. 17, 37 L. ed. 631, 13 Sup. Ct. 738; Robinson v. Cropsey, 2 Edw. Ch. (N. Y.) 138, affd. 6 Paige (N. Y.) 480; Sax-

there was no loan in the beginning, or if a prior debt was extinguished by the conveyance, and the grantor merely has the privilege of repaying if he pleases by a given time, and of receiving a reconveyance, the transaction is a conditional sale.[31]

There can be no mortgage without a debt. There may be agreements for the performance of obligations other than the payment of money; but leaving these out of view, it is essential that there be an agreement, either express or implied on the part of the mortgagor, or some one in whose behalf he executes the mortgage, to pay to the mortgagee a sum of money either on account of a pre-existing debt or a present loan.[32] The fact that there is no agreement for the payment of the debt is a circumstance entitled to considerable weight as tending to show that the conveyance was not intended as a mortgage, and that the relation of debtor and creditor did not exist, but is not conclusive.[33] The fact that interest is payable, by the terms of the contract, upon the money advanced by the person who takes the title to the property, is a circumstance tending to show that the transaction was a loan upon security instead of a conditional sale. Anything tending to show that there was a subsisting debt, or an advance by way of loan goes to prove the transaction to be a mortgage.[34]

ton v. Hitchcock, 47 Barb. (N. Y.) 220; McGuin v. Lee, 10 N. Dak. 160, 86 N. W. 714; De Bruhl v. Maas, 54 Tex. 464.

[31] Stahl v. Dehn, 72 Mich. 645, 40 N. W. 922; De Bruhl v. Maas, 54 Tex. 464.

[32] Henley v. Hotaling, 41 Cal. 22; Voss v. Eller, 109 Ind. 260, 10 N. E. 74; Veeder v. Veeder, 141 Iowa 492, 120 N. W. 61; Jones v. Gillett, 142 Iowa 506, 118 N. W. 314, 121 N. W. 5; Usher v. Livermore, 2 Iowa 117; Klein v. McNamara, 54 Miss. 90; McCourt v. Peppard, 126 Wis. 326, 105 N. W. 809.

[33] Locke v. Moulton, 96 Cal. 21, 30 Pac. 957; Bacon v. Brown, 19 Conn. 29; Jarvis v. Woodruff, 22 Conn. 548; Flagg v. Mann, 14 Pick. (Mass.) 467; Niggeler v. Maurin, 34 Minn. 118, 24 N. W. 369; Fisk v. Stewart, 24 Minn. 97; Doying v. Chesebrough (N. J. Eq.), 136 Atl. 893; Horn v. Keteltas, 46 N. Y. 605, 42 How. Pr. (N. Y.) 138; Matthews v. Sheehan, 69 N. Y. 585; Holmes v. Grant, 8 Paige (N. Y.) 243; Brumfield v. Boutall, 24 Hun (N. Y.) 451; Morris v. Budlong, 78 N. Y. 543; Brown v. Dewey, 1 Sandf. Ch. (N. Y.) 56; Macauley v. Smith, 132 N. Y. 524, 30 N. E. 997; McGuin v. Lee, 10 N. Dak. 160, 86 N. W. 714; McCamant v. Roberts, 80 Tex. 316, 15 S. W. 580, 1054; Hubby v. Harris, 68 Tex. 91, 3 S. W. 558; Rockwell v. Humphrey, 57 Wis. 410, 15 N. W. 394; Schriber v. Le Clair, 66 Wis. 579, 29 N. W. 570, 889. "The want of a covenant to repay the money, is not complete evidence that a conditional sale was intended, but is a circumstance of no inconsiderable importance." Conway v. Alexander, 7 Cranch (U. S.) 218, 3 L. ed. 321.

[34] Farmer v. Grose, 42 Cal. 169; Harbison v. Houghton, 41 Ill. 522; Turpie v. Lowe, 114 Ind. 37, 15 N. E. 934; Honore v. Hutchings, 8 Bush

What is in fact a payment of interest is sometimes disguised under the payment of rent by the grantor in possession to the grantee; but although the transaction has the appearance of a conditional sale, the payment of rent in lieu of interest may be a circumstance tending to show that it is in fact a mortgage.[35] Evidence of the continuance of a debt such as the payment of interest upon it, or the extension of the time of payment is generally conclusive of the character of the original transaction as a mortgage.[36] It shows either that the pre-existing debt was not surrendered or canceled at the time of the conveyance, or, in case there was no such debt, it shows that one was then created.[37]

§ 4652. **Extinguishment of debt.**—An absolute deed delivered in payment of a debt is not converted into a mortgage merely because the grantee therein gives a contemporaneous stipulation binding him to reconvey, on being reimbursed, within an agreed period, an amount equal to the debt and the interest thereon. If the conveyance extinguished the debt and the parties so intend, so that a plea of payment would bar an action thereon, the transaction will be held an absolute or conditional sale notwithstanding.[38] And so if there was, in fact, a sale, an agreement by

(Ky.) 687; Murphy v. Calley, 1 Allen (Mass.) 107; Kraemer v. Adelsberger, 122 N. Y. 467, 25 N. E. 859.

[35] Ewart v. Walling, 42 Ill. 453; Bearss v. Ford, 108 Ill. 16; Preschbaker v. Fearman's Heirs, 32 Ill. 475; Woodward v. Pickett, 8 Gray (Mass.) 617; Boatright v. Peck, 33 Tex. 68; Wright v. Bates, 13 Vt. 341.

[36] Rodgers v. Burt, 157 Ala. 91, 47 So. 226; Reeves v. Abercrombie, 108 Ala. 535, 19 So. 41; Turner v. Wilkinson, 72 Ala. 361; Hall v. Arnott, 80 Cal. 348, 22 Pac. 200; Montgomery v. Spect, 55 Cal. 352; Westlake v. Horton, 85 Ill. 228; Eaton v. Green, 22 Pick. (Mass.) 526; Klein v. McNamara, 54 Miss. 90; Riley v. Starr, 48 Nebr. 243, 67 N. W. 187; Tannyhill v. Pepperl, 70 Nebr. 31, 96 N. W. 1005; Budd v. Van Orden, 33 N. J. Eq. 143, affd. 33 N. J. Eq. 564; Ruffier v. Womack, 30 Tex. 332; Lawrence v. Du Bois, 16 W. Va. 443.

[37] Farmer v. Grose, 42 Cal. 169; Gilchrist v. Beswick, 33 W. Va. 168, 10 S. E. 371.

[38] Martin v. Martin, 123 Ala. 191, 26 So. 525; Knaus v. Dreher, 84 Ala. 319, 4 So. 287; Perdue v. Bell, 83 Ala. 396, 3 So. 698; Farmer v. Grose, 42 Cal. 169; Page v. Vilhac, 42 Cal. 75; Phipps v. Munson, 50 Conn. 267; Rue v. Dole, 107 Ill. 275; Bearss v. Ford, 108 Ill. 16; Rogers v. Beach, 115 Ind. 413, 17 N. E. 609; Hays v. Carr, 83 Ind. 275; Voss v. Eller, 109 Ind. 260, 10 N. E. 74; Bridges v. Linder, 60 Iowa 190, 14 N. W. 217; Elston v. Chamberlain, 41 Kans. 354, 21 Pac. 259; Howe v. Austin, 40 La. Ann. 323, 4 So. 315; Baugher v. Merryman, 32 Md. 185; Knight v. Hartman, 93 Mich. 69, 52 N. W. 1044; Weathersly v. Weathersly, 40 Miss. 462, 90 Am. Dec. 374; Hoopes v. Bailey, 28 Miss. 328; Turner v. Kerr, 44 Mo. 429; Morrison v. Brand, 5 Daly (N. Y.) 40, affd. 56 N. Y. 657; Randall v. Sanders, 87 N. Y. 578; Cobura v. Anderson, 62 How. Pr. (N.

the purchaser to resell the property within a limited time, at the same price, does not convert it into a mortgage.[39] But if the indebtedness be not canceled, equity will regard the conveyance as a mortgage, whether the grantee so regard it or not. He cannot at the same time hold the land absolutely and retain the right to enforce payment of the debt on account of which the conveyance was made. The test, therefore, in cases of this sort by which to determine whether the conveyance is a sale or mortgage, is to be found in the question whether the debt was discharged or not by the conveyance.[40] If in the subsequent transactions of the parties there is no recognition in any way of the relation of debtor and creditor and the vendee for a considerable period holds possession without paying interest or rent, these facts go to show that there is only an agreement for repurchase and not a mortgage.[41] When the transaction is shown to have been based upon a pre-existing debt, the question to be settled is whether the intention of the parties was to cancel that debt or to secure it. This is a question of fact for the determination of which not only the negotiations had at the time of the conveyance, but also the subsequent acts of the parties in relation to it, may be considered. The mere fact that there was a debt at the time is not conclusive that the conveyance was a mortgage for its security. And while the courts generally hold that a pre-existing debt raises the presumption of a mortgage, such presumption is overcome by showing that the debt was surrendered and canceled at the time of the conveyance and the burden is then on the grantor to show that the deed is not to have effect according to its terms.[42]

Y.) 268; McGuin v. Lee, 10 N. Dak. 160, 86 N. W. 714. In re Callahan's Estate, 13 Phila. (Pa.) 381; Rotan Grocery Co. v. Turner, 46 Tex. Civ. App. 534, 102 S. W. 932; Swarm v. Boggs, 12 Wash. 246, 40 Pac. 941.

[39] Eckert v. McBee, 27 Kans. 232; Mason v. Moody, 26 Miss. 184; Gassert v. Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240, affd. 149 U. S. 17, 37 L. ed. 631, 13 Sup. Ct. 738; Harrah v. Smith, 79 Nebr. 51, 112 N. W. 337; Stringfellow v. Braselton, 54 Tex. Civ. App. 1, 117 S. W. 204.

[40] Sutphen v. Cushman, 35 Ill. 186; Rue v. Dole, 107 Ill. 275; Voss v. Eller, 109 Ind. 260, 10 N. E. 609; Macauley v. Smith, 132 N. Y. 524, 30 N. E. 997; Null v. Fries, 110 Pa. St. 521, 1 Atl. 551; Wallace v. Smith, 155 Pa. St. 78, 25 Atl. 807, 35 Am. St. 868; Wasatch Min. Co. v. Jennings, 5 Utah 243, 1 Pac. 65. See also, Bigler v. Jack, 114 Iowa 667, 87 N. W. 700.

[41] O'Reilly v. O'Donoghue, Ir. 10 Eq. 73; Wolfe v. McMillan, 117 Ind. 587, 20 N. E. 509.

[42] Rushton v. McIllvene, 88 Ark.

§ 4653. Contract for loan.—When an absolute conveyance has been made upon an application for a loan, and an agreement is made to reconvey upon payment of the money advanced, as a general rule, the transaction is adjudged to constitute a mortgage.[43] In each case the purpose of the grantor was in the beginning to borrow money; and unless a change be shown in his intention, it is presumed that any use that he may have made of his real estate, in connection with it, was merely as a pledge to secure a loan.[44] The parties having originally met upon the footing of borrowing and lending, although a different consideration be recited in the deed, it will be considered a mortgage until it be shown that the parties afterward bargained for the property independently of the loan.[45] But an application for a loan may in any case result in a sale of land absolutely or conditionally,

299, 114 S. W. 709; Montgomery v. Spect, 55 Cal. 352; Manasse v. Dinkelspiel, 68 Cal. 404, 9 Pac. 547; Ford v. Irwin, 18 Cal. 117, 14 Cal. 428; Rue v. Dole, 107 Ill. 275; Ridings v. Marengo Sav. Bank of Marengo, 147 Iowa 608, 125 N. W. 200; Dillon v. Dillon, 24 Ky. L. 781, 69 S. W. 1099; Gassert v. Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240, affd. 149 U. S. 17, 337 L. ed. 631, 13 Sup. Ct. 738; Samuelson v. Mickey, 73 Nebr. 852, 103 N. W. 671, 166 N. W. 461; Hogarty v. Lynch, 19 N. Y. Super. Ct. 138; Eckford v. DeKay, 8 Paige (N. Y.) 89, affd. 26 Wend. (N. Y.) 29; Bickel v. Wessinger, 58 Ore. 98, 113 Pac. 34; Baisch v. Oakeley, 68 Pa. St. 92; Lewis v. Bayliss, 90 Tenn. 280, 16 S. W. 376; Snavely v. Pickle, 29 Grat. (Va.) 27; Matheney v. Sandford, 26 W. Va. 386.

[43] Parmelee v. Lawrence, 44 Ill. 405; Miller v. Thomas, 14 Ill. 428; Wheeler v. Rustin, 19 Ind. 334; Cross v. Hepner, 7 Ind. 359; Crassen v. Swoveland, 22 Ind. 427; Garvin's Admx. v. Vincent, 27 Ky. L. 1076, 87 S. W. 804; McSorley v. Hughes, 58 Hun (N. Y.) 360, 34 N. Y. St. 945, 12 N. Y. S. 179, affd. 129 N. Y. 659, 30 N. E. 65; Holmes v. Grant, 8 Paige (N. Y.) 243; Conover v. Palmer, 123 App. Div. (N. Y.) 817, 108 N. Y. S. 480; Wagg v. Herbert, 19 Okla. 525, 92 Pac. 250; Brown v. Nickle, 6 Pa. St. 390, revd. 41 Pa. St. 364; Kellum v. Smith, 33 Pa. St. 158; Krug v. Kautz, 21 S. Dak. 461, 113 N. W. 623; Hart v. Eppstein, 71 Tex. 752, 10 S. W. 85; Russell v. Southard, 12 How. (U. S.) 139, 13 L. ed. 927; Davis v. Demming, 12 W. Va. 246; Hoffman v. Ryan, 21 W. Va. 415.

[44] Mobile Bldg. & Loan Assn. v. Robertson, 65 Ala. 382; Crews v. Threadgill, 35 Ala. 334; Greenwood Bldg. & Loan Assn. v. Stanton, 28 Ind. App. 548, 63 N. E. 574; Anonymous, 2 Hayw. (N. Car.) 26; Davis v. Hemenway, 27 Vt. 589; Vangilder v. Hoffman, 22 W. Va. 1; Kerr v. Hill, 27 W. Va. 576.

[45] Crews v. Threadgill, 35 Ala. 334; Dwen v. Blake, 44 Ill. 135; Smith v. Doyle, 46 Ill. 451; Richardson v. Barrick, 16 Iowa 407; Leahigh v. White, 8 Nev. 147; Phillips v. Hulsizir, 20 N. J. Eq. 308; Marvin v. Prentice, 49 How. Pr. (N. Y.) 385; Fiedler v. Darrin, 50 N. Y. 437, revg. 59 Barb. (N. Y.) 651; Tibbs v. Morris, 44 Barb. (N. Y.) 138. In re Sweetzer's Appeal, 71 Pa. St. 264; Morris v. Dixon, 1 How. (U. S.) 118, 11 L. ed. 69; Knowlton v. Walker, 13 Wis. 264.

and because the transaction began with such an application, it is not to be concluded that it necessarily ended in a loan.[46]

§ 4654. Adequacy or inadequacy of price.—Inadequacy of price is one of the circumstances which is considered as of weight, as tending to show that an absolute conveyance accompanied by an agreement to reconvey is a mortgage rather than a conditional sale. This alone will not authorize a court to give the grantor a right to redeem, but in connection with other evidence affords much ground of inference that the transaction was not really what it purports to be.[47] Inadequacy of price to be of controlling

[46] Bogk v. Gassert, 149 U. S. 17, 37 L. ed. 631, 13 Sup. Ct. 738.

[47] Thornborough v. Baker, 3 Swanst. 628; Davis v. Thomas, 1 Russ. & M. 506; Williams v. Owen, 5 M. & C. 303; Douglas v. Culverwell, 3 Gif. 251; Langton v. Horton, 5 Beav. 9; Russell v. Southard, 12 How. (U. S.) 139, 13 L. ed. 927; Morris v. Nixon, 1 How. (U. S.) 118, 11 L. ed. 69. See also, Rodgers v. Burt, 157 Ala. 91, 47 So. 226; Pearson v. Seay, 35 Ala. 612; Crews v. Threadgill, 35 Ala. 334; West v. Hendrix, 28 Ala. 226; Rapier v. Gulf City Paper Co., 77 Ala. 126; Williams v. Reggan, 111 Ala. 621, 20 So. 614; Turner v. Wilkinson, 72 Ala. 361; Crews v. Threadgill, 35 Ala. 334; Vincent v. Walker, 86 Ala. 333, 5 So. 465; Peagler v. Stabler, 91 Ala. 308, 9 So. 157; West v. Hendrix, 28 Ala. 226; Husheon v. Husheon, 71 Cal. 407, 12 Pac. 410; Butsch v. Smith, 40 Colo. 64, 90 Pac. 61; Walker v. Farmers' Bank, 6 Del. Ch. 81, 8 Houst. (Del.) 258, 10 Atl. 94, 14 Atl. 819; Matthews v. Porter, 16 Fla. 466; Chapman v. Ayer, 95 Ga. 581, 23 S. E. 131; Rodgers v. Moore, 88 Ga. 88, 13 S. E. 962; Rue v. Dole, 107 Ill. 275; Story v. Springer, 155 Ill. 25, 39 N. E. 570, affg. 43 Ill. App. 495; Helm v. Boyd, 124 Ill. 370, 16 N. E. 85; Carr v. Rising, 62 Ill. 14; Turpie v. Lowe, 114 Ind. 37, 15 N. E. 834; Davis v. Stonestreet, 4 Ind. 101; Bridges v. Linder, 60 Iowa 190, 14 N. W. 217; Caldwell v. Melveldt, 93 Iowa 730, 61 N. W. 1090; Conlee v. Heying, 94 Iowa 734, 62 N. W. 678; Trucks v. Lindsey, 18 Iowa 504; Wilson v. Patrick, 34 Iowa 362; Bigler v. Jack, 114 Iowa 667, 87 N. W. 700; Gossum v. Gossum, 13 Ky. L. 243, 15 S. W. 1057; Trimble v. McCormick, 12 Ky. L. 857, 15 S. W. 358; Oldham v. Halley, 2 J. J. Marsh. (Ky.) 113; Reed v. Reed, 75 Maine 264; Thompson v. Banks, 2 Md. Ch. 430; Campbell v. Dearborn, 109 Mass. 130, 12 Am. Rep. 671; Rathbone v. Maltz, 155 Mich. 306, 118 N. W. 991; Klein v. McNamara, 54 Miss. 90; Freeman v. Wilson, 51 Miss. 329; Donovan v. Boeck, 217 Mo. 70, 116 S. W. 543; Pierce v. Traver, 13 Nev. 526; Mooney v. Byrne, 163 N. Y. 86, 57 N. E. 163; Lawrence v. Farmers Loan & Trust Co., 13 N. Y. 200, 642; Brown v. Dewey, 2 Barb. (N. Y.) 28; Robinson v. Cropsey, 6 Paige (N. Y.) 480; Steel v. Black, 56 N. Car. 427; Streator v. Jones, 10 N. Car. 423; Sellers v. Stalcup, 7 Ired. Eq. (N. Car.) 13; Kemp v. Earp, 7 Ired. Eq. (N. Car.) 167; Wagg v. Herbert, 19 Okla. 525, 92 Pac. 250; Wharf v. Howell, 5 Binn. (Pa.) 499; Overton v. Bigelow, 3 Yerg. (Tenn.) 513; Cole's Admrs. v. Perry, 7 Tex. 109; Gibbs v. Penny, 43 Tex. 560; Gray v. Shelby, 83 Tex. 405, 18 S. W. 809; Temple Nat. Bank v. Warner, 92 Tex. 226, 47 S. W. 515; Kerr v. Hill, 27 W. Va. 576; Vangilder v. Hoffman, 22 W. Va. 1; Lawrence v. DuBois, 16 W. Va. 443; Davis v. Demming, 12 W. Va. 246; Gilchrist v. Beswick, 33 W. Va. 168, 10 S. E. 371.

effect must be gross.[48] If it be very inadequate, it is a circumstance tending to show a loan and mortgage; but it is not conclusive. Nor would the fact of the adequacy of price, taken in connection with the absence of any obligation to repay the money, be conclusive that a conditional sale was intended.[49] Nevertheless, the fact that the consideration is fully equal to the value of the land is evidence of some weight that the transaction was a sale and not a mortgage, because men in making a loan do not usually advance the full amount of the land.[50]

§ 4655. **Evidence.**—It is a settled rule and practice of courts of equity to set aside a formal deed, and allow the grantor to redeem upon proof, even by parol evidence, that the conveyance was not a sale, but merely a security for a debt, and therefore a mortgage. Unless prohibited by statute, the doctrine is practically universal that in equity a deed may be converted into a mortgage whenever there are proper equitable grounds for the exercise of the power. But at law it is generally agreed that parol evidence to show that a deed absolute on its face was intended only as a mortgage is inadmissible.[51] To obtain relief the

[48] Elliott v. Maxwell, 42 N. Car. 246,

[49] White v. Redenbaugh, 41 Ind. App. 580, 82 N. E. 110; Brown v. Dewey, 2 Barb. (N. Y.) 28, 1 Sandf. Ch. (N. Y.) 56.

[50] Carr v. Rising, 62 Ill. 14.

[51] Bragg v. Massie's Admrs., 38 Ala. 89, 79 Am. Dec. 82; Johnson v. Hattaway, 155 Ala. 516, 46 So. 760; Rodgers v. Burt, 157 Ala. 91, 47 So. 226; Thornton v. Pinckard, 157 Ala. 206, 47 So. 289; Shreve v. McGowin, 143 Ala. 665, 42 So. 94; Harper v. T. N. Hayes Co., 149 Ala. 174, 43 So. 360; Rushton v. McIlvene, 88 Ark. 299, 114 S. W. 709; Reynolds v. Blanks, 78 Ark. 527, 94 S. W. 694; Beckman v. Waters, 161 Cal. 581, 119 Pac. 922; Heron v. Weston, 44 Colo. 379, 100 Pac. 1130; Benton v. Jones, 8 Conn. 186; Reading v. Weston, 8 Conn. 117, 20 Am. Dec. 97; De Bartlett v. De Wilson, 52 Fla. 497, 42 So. 189; Askew v. Thompson, 129 Ga. 325, 58 S. E. 854; Bashinski v. Swint, 133 Ga. 38, 65 S. E. 152; Spencer v. Schuman, 132 Ga. 515, 64 S. E. 466; Thompson v. Burns, 15 Idaho 572, 99 Pac. 111; Bartoletti v. Hoerner, 154 Ill. App. 336; Mahaffy v. Faris, 144 Iowa 220, 122 N. W. 134, 24 L. R. A. (N. S.) 840n; Farley v. Goocher, 11 Iowa 570; Cold v. Beh, 152 Iowa 368, 132 N. W. 73; Kinkead v. Peet, 137 Iowa 692, 114 N. W. 616; Bradford v. Helsell, 150 Iowa 732, 130 N. W. 908; Lavalleur v. Hahn, 152 Iowa 649, 132 N. W. 877; Moore v. Wade, 8 Kans. 380; Graham v. Fischer (Ky.), 110 S. W. 386; Leibel v. Tandy, 146 Ky. 101, 141 S. W. 1183; Brown v. Spradlin, 136 Ky. 703, 125 S. W. 150; Hobbs v. Rowland (Ky.), 123 S. W. 1185; Oberdorfer v. White, 25 Ky. L. 1629, 78 S. W. 436; Eames v. Woodson, 120 La. 1031, 46 So. 13; Stinchfield v. Milliken, 71 Maine 567; Bryant v. Crosby, 36 Maine 562, 58 Am. Dec. 767; Hurd v. Chase, 100 Maine 561, 62 Atl. 660; Funk v. Harshman, 110 Md. 127, 72 Atl. 665; Miller v. Miller, 101 Md. 600, 61 Atl. 210; Sears v. Gilman, 199 Mass. 384, 85 N. E. 466; Jennings v. Demmon, 194 Mass. 108, 80 N. E. 471; Ruch v. Ruch, 159 Mich. 231, 124 N. W. 52, 16 Detroit

plaintiff must have equitable grounds for it. The grounds on which courts of equity admit oral evidence to show that a deed absolute in form is in fact a mortgage, are purely equitable, and relief is refused whenever the consideration is wanting.[52] Therefore, when a debtor has made an absolute conveyance of his land to one creditor for the purpose of defrauding his other creditors, he is in no condition to ask a court of equity to interfere actively in his behalf to help him get his land back again, and thus secure to him the fruits of his fraudulent devices.[53] He must come into equity with clean hands.[54] Parol evidence is admissible to show that the deed and defeasance are parts of the same transaction, and that together they were intended to constitute a mortgage.[55] If the instruments themselves show their connections, and that the purpose of the transaction was to secure a debt, no parol proof is necessary.[56] Such proof is introduced, not to contradict or vary the writings, but to show that they are really one arrangement and were agreed upon at the same time.[57] It is also ad-

Leg. N. 931; Gates v. Sutherland, 76 Mich. 231, 42 N. W. 1112; Olney v. Brown, 163 Mich. 125, 128 N. W. 241, 17 Detroit Leg. N. 895; Jones v. Blake, 33 Minn. 362, 23 N. W. 538; Belote v. Morrison, 8 Minn. 87; McClane v. White, 5 Gil. (Minn.) 139; Schwartz v. Lieber (Miss.), 32 So. 954; Hogel v. Lindell, 10 Mo. 483; Webb v. Rice, 6 Hill (N. Y.) 219; Sandlin v. Kearney, 154 N. Car. 596, 70 S. E. 942; Miller v. Smith, 20 N. Dak. 96, 126 N. W. 499; Omlie v. O'Toole, 16 N. Dak. 126, 112 N. W. 677; Wagg v. Herbert, 19 Okla. 525, 92 Pac. 250; Hall v. O'Connell, 52 Ore. 164, 95 Pac. 717, 96 Pac. 1070; Elliott v. Bozorth, 52 Ore. 391, 97 Pac. 632; Eldriedge v. Hoefer, 52 Ore. 241, 93 Pac. 246, 94 Pac. 563, 96 Pac. 1105; Harmon v. Grants Pass &c. Trust Co., 60 Ore. 69, 118 Pac. 188; Bickel v. Wessinger, 58 Ore. 98, 113 Pac. 34; Yates v. Caswell (Tex. Civ. App.), 126 S. W. 914; Musick v. O'Brien (Tex. Civ. App.), 102 S. W. 458; Nagle v. Simmank, 54 Tex. Civ. App. 432, 116 S. W. 862; Duerden v. Solomon, 33 Utah 468, 94 Pac. 978; Batchelder v. Randolph, 112 Va. 296, 71 S. E. 533; Bachrach v. Bachrach, 111 Va. 232, 68 S. E. 985; Billingsley v. Stutler, 52 W. Va. 92, 43 S. E. 96. In some states, however, it is admissible at law. Tillson v. Moulton, 23 Ill. 648; Miller v. Thomas, 14 Ill. 428; Coates v. Woodworth, 13 Ill. 654; McAnnulty v. Leick, 59 Iowa 586, 13 N. W. 743.

[52] Fitch v. Miller, 200 Ill. 170, 65 N. E. 650.

[53] Webber v. Farmer, 2 Bro. Parl. Cas. 88; Baldwin v. Cawthorne, 19 Ves. 166; Hassam v. Barrett, 115 Mass. 256; Arnold v. Mattison, 3 Rich. Eq. (S. Car.) 153.

[54] Ybarra v. Lorenzana, 53 Cal. 197; Parrott v. Baker, 82 Ga. 364, 9 S. E. 1068; Kitts v. Wilson, 130 Ind. 492, 29 N. E. 401; Hassam v. Barrett, 115 Mass. 256.

[55] Gay v. Hamilton, 33 Cal. 686; Franklin v. Ayer, 22 Fla. 654; First Nat. Bank v. Ashmead, 23 Fla. 379, 2 So. 657, 665; Preschbaker v. Feaman's Heirs, 32 Ill. 475; Tillson v. Moulton, 23 Ill. 648; Gassert v. Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240, affd. 149 U. S. 17, 37 L. ed. 631, 13 Sup. Ct. 738; Waters v. Crabtree, 105 N. Car. 394, 11 S. E. 240; Kelley v. Thompson, 7 Watts (Pa.) 401.

[56] First Nat. Bank v. Ashmead, 23 Fla. 379, 2 So. 657, 665.

[57] Reitenbaugh v. Ludwick, 31 Pa. St. 131; Wilson v. Schoenberger, 31

missible to show that the defeasance has been lost or destroyed by fraud or mistake.[58] The legal effect of the deed and bond to reconvey, when the instruments are not ambiguous, is a matter of law for the courts.[59]

When the conveyance and the agreement to reconvey on payment of the purchase-money are on their face of even date, and disclose a debt secured, the transaction is necessarily a mortgage, and parol evidence of a different understanding by the parties will not be received to convert it into a conditional sale.[60] When the two instruments are of different dates, such evidence is admissible. If the agreement recites that the deed was delivered on the same day with the agreement, although the dates are different, prima facie the transaction is a mortgage; but evidence is admissible to account for the discrepancy between the dates and the execution of the paper, and such evidence may show that the deed was executed upon a sale, and not as security.[61] If it be acknowledged or proved that it was in the beginning a sale, the burden of proof is upon the grantor to establish a change in its character.[62] Parol evidence is admissible in equity to show that a conditional sale, and not a mortgage, was intended, in case there is nothing on the face of the papers to determine whether the transaction was the one or the other.[63] The question is then to be decided by the jury under instructions, and not by the court.[64] For this purpose evidence of the repeated assertions

Pa. St. 295; Umbenhower v. Miller, 101 Pa. St. 71.

[58] Marks v. Pell, 1 Johns. Ch. (N. Y.) 594.

[59] Keith v. Catchings, 64 Ga. 773.

[60] Proctor v. Cole, 66 Ind. 576; Voss v. Eller, 109 Ind. 260, 10 N. E. 74; Gassert v. Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240, affd. 149 U. S. 17, 37 L. ed. 631, 13 Sup. Ct. 738; Kerr v. Gilmore, 6 Watts (Pa.) 405; Brown v. Nickle, 6 Pa. St. 390, revd. 41 Pa. St. 364.

[61] Haines v. Thompson, 70 Pa. St. 434. See Baisch v. Oakeley, 68 Pa. St. 92; Gubbings v. Harper, 7 Phila. (Pa.) 276.

[62] Haines v. Thomson, 70 Pa. St. 434.

[63] Bigler v. Jack, 114 Iowa 667, 87 N. W. 700; Gassert v. Bogk, 7 Mont. 518, 19 Pac. 281, 1 L. R. A. 240, affd. 149 U. S. 17, 37 L. ed. 631, 13 Sup. Ct. 738. In Alabama, however, it is declared that parol proof is inadmissible to show that an absolute conveyance was intended to operate as a conditional sale, or a sale with a right to redeem. Peagler v. Stabler, 91 Ala. 308, 9 So. 157. See also, Daniels v. Lowery, 92 Ala. 519, 8 So. 352.

[64] Baker v. Fireman's &c. Ins. Co., 79 Cal. 34, 21 Pac. 357; Wolfe v. McMillan, 117 Ind. 587, 20 N. E. 509; Alstin's Exr. v. Cundiff, 52 Tex. 453; Bogk v. Gassert, 149 U. S. 17, 37 L. ed. 631, 13 Sup. Ct. 738.

of the grantee that he had bought the property and owned it, of his repeated denials that the grantor had any interest in it, and acts of ownership inconsistent with the position of a mere mortgagee, may be received.[65] But if the instrument on its face be a mortgage, or if a deed and bond of defeasance be executed together as part of the same transaction and therefore constitute a mortgage, parol evidence is not admissible to show that the parties intended that the transaction should operate as a conditional sale. It is then for the court to construe the instruments and determine their legal effect.[66] On the other hand, parol evidence is admissible in equity to show that a formal conveyance, with a defeasance executed at the same time or afterward, constituted in fact a mortgage, and not a conditional sale.[67] But although a formal conveyance can be shown to be a mortgage by extrinsic evidence, a formal mortgage cannot be shown to be a conditional sale.[68] The reason of the rule that a formal conveyance may be shown by parol to be a mortgage while a formal mortgage cannot be shown to be a conditional sale by the same means is that in the one case such proof raises an equity consistent with the writing, while in the other, it would contradict the writing.[69] Such evidence is inadmissible at law. It is received only in equity and when there exists equitable ground for its admission.[70]

Very slight circumstances showing that the transfer was not understood at the time to be absolute, but was made to secure the repayment of the sum advanced, may be sufficient to turn the scale, if the evidence be not clear whether the transaction was a sale or only a mortgage.[71] If the evidence is

[65] Newcomb v. Bonham, 1 Vern. 8, 215, 232; Langton v. Horton, 5 Beav. 9; Hanford v. Blessing, 80 Ill. 188.

[66] Gassert v. Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240, affd. 149 U. S. 17, 37 L. ed. 631, 13 Sup. Ct. 738.

[67] Farmer v. Grose, 42 Cal. 169. See Gay v. Hamilton, 33 Cal. 686; Tillson v. Moulton, 23 Ill. 648; Bearss v. Ford, 108 Ill. 16; Heath v. Williams, 30 Ind. 495; Stitt v. Rat Portage Lumber Co., 96 Minn. 27, 104 N. W. 561; Reitenbaugh v. Ludwick, 31 Pa. St. 131.

[68] McClintock v. McClintock, 3 Brewst. (Pa.) 76; Wharf v. Howell, 5 Binn. (Pa.) 499; Reitenbaugh v. Ludwick, 31 Pa. St. 131.

[69] Kunkle v. Wolfersberger, 6 Watts (Pa.) 126; Woods v. Wallace, 22 Pa. St. 171; Shields v. Simonton, 65 W. Va. 179, 63 S. E. 972.

[70] Bragg v. Massie's Admr., 38 Ala. 89, 79 Am. Dec. 82; McClane v. White, 5 Gil. (Minn.) 139; Belote v. Morrison, 8 Gil. (Minn.) 62; Webb v. Rice, 6 Hill (N. Y.) 219. Contra, Tillson v. Moulton, 23 Ill. 648.

[71] Hubert v. Sistrunk (Ala.), 53 So.

doubtful and unsatisfactory, if it fails to overcome the strong presumption arising from the terms of the absolute deed by testimony entirely clear and convincing beyond reasonable controversy, the deed must have effect in accordance with its terms.[72] When there is a substantial conflict in the evidence, a mere preponderance is not sufficient to warrant a change in the character of a deed or other solemn instrument in writing.[73] The burden of proof to show that an absolute deed was intended as a mortgage is upon the grantor.[74] One who alleges that his deed in absolute form was intended as a mortgage only is required to make strict proof of the fact. Having deliberately given the transaction the form of a bargain and sale, slight and indefinite

819; McKinney v. Miller, 19 Mich. 142.

[72] "The security of titles and sound public policy require that a party, alleging that a deed absolute in form is, nevertheless, a mortgage, should show it by very satisfactory evidence, and where he attempts to show it by oral evidence, his proof should amount to more than a mere guess or surmise, or even inferences which are just as consistent with one theory of the deed as the other." Wilson v. Parshall, 129 N. Y. 223, 29 N. E. 297; Howland v. Blake, 97 U. S. 624, 24 L. ed. 1027. "Many of the cases hold that, upon the unsupported evidence of an interested witness, a decree declaring a deed absolute in terms to be only an instrument for the security of a debt cannot be sustained. In other cases it is held that where the evidence of a party rests chiefly in the evidence of one witness, and that is disputed by a witness equally credible, a case for relief is not made out." Shattuck v. Bascom, 55 Hun (N. Y.) 14, 28 N. Y. St. 333, 9 N. Y. S. 934. Thus an absolute deed will not be declared a mortgage on the unsupported testimony of the grantor. Adams v. Pilcher, 92 Ala. 474, 8 So. 757; Betts v. Betts, 132 Iowa 72, 106 N. W. 928; Wilson v. Parshall, 129 N. Y. 223, 29 N. E. 297.

[73] Perot v. Cooper, 17 Colo. 80, 28 Pac. 391, 31 Am. Rep. 258; Hill v. Viele, 128 Ill. App. 5; Skeels v. Blanchard (Vt.), 81 Atl. 913. Contra, Schmidt v. Barclay, 161 Mich. 1, 125 N. W. 729.

[74] Grummer v. Price (Ark.), 143 S. W. 95; Hays v. Emerson, 75 Ark. 551, 87 S. W. 1027; Bryant v. Broadwell, 140 Cal. 490, 74 Pac. 33; Deadman v. Yantis, 230 Ill. 243, 82 N. E. 592, 120 Am. St. 291; Belinski v. National Brewing Co., 124 Ill. App. 45, Rankin v. Rankin, 216 Ill. 132, 74 N. E. 763, affg. 117 Ill. App. 636; Wright v. Wright (Iowa), 98 N. W. 137; Ridings v. Marengo Sav. Bank of Marengo, 147 Iowa 608, 125 N. W. 200; Schmidt v. Barclay, 161 Mich. 1, 125 N. W. 729; Miller v. Peter, 158 Mich. 336, 122 N. W. 780; Powell v. Crow, 204 Mo. 481, 102 S. W. 1024; Lake v. Weaver, 76 N. J. Eq. 280, 74 Atl. 451, 34 L. R. A. (N. S.) 495n; Winters v. Earl, 52 N. J. Eq. 52, 28 Atl. 15, affd. 52 N. J. Eq. 588, 33 Atl. 50; Fullerton v. McCurdy, 55 N. Y. 637; Elliott v. Bozorth, 52 Ore. 391, 97 Pac. 632; Haines v. Thomson, 70 Pa. St. 434; Todd v. Campbell, 32 Pa. St. 250; Lowry v. Carter, 46 Tex. Civ. App. 488, 102 S. W. 930; Goodbar v. Bloom, 43 Tex. Civ. App. 434, 96 S. W. 657; Irvin v. Johnson, 44 Tex. Civ. App. 436, 98 S. W. 405; Frazier v. Seureau (Tex. Civ. App.), 128 S. W. 649; Miller v. Yturria, 69 Tex. 549, 7 S. W. 206; McLean v. Ellis, 79 Tex. 398, 15 S. W. 394; Fridley v. Somerville, 60 W. Va. 272, 54 S. E. 502.

evidence should not be permitted to change its character.[75] The proof must be clear, unequivocal, and convincing.[76]

[75] Knowles v. Knowles, 86 Ill. 1; Sharp v. Smitherman, 85 Ill. 153; Parmelee v. Lawrence, 44 Ill. 405; Dwen v. Blake, 44 Ill. 135; Taintor v. Keyes, 43 Ill. 332; Price v. Karnes, 59 Ill. 276; Smith v. Cremer, 71 Ill. 185; Magnusson v. Johnson, 73 Ill. 156; Johnson v. National Bank of Commerce of Tacoma, 65 Wash. 261, 118 Pac. 21.

[76] Turner v. Wilkinson, 72 Ala. 361; Parks v. Parks, 66 Ala. 326; Parish v. Gates, 29 Ala. 254; Downing v. Woodstock Iron Co., 93 Ala. 262, 9 So. 177; Knaus v. Dreher, 84 Ala. 319, 4 So. 287; Marsh v. Marsh, 74 Ala. 418; Mitchell v. Wellman, 80 Ala. 16; Peagler v. Stabler, 91 Ala. 308, 9 So. 157; Rodgers v. Burt, 157 Ala. 91, 47 So. 226; Thornton v. Pinckard, 157 Ala. 206, 47 So. 289; Tribble v. Singleton, 158 Ala. 308, 48 So. 481; Grummer v. Price (Ark.), 143 S. W. 95; Williams v. Cheatmen, 19 Ark. 278; Blair v. Squire, 127 Cal. xviii, 59 Pac. 211; Falk v. Wittram, 120 Cal. 479, 52 Pac. 707, 65 Am. St. 184; Mahoney v. Bostwick, 96 Cal. 53, 30 Pac. 1020, 31 Am. St. 175; Henley v. Hotaling, 41 Cal. 22; Couts v. Winston, 153 Cal. 686, 96 Pac. 357; Emery v. Lowe, 140 Cal. 379, 73 Pac. 981; Townsend v. Petersen, 12 Colo. 491, 21 Pac. 619; Perot v. Cooper, 17 Colo. 80, 28 Pac. 391, 31 Am. St. 258; Whitsett v. Kershow, 4 Colo. 419; Armor v. Spalding, 14 Colo. 302, 23 Pac. 789; Persse v. Atlantic-Pacific Railway Tunnel Co., 5 Colo. App. 117, 37 Pac. 951; Perot v. Cooper, 17 Colo. 80, 28 Pac. 391, 31 Am. St. 258; Butsch v. Smith, 40 Colo. 64, 90 Pac. 61; Baird v. Baird, 48 Colo. 506, 111 Pac. 79; Adams v. Adams, 51 Conn. 544; Walker's Admx. v. Farmers' Bank (Del.), 14 Atl. 819; Hayward v. Mayse, 1 App. D. C. 133; Satterfield v. Malone, 35 Fed. 445, 1 L. R. A. 35; Guarantee Gold Bond Loan & Savings Co. v. Edwards, 164 Fed. 809, 90 C. C. A. 585; Hoglund v. Royal Trust Co., 159 Ill. App. 390; Gray v. Hayhurst, 157 Ill. App. 488; Krebs v. Lauser, 133 Iowa 241, 110 N. W. 443; Cold v. Beh, 152 Iowa 368, 132 N. W. 73; Bradford v. Helsell, 150 Iowa 732, 130 N. W. 908; Stokeley v. Flanders (Ky.), 128 S. W. 608; Funk v. Harshman, 110 Md. 127, 72 Atl. 665; Stitt v. Rat Portage Lumber Co., 96 Minn. 27, 104 N. W. 561; O'Hanlon v. Barry, 87 Nebr. 522, 127 N. W. 860; Bascombe v. Marshall, 129 App. Div. (N. Y.) 516, 113 N. Y. S. 991; Reich v. Cockran, 124 N. Y. S. 1127, 139 App. Div. (N. Y.) 912; Bascombe v. Marshall, 129 App. Div. (N. Y.) 516, 113 N. Y. S. 991, affd. 198 N. Y. 538, 92 N. E. 1077; Reich v. Cockran, 139 App. Div. (N. Y.) 912, 102 N. Y. S. 827; In re Holmes, 79 App. Div. (N. Y.) 264, 79 N. Y. S. 592, affd. 176 N. Y. 603, 68 N. E. 1118; Adams v. McIntyre (N. Dak.), 133 N. W. 915; Miller v. Smith, 20 N. Dak. 96, 126 N. W. 499; Hall v. O'Connell, 52 Ore. 164, 95 Pac. 717, 96 Pac. 1070; Bickel v. Wessinger, 58 Ore. 98, 113 Pac. 34; Jones v. Jones, 20 S. Dak. 632, 108 N. W. 23; Harrison v. Hogue (Tex. Civ. App.), 136 S. W. 118; Coyle v. Davis, 116 U. S. 108, 29 L. ed. 583, 6 Sup. Ct. 314; Howland v. Blake, 97 U. S. 624, 24 L. ed. 1027; Cadman v. Peter, 118 U. S. 73, 30 L. ed. 78, 6 Sup. Ct. 957; Bachrach v. Bachrach, 111 Va. 232, 68 S. E. 985; Reynolds v. Reynolds, 42 Wash. 107, 84 Pac. 579; Johnson v. National Bank of Commerce of Tacoma, 65 Wash. 261, 118 Pac. 21; Way v. Mayhugh, 57 W. Va. 175, 50 S. E. 724. To the same effect, see Matthews v. Porter, 16 Fla. 466; Shays v. Norton, 48 Ill. 100; Price v. Karnes, 59 Ill. 276; Hancock v. Harper, 86 Ill. 445; Jones v. Brittan, 1 Woods (U. S.) 667; Fed. Cas. No. 7455. See also, Maher v. Farwell, 97 Ill. 56; Helm v. Boyd, 124 Ill. 370, 16 N. E. 85; Bailey v. Bailey, 115 Ill. 551, 4 N. E. 394; Darst v. Murphy, 119 Ill. 343, 9 N. E. 887; Strong v. Strong, 126 Ill. 301, 18 N. E. 665; Workman v. Greening, 115 Ill. 447, 4 N. E. 385; Bartling v. Brasuhn, 102 Ill. 441; Williams v. Williams, 180 Ill. 361, 54 N. E. 229; Heaton v. Gaines, 198 Ill. 479,

§ 4656. Waiver of right of redemption.—When it is once established that the separate instrument is a defeasance, the conveyance assumes the character of a mortgage with the inseparable incident of redemption, which no agreement of the parties,

64 N. E. 1081, affg. 100 Ill. App. 26; Conwell v. Evill, 4 Blackf. (Ind.) 67; Ensminger v. Ensminger, 75 Iowa 89, 39 N. W. 208, 9 Am. St. 462; Kibby v. Harsh, 61 Iowa 196, 16 N. W. 85; Allen v. Fogg, 66 Iowa 229, 23 N. W. 643; Gardner v. Weston, 18 Iowa 533; Knight v. McCord, 63 Iowa 429, 19 N. W. 310; Corbit v. Smith, 7 Iowa 60, 71 Am. Dec. 431; Hyatt v. Cochran, 37 Iowa 309; Langer v. Merservey, 80 Iowa 158, 45 N. W. 732; Wright v. Mahaffey, 76 Iowa 96, 40 N. W. 112; Baird v. Reininghaus, 87 Iowa 167, 54 N. W. 148; Reeder v. Gorsuch, 55 Kans. 553, 40 Pac. 897; Knapp v. Bailey, 79 Maine 195, 9 Atl. 122, 1 Am. St. 295; Cochrane v. Price (Md.), 8 Atl. 361; Faringer v. Ramsay, 2 Md. 365; Commonwealth v. Reading Sav. Bank, 137 Mass. 431; Case v. Peters, 20 Mich. 298; Tilden v. Streeter, 45 Mich. 533, 539, 8 N. W. 502; Johnson v. Van Velsor, 43 Mich. 208, 5 N. W. 265; Sowles v. Wilcox, 127 Mich. 166, 86 N. W. 689; Williams v. Stratton, 18 Miss. 418; Quick v. Turner, 26 Mo. App. 29; Cobb v. Day, 106 Mo. 278, 17 S. W. 323; Worley v. Dryden, 57 Mo. 226; Jones v. Rush, 156 Mo. 364, 27 S. W. 118; Wilde v. Homan, 58 Nebr. 634, 79 N. W. 546; Bingham v. Thompson, 4 Nev. 224; Pierce v. Traver, 13 Nev. 526; Holmes v. Grant, 8 Paige (N. Y.) 243; Marks v. Pell, 1 Johns. Ch. (N. Y.) 594; Erwin v. Curtis, 43 Hun (N. Y.) 292, 6 N. Y. St. 116, affd. 112 N. Y. 660, 20 N. E. 412; Haas v. Nauert, 19 N. Y. St. 472, 2 N. Y. S. 723; Shattuck v. Bascom, 55 Hun (N. Y.) 14, 28 N. Y. St. 333, 9 N. Y. S. 934; Sidway v. Sidway, 54 Hun (N. Y.) 634, 26 N. Y. St. 898, 7 N. Y. S. 421; Moore v. Ivey, 43 N. Car. 192; Hinton v. Pritchard, 107 N. Car. 128, 12 S. E. 242, 10 L. R. A. 401; Brown v. Carson's Exrs., 45 N. Car. 272; Clement v. Clement, 1 Jones Eq. (N. Car.) 184; Leggett v. Leggett, 88 N. Car. 108; Williams v. Hodges, 95 N. Car. 32; Smiley v. Pearce, 98 N. Car. 185, 3 S. E. 631; McNair v. Pope, 100 N. Car. 404, 6 S. E. 234; Watkins v. Williams, 123 N. Car. 170, 31 S. E. 388; Jasper v. Hazen, 4 N. Dak. 1, 58 N. W. 454, 23 L. R. A. 58; Albany & Santiam Water Ditch or Canal Co. v. Crawford, 11 Ore. 243, 4 Pac. 113; Pancake v. Cauffman, 114 Pa. St. 113, 7 Atl. 67; Lance's App., 112 Pa. St. 456, 4 Atl. 375; In re Hartley's Appeal, 103 Pa. St. 23; In re Logue's Appeal, 104 Pa. St. 136; Nicolls v. McDonald, 101 Pa. St. 514; In re Stewart's Appeal, 98 Pa. St. 377; Haines v. Thomson, 70 Pa. St. 434; Arnold v. Mattison, 3 Rich. Eq. (S. Car.) 153; Miller v. Price, 66 S. Car. 85, 44 S. E. 584; Brewster v. Davis, 56 Tex. 478; Miller v. Yturria, 69 Tex. 549, 7 S. W. 206; Gazley v. Herring (Tex.), 17 S. W. 17. The rule in this state is an exception to the general rule. It is held to be error to require clear and satisfactory proof. Wallace v. Berry, 83 Tex. 328, 18 S. W. 595; Edwards v. Wall, 79 Va. 321; Holladay v. Willis, 101 Va. 274, 43 S. E. 616; Kerr v. Hill, 27 W. Va. 576; Vangilder v. Hoffman, 22 W. Va. 1; Butler v. Butler, 46 Wis. 430, 1 N. W. 70; McCormick v. Herndon, 67 Wis. 648, 31 N. W. 303; Rockwell v. Humphrey, 57 Wis. 410, 15 N. W. 394; Kent v. Lasley, 24 Wis. 654; Newton v. Holley, 6 Wis. 592; Lake v. Meacham, 13 Wis. 355; Fowler v. Adams, 13 Wis. 458; Harrison v. Juneau Bank, 17 Wis. 350; McClellan v. Sanford, 26 Wis. 595; Sable v. Maloney, 48 Wis. 331, 4 N. W. 479; Schriber v. LeClair, 66 Wis. 579, 29 N. W. 570, 889; Hunter v. Maanum, 78 Wis. 656, 48 N. W. 51. The rule stated in these cases is as follows: "To convert a deed absolute into a mortgage, the evidence should be so clear as to leave no substantial doubt that the real intention of the parties was to execute a mortgage." Becker v. Howard, 75 Wis. 415, 44 N. W. 755.

that the estate shall be absolute if the money be not paid at the day fixed, can waive.[77] The intent of the parties contrary to the rules of law avails nothing. The right of redemption, therefore, cannot be affected by receipt and account given by the grantor to the grantee, mentioning the deed as an absolute conveyance.[78] In all cases, a condition express or implied, that the deed shall be void if payment be made at the day is, in equity, regarded as substantially performed by payment, and thereupon reconveyance may be enforced.[79] Neither can the right of redemption be restricted to the mortgagor personally, as such a restriction is inconsistent with the nature of a mortgage and void.[80] The right to redeem and the right to foreclose are reciprocal. The mortgagee, it is said, may demand payment and may foreclose the mortgage whenever the mortgagor has the right to redeem.[81] The mortgagor is not allowed to renounce beforehand

[77] Jackson v. Lynch, 129 Ill. 72, 21 N. E. 580, 22 N. E. 246; Gassert v. Strong, 13 Mont. 18, 98 Pac. 497; Mooney v. Byrne, 163 N. Y. 86, 57 N. E. 163; Kelton v. Brown, 39 S. W. (Tenn.) 541.

[78] Bayley v. Bailey, 5 Gray (Mass.) 505.

[79] Anthony v. Anthony, 23 Ark. 479; Sherrer v. Harris (Ark.), 13 S. W. 730; Endel v. Walls, 16 Fla. 786; Lindsay v. Matthews, 17 Fla. 575; Clark v. Lyon, 46 Ga. 202; Hunter v. Hatch, 45 Ill. 178; Ewart v. Walling, 42 Ill. 453; Reigard v. McNeil, 38 Ill. 400; Tillson v. Moulton, 23 Ill. 648; Clark v. Finlon, 90 Ill. 245; Church v. Cole, 36 Ind. 34; Thompson v. People's Bldg. &c. Co., 114 Iowa 481, 87 N. W. 438; Wilson v. Patrick, 34 Iowa 362; Holliday v. Arthur, 25 Iowa 19; Richardson v. Barrick, 16 Iowa 407; Scott v. Mewhirter, 49 Iowa 487; Brush v. Peterson, 54 Iowa 243, 6 N. W. 287; Moore v. Wade, 8 Kans. 380; Howe v. Russell, 36 Maine 115; Baugher v. Merryman, 32 Md. 185; McIntier v. Shaw, 6 Allen (Mass.) 83; Parks v. Hall, 2 Pick. (Mass.) 206; Steel v. Steel, 4 Allen (Mass.) 417; Phœnix v. Gardner, 13 Minn. 430; Vasser v. Vasser, 23 Miss. 378; Davis v. Clay, 2 Mo. 161; Wilson v. Drumrite, 21 Mo. 325; Bingham v. Thompson, 4 Nev. 224; Somersworth &c. Bank v. Roberts, 38 N. H. 22; Sweet v. Parker, 22 N. J. Eq. 453; Judge v. Reese, 24 N. J. Eq. 387; DeCamp v. Crane, 19 N. J. Eq. 166, revd. 21 N. J. Eq. 414; Vanderhaize v. Huques, 13 N. J. Eq. 244; Simon v. Schmidt, 41 Hun (N. Y.) 318, 2 N. Y. St. 388; Mooney v. Byrne, 163 N. Y. 86, 57 N. E. 163; Miller v. McGuckin, 15 Abb. N. Cas. (N. Y.) 204; Poston v. Jones, 122 N. Car. 536, 29 S. E. 951; Cotterell v. Long, 20 Ohio 464; Miami Exporting Co. v. Bank of U. S., Wright (Ohio) 249; In re Sweetser's Appeal, 71 Pa. St. 264; In re Danzeisen's Appeal, 73 Pa. St. 65; In re Harper's Appeal, 64 Pa. St. 315; Odenbaugh v. Bradford, 67 Pa. St. 96; Halo v. Schick, 57 Pa. St. 319; Nichols v. Reynolds, 1 R. I. 30, 36 Am. Dec. 238; Bennet v. Union Bank, 5 Humph. (Tenn.) 612; McGan v. Marshall, 7 Humph. (Tenn.) 121; Webb v. Patterson, 7 Humph. (Tenn.) 431; Hinson v. Partee, 11 Humph. (Tenn.) 587; Wright v. Bates, 13 Vt. 341; Mott v. Harrington, 12 Vt. 199; Yates v. Yates, 21 Wis. 473; Rogan v. Walker, 1 Wis. 527.

[80] Johnston v. Gray, 16 Serg. & R. (Pa.) 361, 16 Am. Dec. 577. See McClurkan v. Thompson, 69 Pa. St. 305.

[81] Taylor v. McClain, 60 Cal. 651.

his privilege of redemption. When one borrows money upon the security of his property, he is not allowed by any form of words to preclude himself from redeeming.[82] A stipulation, that unless the debt is paid within a certain time the deed shall be absolute, will not be given that effect, because the very terms of the agreement show that the instrument is a mortgage, and such agreement of the parties in the mortgage itself or otherwise, made at the time, is without effect.[83] He cannot agree that upon default his mortgage shall become an absolute conveyance. A subsequent agreement, that what was originally a mortgage shall be regarded as an absolute conveyance, will not be sustained unless fairly made and no undue advantage is taken by the creditors.[84] The burden is therefore upon the creditor to show that the right of redemption was given up deliberately and for an adequate consideration.[85] If originally taken as a mortgage, nothing but a subsequent agreement of the parties can change its character, and deprive the mortgagor of his right of redemption; and even such an agreement cannot change its character as to intervening interests.[86] This right cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the

[82] McMillan v. Jewett, 85 Ala. 476, 5 So. 145; Nelson v. Kelly, 91 Ala. 569, 8 So. 690; Fields v. Helms, 82 Ala. 449, 3 So. 106; Robinson v. Farrelly, 16 Ala. 472; Pierce v. Robinson, 13 Cal. 116; Horton v. Murden, 117 Ga. 72, 43 S. E. 786; Turpie v. Lowe, 114 Ind. 37, 15 N. E. 834; Clark v. Condit, 18 N. J. Eq. 358; Youle v. Richards, 1 N. J. Eq. 534, 23 Am. Dec. 722; Simon v. Schmidt, 41 Hun (N. Y.) 318, 2 N. Y. St. 388; Clark v. Henry, 2 Cow. (N. Y.) 324; Rankin v. Mortimere, 7 Watts (Pa.) 372; Cherry v. Bowen, 4 Sneed (Tenn.) 415; Peugh v. Davis, 96 U. S. 332, 24 L. ed. 775.

[83] Macauley v. Smith, 132 N. Y. 524, 30 N. E. 997.

[84] Mills v. Mills, 26 Conn. 213; Cassem v. Heustis, 201 Ill. 208, 66 N. E. 283, 94 Am. St. 160; Henry v. Davis, 7 Johns. Ch. (N. Y.) 40, affd. 2 Cow. (N. Y.) 324; Wright v. Bates, 13 Vt. 341; Lynch v. Ryan, 132 Wis. 271, 111 N. W. 707, 612 N. W. 427.

[85] Locke's Exr. v. Palmer, 26 Ala. 312; Brown v. Gaffney, 28 Ill. 149; Bearss v. Ford, 108 Ill. 16; Baugher v. Merryman, 32 Md. 185; Shaw v. Wallridge, 33 Ohio St. 1; Villa v. Rodriguez, 12 Wall. (U. S.) 323, 20 L. ed. 406.

[86] Peagler v. Stabler, 91 Ala. 308, 9 So. 157; McKinstry v. Conly, 12 Ala. 678; Haggerty v. Brower, 105 Iowa 395, 75 N. W. 321; LeComte v. Pennock, 61 Kans. 330, 59 Pac. 641; McPherson v. Hayward, 81 Maine 329, 17 Atl. 164; Reed v. Reed, 75 Maine 264; Batty v. Snook, 5 Mich. 231; Clark v. Landon, 90 Mich. 83, 51 N. W. 357; Elliott v. Wood, 53 Barb. (N. Y.) 285, affd. 45 N. Y. 71; Tibbs v. Norris, 44 Barb. (N. Y.) 138; Bunacleugh v. Poolman, 3 Daly (N. Y.) 236; Clark v. Henry, 2 Cow. (N. Y.) 324; Henry v. Davis, 7 Johns. Ch. (N. Y.) 40, affd. 2 Cow. (N. Y.) 324; Palmer v. Gurnsey, 7 Wend. (N. Y.) 248; Cooper v. Whitney, 3 Hill (N. Y.) 95; Marks v. Pell, 1 Johns. Ch. (N. Y.) 594;

mortgage.[87] The maxim, "Once a mortgage always a mortgage," applies to such a deed; and if a purchaser take a conveyance from the grantee, with a knowledge that the grantor claims an interest in the property, he takes it charged with the same equity it was charged with in the hands of the mortgagee.[88] It is held, however, that the mortgagor may make a subsequent release of the equity of redemption, but an adequate consideration is necessary to support it. It must be for a consideration that would be deemed reasonable if the transaction were between other parties. The transaction must in all respects be fair, with no unconscientious advantage taken by the mortgagee.[89]

C. Equitable Mortgages.

§ 4657. Definition.—The term "equitable mortgage" is properly applied to a transaction which would not in law be held to be a mortgage yet the effect of which is to convey real estate or some interest therein as security for a debt. The term is used more properly with reference solely to the kind of instrument or contract by which equity establishes a lien. It is the equitable form of the transaction and not the equitable nature of the property which is necessary to create an equitable mortgage. A deed or contract which does not contain a condition or defeasance but is used for the purpose of pledging real property or some interest in it as security for a debt or obligation and with the intention of creating a mortgage is an equitable mortgage.[90]

Williams v. Thorn, 11 Paige (N. Y.) 459; Parsons v. Mumford, 3 Barb. Ch. (N. Y.) 152; Horn v. Keteltas, 46 N. Y. 605, 42 How. Pr. (N. Y.) 138; Murray v. Walker, 31 N. Y. 399; Carr v. Carr, 52 N. Y. 251; Remsen v. Hay, 2 Edw. Ch. (N. Y.) 535; Macauley v. Smith, 132 N. Y. 524, 30 N. E. 997; Poston v. Jones, 122 N. Car. 536, 29 S. E. 951; Tant v. Guess, 35 S. Car. 605, 14 S. E. 391; Brownlee v. Martin, 21 S. Car. 392; Morris v. Nixon, 1 How. (U. S.) 118, 11 L. ed. 69.

[87] Turpie v. Lowe, 114 Ind. 37, 15 N. E. 834; Peugh v. Davis, 96 U. S. 322, 24 L. ed. 775, revg. 2 MacArthur (D. C.) 14; Bradley v. Carritt, (1903) A. C. 253; Fairclough v. Swan Brewery Co., (1912) A. C. 565, Ann. Cas. 1912D, 957 and note.

[88] French v. Burns, 35 Conn. 359; Greenwood Building & Loan Assn. v. Stanton, 28 Ind. App. 548, 63 N. E. 574.

[89] Ford v. Olden, L. R. 3 Eq. Cas. 461; Linnell v. Lyford, 72 Maine 280; Niggeler v. Maurin, 34 Minn. 118, 24 N. W. 369; Marshall v. Thompson, 39 Minn. 137, 39 N. W. 309.

[90] Alexander v. Mortgage Co. of Scotland, 47 Fed. 131. See Brown v. Brown, 103 Ind. 23, 2 N. E. 233; New Vienna Bank v. Johnson, 47 Ohio St. 306, 24 N. E. 503, 8 L. R. A. 614; Ketchum v. St. Louis, 101 U. S. 306, 25 L. ed. 999; Wayt v. Carwithen, 21 W. Va. 516; Hoile v. Bailey, 58 Wis. 434, 17 N. W. 322.

There are as many kinds of equitable mortgages, as there are varieties of ways in which parties may contract for security by pledging some interest in land.[91] Whatever the form of contract may be, if it is intended thereby to create a security, it is an equitable mortgage.[92] It is not even necessary that the contract should be in express terms a security, for equity will often imply this from the nature of the transactions between the parties.[93]

§ 4658. By agreement.—An agreement to give a mortgage or security on certain property, not objectionable for want of consideration, is treated in equity as a mortgage, upon the principle that equity will treat that as done which by agreement is to be done.[94] So an agreement to make a conveyance of land, when intended as security for a debt, is in the same manner a mortgage. But all such agreements to give mortgages or other conveyances by way of security are ineffectual when no particular property is specified on which the security is to be given.[95] An agreement to give a mortgage on sufficient property is not effectual.[96] Such agreement can, of course, bind only the maker of

[91] Donald v. Hewitt, 33 Ala. 534, 73 Am. Dec. 431; Newlin v. McAfee, 64 Ala. 357; Clarke v. Sibley, 13 Metc. (Mass.) 210; Payne v. Wilson, 74 N. Y. 348.

[92] Woodruff v. Adair, 131 Ala. 530, 32 So. 515; Hall v. Mobile & M. R. Co., 58 Ala. 10; Newlin v. McAfee, 64 Ala. 357; Wood v. Holly Mfg. Co., 100 Ala. 326, 13 So. 948, 46 Am. St. 56; Ross v. Perry, 105 Ala. 533, 16 So. 915; Gest v. Packwood, 39 Fed. 525; New Vienna Bank v. Johnson, 47 Ohio St. 306, 24 N. E. 503, 8 L. R. A. 614.

[93] Bradley v. Merrill, 89 Maine 319, 34 Atl. 160.

[94] Russell v. Russell, 1 Bro. Ch. C. 269; Hester v. Hunnicutt, 104 Ala. 282, 16 So. 162; O'Neal v. Lexias, 85 Ala. 80, 4 So. 745; Morrow v. Turney's Admr., 35 Ala. 131; Richardson v. Hamlett, 33 Ark. 237; Daggett v. Rankin, 31 Cal. 321; Hall v. Hall, 50 Conn. 104; Gest v. Packwood, 39 Fed. 525; Osgood v. Osgood, 78 Mich. 290, 44 N. W. 325; Petrie's Exrs. v. Wright, 6 Sm. & M. (Miss.) 647; Adams v. Johnson, 41 Miss. 258; McQuie v. Peay, 58 Mo. 56; Oliva v. Bunaforza, 31 N. J. Eq. 395; Chase v. Peck, 21 N. Y. 581. In re Howe, 1 Paige (N. Y.) 125, 19 Am. Dec. 395; Payne v. Wilson, 74 N. Y. 348; Husted v. Ingraham, 75 N. Y. 251; Hamilton Trust Co. v. Clemes, 163 N. Y. 423, 57 N. E. 614; Hale v. Omaha Nat. Bank, 64 N. Y. 550; Perry v. Board of Missions &c., 102 N. Y. 99, 6 N. E. 116; Cotterell v. Long, 20 Ohio 464; Bank of Muskingum v. Carpenter's Admrs., 7 Ohio 21, pt. 1, 28 Am. Dec. 616; Delaire v. Keenan, 3 Desaus. Eq. (S. Car.) 74, 4 Am. Dec. 604; Creech v. Long, 72 S. Car. 25, 51 S. E. 614; Boehl v. Wadgymar, 54 Tex. 589; Biebinger v. Continental Bank, 99 U. S. 143, 25 L. ed. 271; Poland v. Lamoille Val. R. Co., 52 Vt. 144; Ott's Exrs. v. King, 8 Grat. (Va.) 224; Atkinson v. Miller, 34 W. Va. 115, 11 S. E. 1007, 9 L. R. A. 544. See, however, Humphreys v. Snyder, Morris (Iowa) 263.

[95] Langley v. Vaughn, 10 Heisk. (Tenn.) 553.

[96] Goldthwaite v. Ellison, 99 Ala.

it and his heirs, and persons having notice. It is not of any force as against the subsequent judgment creditors.[97] It is not necessary that the agreement should in all cases be in writing. Although a parol agreement in respect to lands while it remains altogether executory is not enforcible, yet when there has been a part performance of it, it cannot in equity be avoided.[98] When such parol agreement has been performed by a delivery of a formal mortgage, all objection to the validity of the agreement is removed, and it becomes as effectual for all purposes as if it had been reduced to writing originally.[99] A purchase at a judicial sale for the benefit of the debtor in accordance with a verbal or written agreement with him will be regarded as an equitable mortgage to him.[1] In like manner a conveyance to one who advances money for the benefit of another under an agreement of the latter to purchase at a certain price may be regarded as a mortgage to the latter for the amount of the purchase-money which the purchaser may foreclose.[2] An instrument which does not transfer the legal estate may yet operate as an equitable transfer of it in the nature of a mortgage.[3] Thus, a mortgage to certain executors from which the word "heirs" creating a fee was omitted, and the word "successors" used in its stead was

497, 12 So. 812; Adams v. Johnson, 41 Miss. 258.

[97] But in England an equitable mortgage has priority over a subsequent judgment. Whitworth v. Gaugain, 3 Hare 416; Abbott v. Stratten, 3 Jo. & Lat. 603; Racouillat v. Sansevain, 32 Cal. 376; Price v. Cutts, 29 Ga. 142, 78 Am. Dec. 52.

[98] King v. Williams, 66 Ark. 333, 50 S. W. 695; Cole v. Cole, 41 Md. 301; Hicks v. Turck, 72 Mich. 311, 40 N. W. 339; Irvine v. Armstrong, 31 Minn. 216, 17 N. W. 343; Dean v. Anderson, 34 N. J. Eq. 496; Stoddard v. Hart, 23 N. Y. 556; Baker v. Baker, 2 S. Dak. 261, 49 N. W. 1064, 39 Am. St. 776.

[99] Dudley v. Cadwell, 19 Conn. 218. In this way a mortgage made a few days before the bankruptcy of the mortgagor, but in pursuance of a parol agreement made fifteen months before, and based upon a good consideration, is good against the assignee in bankruptcy, and is not open to the objection that it is void as a fraudulent preference.

[1] Union Mut. Life Ins. Co. v. Slee, 123 Ill. 57, 13 N. E. 222; Beatty v. Brummett, 94 Ind. 76; Stroup v. Haycock, 56 Iowa 729, 16 N. W. 257; Byers v. Johnston, 89 Iowa 278, 56 N. W. 449; Anderson v. Smith, 103 Mich. 446, 61 N. W. 778; Moore v. Nye, 66 Hun (N. Y.) 628, 49 N. Y. St. 168, 21 N. Y. S. 94. See also, Jones v. Pierce, 134 Pa. St. 533, 19 Atl. 689, where the parol evidence was not strong enough to make the transaction a mortgage.

[2] Hughes v. McKenzie, 101 Ala. 415, 13 So. 609; Watts v. Kellar, 56 Fed. 1, 5 C. C. A. 394.

[3] Howard v. Iron & Land Co., 62 Minn. 298, 64 N. W. 896; White v. University Land Co., 49 Mo. App. 450; Leiweke v. Jordan, 59 Mo. App. 619; Mennde v. Delaire, 2 Desaus. (S. Car.) 564.

held to be an equitable mortgage in fee, and was reformed.[4] A seal is not necessary to make an instrument a good equitable mortgage.[5] A written agreement that attempts to appropriate specific property to the payment of a debt, and gives the creditor possession of it to hold till the debtor shall make sales of land and satisfy the debt from such sales, the occupation of the land and the doing of certain work to offset interest on the debt, constitutes an equitable mortgage binding upon the owner of the land, and upon any who buys of him with notice of the agreement.[6] An agreement on the back of a note, making it a charge on particular land, is an equitable mortgage. In this way an agreement intended to operate as a revival of a mortgage note which had been paid may be rendered effectual, although ineffectual to revive the mortgage lien.[7]

§ 4659. **Informal mortgages.**—A mortgage or trust deed, which cannot be enforced by a sale under the power or by a judgment of foreclosure on account of the omission of some formality requisite to a complete mortgage or deed of trust, may nevertheless be regarded as an equitable mortgage, and the lien may be enforced by special proceedings in equity. The attempt to create a security in legal form upon specific property having failed, effect is given to the intention of the parties, and the lien enforced as an equitable mortgage.[8] Any agreement between the

[4] First Nat. Bank v. Adam (Ill.), 25 N. E. 576; Gale's Exrs. v. Morris, 29 N. J. Eq. 222, affd. 30 N. J. Eq. 285; Brown v. First Nat. Bank, 44 Ohio St. 269, 6 N. E. 648; New Vienna Bank v. Johnson, 47 Ohio St. 306, 24 N. E. 503, 8 L. R. A. 614.

[5] Woods v. Wallace, 22 Pa. St. 171; Spencer v. Haynes, 12 Phila. (Pa.) 452; Atkinson v. Miller, 34 W. Va. 115, 11 S. E. 1007, 9 L. R. A. 544.

[6] Daggett v. Rankin, 31 Cal. 321; Blackburn v. Tweedie, 60 Mo. 505; Hackett v. Watts, 138 Mo. 502, 40 S. W. 113; Cummings v. Jackson, 55 N. J. Eq. 805, 38 Atl. 763; Dunman v. Coleman, 59 Tex. 199; Wilson v. Boyce, 92 U. S. 320, 23 L. ed. 608; White Water &c. Canal Co. v. Vallette, 21 How. (U. S.) 414, 16 L. ed. 154; Wayt v. Carwithen, 21 W. Va. 516; Hoile v. Bailey, 58 Wis. 434, 17 N. W. 322. See, however, Allen v. Montgomery, 48 Miss. 101.

[7] Bell v. Pelt, 51 Ark. 433, 11 S. W. 684, 4 L. R. A. 247, 14 Am. St. 57; Peckham v. Haddock, 36 Ill. 38.

[8] Edwards v. Scruggs, 155 Ala. 568, 46 So. 850; Ward v. Stark, 91 Ark. 268, 121 S. W. 382; Margarum v. Christie Orange Co., 37 Fla. 165, 19 So. 637; Longdon v. Wakeley, 62 Fla. 530, 56 So. 408; Foster Lumber Co. v. Harlan County Bank, 71 Kans. 158, 80 Pac. 49, 114 Am. St. 470; Tiernan v. Poor, 1 Gill & J. (Md.) 216, 19 Am. Dec. 225; Stark v. Kirkley, 129 Mo. App. 353, 108 S. W. 625; Payne v. Wilson, 74 N. Y. 348; Sprague v. Cochran, 144 N. Y. 104, 38 N. E. 1000; Stelts v. Martin, 90 S. Car. 14, 72 S. E. 550; Holley's Exr. v. Curry, 58 W. Va.

parties in interest that shows an intention to create a lien may be in equity a mortgage.[9] A mortgage defectively executed in the name of an agent, though purporting to be the mortgage of the corporation, is held to be binding in equity if it appears that the officer or agent had authority to bind it and by accident or mistake executed it in his own name instead of the name of the company.[10] In order that an instrument defectively executed may be declared a mortgage, it must generally appear, however, that the instrument was attempted to be executed by the mortgagor, in pursuance of an agreement indicating an intent that the property described is to be held or transferred as security for an obligation or debt of the mortgagor.[11] An assignment of rents and profits of land as security is an equitable mortgage.[12]

§ 4660. By assignment of contracts of purchase.—An assignment by the vendee of a contract of purchase of land as security for a loan may be regarded as an equitable mortgage.[13] The rules applicable to a mortgage of real property govern it both as to the effect of it and the mode of enforcing it.[14] Where

70, 51 S. E. 135, 112 Am. St. 944; Atkinson v. Miller, 34 W. Va. 115, 11 S. E. 1007, 9 L. R. A. 544; Frank v. Hicks, 4 Wyo. 502, 35 Pac. 475, 1025.

[9] Courtner v. Etheredge, 149 Ala. 78, 43 So. 368; Smith v. Rainey, 9 Ariz. 362, 83 Pac. 463, revg. 209 U. S. 53, 52 L. ed. 679, 28 Sup. Ct. 474; Bell v. Pelt, 51 Ark. 433, 11 S. W. 684, 4 L. R. A. 247, 14 Am. St. 57; Daggett v. Rankin, 31 Cal. 321; Gest v. Packwood, 39 Fed. 525; Baltimore & Ohio R. Co. v. Berkeley Springs & P. R. Co., 168 Fed. 770; Marquam v. Ross, 47 Ore. 374, 78 Pac. 698, 83 Pac. 852; Dietrich v. Hutchinson, 81 Vt. 160, 69 Atl. 661; Wayt v. Carwithen, 21 W. Va. 516; Knott v. Mfg. Co., 30 W. Va. 790, 5 S. E. 266; Fidelity Ins. Co. v. Shenandoah Valley R. Co., 33 W. Va. 761, 11 S. E. 58.

[10] Love v. Sierra Nevada &c. Min. Co., 32 Cal. 639, 91 Am. Dec. 602; Welsh v. Usher, 2 Hill Eq. (S. Car.) 167, Riley Eq. (S. Car.) 121, 29 Am. Dec. 63; Miller v. Rutland & W. R. Co., 36 Vt. 452.

[11] Brown v. Farmers' Supply Depot Co., 23 Ore. 541, 32 Pac. 548.

[12] Ex parte Willis, 1 Ves. Jr. 162; Abbott v. Stratten, 3 Jo. & LaT. 603; Gest v. Packwood, 39 Fed. 525. See, however, Alexander v. Berry, 54 Miss. 422.

[13] Fitzhugh v. Smith, 62 Ill. 486; Laughlin v. Braley, 25 Kans. 147; Sibley v. Ross, 88 Mich. 315, 50 N. W. 379; Smith v. Lackor, 23 Minn. 454; Niggeler v. Maurin, 34 Minn. 118, 24 N. W. 369; Burrows v. Hoveland, 40 Nebr. 464, 58 N. W. 947; Stoddard v. Whiting, 46 N. Y. 627; Titcomb v. Fonda &c. R. Co., 38 Misc. (N. Y.) 630, 78 N. Y. S. 226; Stephens v. Allen, 11 Ore. 188, 3 Pac. 168; Lovejoy v. Chapman, 23 Ore. 571, 32 Pac. 687; Gilkerson v. Connor, 24 S. Car. 321; Roddy v. Elam, 12 Rich. Eq. (S. Car.) 343; Morris v. Nyswanger, 5 S. Dak. 307, 58 N. W. 800; Shoecraft v. Bloxham, 124 U. S. 730, 31 L. ed. 574, 8 Sup. Ct. 686; Scott v. Farnam, 55 Wash. 336, 104 Pac. 639; Bull v. Sykes, 7 Wis. 449.

[14] Brockway v. Wells, 1 Paige (N. Y.) 617.

one having a contract for the purchase of land agrees with another that he shall pay the purchase-money and take a deed of the land for his security until repaid, the arrangement amounts to a mortgage of such equitable title.[15] In like manner, if the owner of land-warrants secures a debt by having them entered in the name of his creditor, such entry is a mortgage.[16] A bond for conveyance may be assigned by way of mortgage. If the assignee subsequently obtains the legal title to the land by virtue of the bond and surrenders that, he will hold the land subject to the right of the assignor to redeem.[17] Such a bond is itself sometimes declared to be in equity equivalent to a conveyance of the property, with a mortgage back; so that the assignment of it is equivalent to the assignment of a mortgage.[18] When land is sold on credit, and a bond is given to the purchaser to make title on payment of the purchase-money, the effect of the contract is to create a mortgage, the same as if the vendor had conveyed the land by an absolute deed to the purchaser, and taken back a mortgage to secure the payment of the purchase-money. The lien so created is an encumbrance on the land not only against the purchaser and his heirs, but also as against all subsequent purchasers.[19] The assignment of a certificate of purchase of public lands issued by a state operates as an equitable mortgage, when intended to secure a debt due from the assignor to the assignee.[20]

[15] Purdy v. Bullard, 41 Cal. 444; In re Fessler's Appeal, 75 Pa. St. 483.

[16] Dwen v. Blake, 44 Ill. 135.

[17] Fenno v. Sayre, 3 Ala. 458; Christy v. Dana, 34 Cal. 548; Baker v. Bishop Hill Colony, 45 Ill. 264; Newhouse v. Hill, 7 Blackf. (Ind.) 584; Jones v. Lapham, 15 Kans. 540; Alderson v. Ames, 6 Md. 52; Sinclair v. Armitage, 12 N. J. Eq. 174; Neligh v. Michenor, 11 N. J. Eq. 539; Bull v. Sykes, 7 Wis. 449.

[18] Jones v. Lapham, 15 Kans. 540; Button v. Schroyer, 5 Wis. 598.

[19] Strauss v. White, 66 Ark. 167, 51 S. W. 64; Holman v. Patterson, 29 Ark. 357; McConnell v. Beattie, 34 Ark. 113; Lewis v. Boskins, 27 Ark. 61; Smith v. Robinson, 13 Ark. 533; Moore v. Anders, 14 Ark. 628, 60 Am. Dec. 551; Shall v. Biscoe, 18 Ark. 142; Tanner v. Hicks, 4 Sm. & M. (Miss.) 294; Graham v. McCampbell, Meigs (Tenn.) 52, 33 Am. Dec. 126; Pintard v. Goodloe, Hemp. (U. S.) 502, Fed. Cas. No. 11171, affd. 12 How. (U. S.) 24, 13 L. ed. 877; Thredgill v. Pintard, 12 How. (U. S.) 24, 13 L. ed. 877; Paine v. McDowell, 71 Vt. 28, 41 Atl. 1042.

[20] Hays v. Hall, 4 Port. (Ala.) 374, 30 Am. Dec. 530; Hill v. Eldred, 49 Cal. 398; Case v. McCabe, 35 Mich. 100; Gunderman v. Gunnison, 39 Mich. 313; Stover's Heirs v. Bounds' Heirs, 1 Ohio St. 107; Wright v. Shumway, 1 Biss. (U. S.) 23, Fed. Cas. No. 18093; Dodge v. Silverthorn, 12 Wis. 644.

It may be enforced for the debt and for money paid by the assignee in order to prevent a forfeiture of the title.[21]

A pre-emptor of public land cannot mortgage his interest before entry. Before a valid mortgage can be made of a pre-emption of public land, an entry of it according to law must be made. The statutes of the United States provide that any grant or conveyance made before entry shall be void. Even where a mortgage is regarded as neither a grant nor conveyance, and therefore not within the letter of the statute, it is construed to include a mortgage within its prohibition. The intention of the act was that the title should be perfect and unencumbered when it passes from the United States by the entry to the settler.[22] But, on the other hand, there are numerous decisions to the effect that an ordinary mortgage by a pre-emptor of land, prior to the time of making his final proof, is not a grant or conveyance within the prohibitory clause of the statute.[23] If an occupant having a right of pre-emption mortgages his interest for a valuable consideration, and subsequently commutes the same, proves his occupation, pays the purchase-price, and receives a patent of the land, the

[21] Hill v. Eldred, 49 Cal. 398.

[22] Sec. 13, of the act of Congress Sept. 4, 1841, R. S. sec. 2262, provides that, before an entry shall be allowed, the claimant shall make oath that "he has not directly or indirectly made any agreement or contract in any way or manner, with any person or persons, whatsoever, by which the title which he might acquire from the government of the United States should inure in whole or in part, to the benefit of any person except himself." And it also provides that "any grant or conveyance which he may have made, except in the hands of bona fide purchasers, for a valuable consideration, shall be null and void." Bull v. Shaw, 48 Cal. 455; Moffatt v. Bulson, 96 Cal. 106, 30 Pac. 1022; 31 Am. St. 192; Brewster v. Madden, 15 Kans. 249; Green v. Houston, 22 Kans. 35; Mellison v. Allen, 30 Kans. 382, 2 Pac. 97; Penn v. Ott, 12 La. Ann. 233; Woodbury v. Dorman, 15 Gil. (Minn.) 272; McCue v. Smith, 9 Minn. 252, Gil. 237, 86 Am. Dec. 100; Bass v. Buker, 6 Mont. 442, 12 Pac. 922; Craig v. Tappin, 2 Sandf. Ch. (N. Y.) 78; Warren v. Van Brunt, 19 Wall. (U. S.) 646, 22 L. ed. 219.

[23] Norris v. Heald, 12 Mont. 282, 29 Pac. 1121, 33 Am. St. 581, holds that the statute does not prohibit mortgages by pre-emptors made in good faith for borrowed money. Larson v. Weisbecker, 1 Dec. Dept. Int. 409; In re Ray's Appeal, 6 Dec. Dept. Int. 340; Haling v. Eddy, 9 Dec. Dept. Int. 337. See also, Wilcox v. John, 21 Colo. 367, 40 Pac. 880, 52 Am. St. 246; Hubbard v. Mulligan, 13 Colo. App. 116, 57 Pac. 738; Nycum v. McAllister, 33 Iowa 374; Jones v. Tainter, 15 Minn 512; Fuller v. Hunt, 48 Iowa 163; Cheney v. White, 5 Nebr. 261, 25 Am. Rep. 487; Jones v. Yoakam, 5 Nebr. 265; Larison v. Wilbur, 1 N. Dak. 284, 47 N. W. 381; Guaranty Sav. Bank v. Bladow, 6 N. Dak. 108, 69 N. W. 41; Paige v. Peters, 70 Wis. 178, 35 N. W. 328, 5 Am. St. 156.

mortgage is a valid lien upon the property and the title thus acquired inures to the benefit of the mortgagee.[24]

§ 4661. By deposit of title deeds.—An equitable mortgage may, at common law, be created by deposit of the title deeds of a legal or an equitable estate as security for the payment of money.[25] This method of creating a lien upon land is of frequent use in England and is sometimes adopted in the United States.[26] The legal effect of the deposit is, that the mortgagor contracts that his interest in the land shall be liable for the debt, and that he shall make such a mortgage or conveyance as may be necessary to vest that interest in the mortgagee.[27] It binds whatever interest he has in the whole property described in the title deed. It does not imply that he will make perfect title to the property, but that he will give effect to the interest he has in it at the time, or may acquire afterward during the deposit.[28] The deposit may be made to cover subsequent advances by a subsequent parol agreement to that effect between the parties, without a return of the deeds and a new deposit of them.[29] It is not necessary that every deed relating to the property should be deposited;[30] nor is it necessary that they should show a title in the mortgagor by including the deed by which he acquired title.[31] A deposit of the title deed omitting the latter deed has been held to have priority over a subsequent deposit of the latter deed alone.[32] A

[24] Whitney v. Buckman, 13 Cal. 536; Kirkaldie v. Larrabee, 31 Cal. 455, 89 Am. Dec. 205; Orr v. Stewart, 67 Cal. 275, 7 Pac. 693; Fuller v. Hunt, 48 Iowa 163; Nycum v. McAllister, 33 Iowa 374;; Newkirk v. Marshall, 35 Kans. 77, 10 Pac. 571; Lang v. Morey, 40 Minn. 396, 42 N. W. 88, 12 Am. St. 748; Stark v. Duvall, 7 Okla. 213, 54 Pac. 453; Fariss v. Deming Inv. Co., 5 Okla. 496, 49 Pac. 926; Spies v. Newberg, 71 Wis. 279, 37 N. W. 417, 5 Am. St. 211.

[25] Russell v. Russell, 1 Bro. Ch. C. 269; Pye v. Danbury, 2 Dick. 759; Whitbread v. Jordan, 1 Y. & Coll. 303; Carey v. Rawson, 8 Mass. 159; Mandeville v. Welch, 5 Wheat. (U. S.) 277, 5 L. ed. 87; Jarvis v. Dutcher, 16 Wis. 307.

[26] Higgins v. Manson, 126 Cal. 467, 58 Pac. 907, 77 Am. St. 192; Martin v. Bowen, 51 N. J. Eq. 452, 26 Atl. 823; Hamilton Trust Co. v. Clunes, 163 N. Y. 423, 57 N. E. 614. This is not valid in some states. Bloomfield State Bank v. Miller, 55 Nebr. 243, 75 N. W. 569, 44 L. R. A. 387, 70 Am. St. 381.

[27] Pryce v. Bury, 2 Drew 41.

[28] Ex parte Bisdee, 1 Mont. D. & D. 333.

[29] Ex parte Langston, 17 Ves. 227; Baynard v. Wooley, 20 Beav. 583; Ex parte Kensington, 2 V. & B. 79.

[30] Ex parte Wetherell, 11 Ves. 398; Lacon v. Allen, 3 Drew 579.

[31] Roberts v. Croft, 24 Beav. 223, affd. 2 DeG. & J. 1.

[32] Roberts v. Croft, 24 Beav. 223, affd. 2 DeG. & J. 1.

deposit for the purpose of preparing a legal mortgage creates an equitable mortgage.[33] In America the doctrine of a mortgage by deposit of title deeds has been adopted only to a very limited extent. Generally, something more is acquired than a mere verbal agreement or understanding that the creditor is to hold them as security or indemnity. To create a lien upon land in this way would be, it is declared, to repeal judicially the statutes of fraud and perjuries, making void sales not evidenced by writing. The doctrine, moreover, is not compatible with the registry system. It may, therefore, be considered as generally rejected, so far as it sustains a mortgage upon a verbal or implied promise in connection with the deposit of the deed.[34] But a written memorandum may make the deposit a mortgage even where a deposit of title deeds upon a verbal agreement that they shall be held as security for a debt does not constitute an equitable mortgage, and a written agreement to the same effect accompanying the deeds will make the transaction a mortgage.[35]

D. Parties.

§ 4662. **Parties—In General.**—In order to make a valid mortgage it is essential that there be proper contracting parties. In general any person who has legal capacity to act for himself may make a mortgage of his property or may authorize any one else to do so in his behalf. It has been held that a person cannot make a mortgage to himself though he claims to make it in one capacity and accept it in another.[36] By statutory pro-

[33] Ex parte Hooper, 1 Mo. 7, 19 Ves. 477; Hockley v. Bantock, 1 Russ. 141. The law seems to be otherwise in South Carolina. Hutzler v. Phillips, 26 S. Car. 136, 1 S. E. 502, 4 Am. St. 687.

[34] Lehman v. Collins, 69 Ala. 127; English v. McElroy, 62 Ga. 413; Tuller v. Leaverton, 143 Iowa 162, 121 N. W. 515; In re Snyder, 138 Iowa 553, 114 N. W. 615; Vanmeter v. McFadden, 8 B. Mon. (Ky.) 435; Hall v. McDuff, 24 Maine 311; Gardner v. McClure, 6 Minn. 250; Gothard v. Flynn, 25 Miss. 58; Bloomfield State Bank v. Miller, 55 Nebr. 243, 75 N. W. 569, 44 L. R. A. 387, 70 Am. St. 381; Bloom v. Noggle, 4 Ohio St. 45; Schitz v. Dieffenbach, 3 Pa. St. 233; Bower v. Oyster, 3 Pen. & W. (Pa.) 239; Spencer v. Haynes, 12 Phila. (Pa.) 452; Sidney v. Stevenson, 33 Leg. Int. (Pa.) 42; Meador v. Meador, 3 Heisk. (Tenn.) 562; Bicknell v. Bicknell, 31 Vt. 498.

[35] In re Luch's Appeal, 44 Pa. St. 519; Edward's Exrs. v. Trumbull, 50 Pa. St. 509; Rankin v. Mortimere, 7 Watts (Pa.) 372; Spencer v. Haynes, 12 Phila. (Pa.) 452.

[36] Gorham's Admr. v. Meacham's Admr., 63 Vt. 231, 22 Atl. 572.

visions in many states, guardians or others acting for infants, insane or other persons without legal capacity to act for themselves may be authorized upon application to court showing sufficient cause, to convey in mortgage the real estate of their wards. Like authority is sometimes given to trustees, executors, or administrators, although not having title to the property themselves, but only authority over it for certain purposes, and acting in a representative capacity in respect to it, to mortgage it for the benefit of the parties in interest.[37] The jurisdiction of a court to order the mortgaging of a decedent's real estate can only be exercised in the manner and by the procedure prescribed by statute.[38]

§ 4663. Executors, administrators and guardians.—A mortgage made by an executor or an administrator without the authority of a statute and license by a court of competent jurisdiction is void, and the heirs in whom is vested the estate are not estopped to plead the invalidity of the mortgage by reason of the benefit resulting to them from the money obtained upon it.[39] Such mortgages depend upon the particular provision authorizing them and the power must be exercised strictly for the purposes for which it is given and all the requirements of the statutes must be strictly followed.[40] But when the power to mortgage has been granted by a court of competent jurisdiction, the parties to the mortgage are protected thereby without investigating the truth of the facts upon which it was granted; their truth cannot be questioned in any collateral proceedings.[41] An administrator or executor who undertakes to bind the estate of a decedent without authority may make himself personally liable although he adds to his own name the designation of his office.[42] A tes-

[37] Ames v. Holderbaum, 44 Fed. 224.

[38] Duryea v. Mackey, 151 N. Y. 204, 45 N. E. 458, revg. 74 Hun (N. Y.) 638, 56 N. Y. S. 887, 26 N. Y. S. 1120.

[39] Black v. Dressell's Heirs, 20 Kans. 153; Shrigley v. Black, 59 Kans. 487, 53 Pac. 477.

[40] Merritt v. Simpson, 41 Ill. 391; Wetherill v. Harris, 67 Ind. 452; Smith v. Eels, 27 Ind. App. 321, 61 N. E. 200; Edwards v. Taliafero, 34 Mich. 13; Smithwick v. Kelly, 79 Tex. 564, 15 S. W. 486. For circumstances authorizing an order to mortgage, see In re Morris, 63 Hun (N. Y.) 619, 45 N. Y. St. 716, 18 N. Y. S. 680, affd. 133 N. Y. 693, 31 N. E. 627.

[41] Griffin v. Johnson, 37 Mich. 87. See United States Trust Co. v. Roche, 116 N. Y. 120, 22 N. E. 265.

[42] Shrigley v. Black, 59 Kans. 487,

tator may provide by his will that his executor may mortgage his real estate or some specific portion of it to raise money for the payment of his debts. A mortgage made by virtue of such authority is valid unless in conflict with statutory provisions. If such a mortgage has the sanction of the statute the testator's creditors can have no valid objection to it.[43] Their claims are not liens upon the real estate having priority of such a mortgage but even if they could be considered liens upon the real estate in general, it has been held that a mortgage made by authority of the testator's will to pay debts would be a lien superior to such claims.[44] An executor authorized by will to borrow money in such way as it seems best to him for the purpose of paying the testator's debt has authority to execute a mortgage upon the testator's land to secure a loan for this purpose.[45] A guardian may mortgage the property of his ward when authorized by the proper court under statutory authority.[46] Such mortgage passes the title of the ward if it has title, but if the ward has no title none passes by the mortgage.[47] The fact that the guardian has not given a bond at the time of his appointment as required by statute does not invalidate his mortgage executed in the manner provided by statute.[48] The power in any court to direct a mortgage of the real estate of an infant is purely statutory. There is no such power inherent in a court of equity.[49]

§ 4664. **Insane persons.**—As a general rule the mortgage of an insane person is invalid as against the mortgagor, his heirs

53 Pac. 477; Hellier v. Lord, 55 N. J. L. 367, 26 Atl. 986.

[43] Iowa Loan & Trust Co. v. Holderbaum, 86 Iowa 1, 52 N. W. 550; Brown v. Morrill, 45 Minn. 483, 48 N. W. 328.

[44] Ames v. Holderbaum, 44 Fed. 224.

[45] Fletcher v. American Trust &c. Co., 111 Ga. 300, 36 S. E. 767, 78 Am. St. 164.

[46] United States Mort. Co. v. Sperry, 138 U. S. 313, 34 L. ed. 969, 11 Sup. Ct. 321.

[47] Thus under a will by which the testator provided that the land "be reserved for his children, and be equally divided among them when the youngest attains the age of twenty-one years," and devises the land to his executors in trust during minority of his children, no title vests in the children until the youngest becomes twenty-one years old; and a mortgage made by the children's guardian under an order of court, during their minority, passes no title. Kingman v. Harmon, 131 Ill. 171, 23 N. E. 430.

[48] Hunt v. Insley, 56 Kans. 213, 42 Pac. 709.

[49] Losey v. Stanley, 147 N. Y. 560, 42 N. E. 8, revg. 83 Hun (N. Y.) 420; Jenkins v. Fahey, 73 N. Y. 355; Horton v. McCoy, 47 N. Y. 21; Forman v. Marsh, 11 N. Y. 544; Baker v. Lorillard, 4 N. Y. 257; Rogers v. Dill, 6 Hill (N. Y.) 415.

or assigns, unless it be confirmed by him when of sound mind, or by his legally constituted guardian or by his heirs or devisees. It may be disaffirmed in a proper case without returning the consideration money to the mortgagee.[50] A mortgage, made by one who was insane at intervals both before and after the execution of it, usually depends, as to its validity, upon the question whether he was sane at the time; and the fact of his sanity must in such case be established by clear and satisfactory evidence.[51] If at the time he executed the mortgage he comprehended what he was doing, and the consequences of his acts, it will be held valid, if it be fair and no undue advantage has been taken of him, although it may appear probable that there were times, previous to the execution of the mortgage, when he might not have had sufficient capacity on account of a disease which would not be uniform in its influence on his mind.[52] Sanity is presumed, and the burden is upon a mortgagor, who seeks to avoid his mortgage on the ground of his mental disability, to prove such disability.[53] Mere weakness of mind will not enable one to avoid a mortgage, unless it appears that his memory or reasoning faculties were seriously impaired,[54] or unless advantage has been taken of such weakness in procuring the mortgage.[55] In some cases parties dealing in good faith with insane persons, without knowledge of their insanity, will be protected in equity to the extent of the consideration paid; but it has been held that a mortgage made by an insane person without any consideration will not be upheld even in favor of an assignee of the mortgage who takes it relying upon the record, without knowledge of the mortgagor's insanity.[56]

§ 4665. **Infants.**—The general rule is that a mortgage given by an infant is voidable only and not void, and he may,

[50] Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117; Valpey v. Rea, 130 Mass. 384; Brigham v. Fayerweather, 144 Mass. 48, 10 N. E. 735.

[51] Holmes v. Martin, 123 Mich. 155, 81 N. W. 1072; Ripley v. Babcock, 13 Wis. 425.

[52] Howells v. Griffiths (N. J.), 22 Atl. 928; Day v. Seely, 17 Vt. 542.

[53] Brown v. Cory, 9 Kans. App. 702, 59 Pac. 1097.

[54] White v. Farley, 81 Ala. 563, 8 So. 215; Chancellor v. Donnell, 95 Ala. 342, 10 So. 910; Rawdon v. Rawdon, 28 Ala. 565; Stubbs v. Houston, 33 Ala. 555; In re Carmichael, 36 Ala. 514; Pidcock v. Potter, 68 Pa. St. 342, 8 Am. Rep. 181.

[55] Marmon v. Marmon, 47 Iowa 121.

[56] Hull v. Louth, 109 Ind. 315, 10 N. E. 270, 58 Am. Rep. 405.

upon coming of age, either ratify or disaffirm it. An infant who had purchased land and given a mortgage for the purchase-money, or a part of it, may upon coming of age avoid the transaction.[57] He may relinquish the property and reclaim the money paid on account of it.[58] But if he seeks to avoid the debt and mortgage, he must usually surrender and reconvey the property. If he continues to hold the land and apply it to his own uses, he affirms the mortgage and makes himself legally liable for its payment.[59] If he wishes to disaffirm he must do so promptly upon attaining his majority.[60] If he ratifies the conveyance to himself, he ratifies his mortgage for the purchase-money. They constitute one transaction and he cannot enjoy the one without being bound by the other.[61] He is not allowed after coming of age, to try his chances of gaining something by the transaction, and then, upon finding that he cannot, to plead his disability.[62] But an infant may, in some cases, avoid his mortgage upon coming of age without returning the consideration received.[63] An infant's mortgage for necessaries is an exception to the general rule and is valid and may be enforced.[64]

An infant on coming of age may ratify his mortgage in various ways. It has been held that his payment of interest on the mortgage debt after obtaining his majority is a ratification;[65] that the mere retaining the possession of land for which he has given a mortgage for the purchase-money, is a ratification of the whole transaction;[66] and that his conveyance of the same land

[57] Gribben v. Maxwell, 34 Kans. 8, 7 Pac. 584, 55 Am. Rep. 233; Leavitt v. Files, 38 Kans. 26, 15 Pac. 891; Myers v. Knabe, 51 Kans. 720, 33 Pac. 602.

[58] Willis v. Twambly, 13 Mass. 204.

[59] Grace v. Whitehead, 7 Grant Ch. (U. C.) 591; Hubbard v. Cummings, 1 Greenl. (Maine) 11; Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; Young v. McKee, 13 Mich. 552; Robbins v. Eaton, 10 N. H. 561; Roberts v. Wiggin, 1 N. H. 73, 8 Am. Dec. 38; Coutant v. Servoss, 3 Barb. (N. Y.) 128; Kitchen v. Lee, 11 Paige (N. Y.) 107, 42 Am. Dec. 101; Lynde v. Budd, 2 Paige (N. Y.) 191, 21 Am. Dec. 84; Henry v. Root, 33 N. Y. 526; Bigelow v. Kinney, 3 Vt. 353, 21 Am. Dec. 589; Callis v. Day, 38 Wis. 643.

[60] Featherston v. McDonell, 15 U. C. C. P. 162; Loomer v. Wheelwright, 3 Sandf. Ch. (N. Y.) 135.

[61] Dana v. Coombs, 6 Greenl. (Maine) 89, 19 Am. Dec. 194; Heath v. West, 28 N. H. 101.

[62] Terry v. McClintock, 41 Mich. 492, 2 N. W. 787; Flynn v. Powers, 54 Barb. (N. Y.) 550, 35 How. Pr. (N. Y.) 279, affd. 54 Barb. (N. Y.) 550, 36 How. Pr. (N. Y.) 287.

[63] Scott v. Brown, 106 Ala. 604, 17 So. 731.

[64] Askey v. Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176.

[65] American Mortg. Co. v. Wright, 101 Ala. 658, 14 So. 399.

[66] Callis v. Day, 38 Wis. 643.

upon coming of age, subject to the mortgage, is sufficient ratification of it.[67] The right to rescind his contract is a personal privilege. It is given him for his protection, and he alone, or his heirs or representatives can exercise it. A subsequent purchaser or lienholder, or any persons standing in the place of the infant, cannot take advantage of this defense.[68] His assignee in bankruptcy is not permitted to disaffirm a mortgage made by the bankrupt while under age, though not ratified or affirmed by him after attaining his majority.[69] The subsequent ratification usually relates back to the original execution of the mortgage as against all persons except purchasers for a new and valuable consideration.[70] It has been held, however, that a mortgage by an infant which was not in any way for his benefit is not merely voidable, but void, and therefore not subject to ratification.[71]

§ 4666. **Married women—In general.**—At common law a married woman could not make a mortgage even to secure the purchase-money of real estate conveyed to her. Both the mortgage and the note were void.[72] In equity however her rights have been extended over her separate estate and the settled doctrine now is that her property is holden in equity for her engagement whether in writing or not. But at law they cannot be enforced. Her obligations are not strictly debts. She is not personally holden for them; but her separate estate is subjected to their payment. The proceeding to enforce them, therefore, is in the nature of a proceeding in rem. The common-law rights and liabilities of married women have been greatly changed in this country by statute. These statutes vary in the several states but liberal provision is generally made for the holding of separate property by married women and for their contracting in relation

[67] Or by part payment, Keegan v. Cox, 116 Mass. 289; Allen v. Poole, 54 Miss. 323. See also, Story v. Johnson, 2 Y. & C. Exch. 588, 607; Phillips v. Green, 5 T. B. Mon. (Ky.) 345; Boston Bank v. Chamberlain, 15 Mass. 220; Lynde v. Budd, 2 Paige (N. Y.) 191, 21 Am. Dec. 84.

[68] Baldwin v. Rosier, 48 Fed. 810.

[69] Mansfield v. Gordon, 144 Mass. 168, 10 N. E. 773 (under state insolvent act).

[70] Palmer v. Miller, 25 Barb. (N. Y.) 399.

[71] Cronise v. Clark, 4 Md. Ch. 403; Chandler v. McKinney, 6 Mich. 217, 74 Am. Dec. 686.

[72] Savage v. Holyoke, 59 Maine 345; Newbegin v. Langley, 39 Maine 200, 63 Am. Dec. 612; Heburn v. Warner, 112 Mass. 271, 17 Am. Rep. 86; Owens v. Johnson, 8 Baxt. (Tenn.) 265.

to it. As a general rule a married woman is authorized to contract with reference to her separate property as if she were sole, but she cannot impair her husband's tenancy by the curtsy, except with the concurrence of her husband.[73] Her deed made without such consent or authority is invalid, and cannot be enforced even in equity.[74] Even when given to secure the purchase-money of land, it does not amount to a declaration of trust in favor of the vendor.[75] Her sole deed is absolutely void.[76] The equity doctrine that the separate property of a married woman is answerable for her debts to the full extent to which it is subject to her disposal has been adopted by some of the states in this country, and equity enforces her contract on her separate property because not being personally liable, there is no remedy at law. The reason for this rule, as laid down by the English courts, is that "the separate property of a married woman being a creature of equity, it follows, that, if she has a power to deal with it, she has the other power incident to property in general, namely, the power of contracting debts to be paid out of it; and inasmuch as her creditors have not the means at law of compelling payment of those debts, a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property, as the only means by which they can be satisfied."[76a]

§ 4667. Married women—Mortgage to secure husband's debts.—A married woman can bind herself personally only

[73] To pass any interest in her property she must be a party to the granting part of the deed. A mortgage which purports on its face to be that of her husband merely, does not bind her estate though she sign and acknowledge it. Berrigan v. Fleming, 2 Lea (Tenn.) 271. See also, Major v. Holmes, 24 Mass. 108; Concord Bank v. Bellis, 10 Cush. (Mass.) 276; Weed Sewing Machine Co. v. Emerson, 115 Mass. 554. See Rev. Law Mass. 1902, ch. 153, p. 1.

[74] Herdman v. Pace, 85 Ill. 345; Elder v. Jones, 85 Ill. 384.

[75] Lewis v. Graves, 84 Ill. 205; Morrison v. Brown, 83 Ill. 562.

[76] In Perrine v. Newell, 49 N. J. Eq. 57, 23 Atl. 492, it was held that the bond or note given by a married woman with her invalid mortgage is an acknowledgment of a debt due by her for the benefit of her separate estate. "Although the mortgage is not valid as such, it will nevertheless operate in equity as an appointment of the property described in it for the payment of that debt, and equity will decree that the debt be a charge upon the property so appointed and that the property shall be sold to pay it. The debt is not a lien upon their estate until made so by a decree of this court. The lien is in virtue of the decree of this court, not in virtue of the mortgage." Warner v. Crouch, 14 Allen (Mass.) 163; Moore v. Rake, 26 N. J. L. 574; Rake v. Lawshee, 24 N. J. L. 613.

[76a] Owens v. Dickenson, Cr. & Phil. 48.

by such obligations as have reference to her separate property. She is not bound, therefore, by a note given by her alone or jointly with her husband for a debt of the husband.[77] The fact that the note is secured by a mortgage on her real estate does not make the note such an obligation respecting her separate estate as to render her liable upon it,[78] although the mortgage itself be in equity a valid and binding lien upon her separate property.[79] But she may, however, with the proper assent of her husband, in most jurisdictions convey her separate real estate; and if there be a valid consideration for the conveyance it is as effectual as it would be if she were not married. She may, therefore, convey her real estate in mortgage to secure a valid debt, as, for instance, a valid note against her husband. Her mortgage is then binding, because it is a contract entered into by her in relation to her separate property, and to secure a valid and existing debt.[80] A statutory provision that the separate property of a married woman shall not be liable for the debts of the husband does not affect her power to mortgage her land to secure the payment of her husband's debt where it is also provided that she may convey, devise and bequeath the same or any interest therein in the same manner and with like effect, as if she were unmarried.[81] In some states a married woman may make a valid mortgage of her separate property to secure the payment of the debt of her husband or of any other person, in the same manner as if she were unmarried.[82] Any consideration which would be sufficient to sup-

[77] Stafford Sav. Bank v. Underwood, 54 Conn. 2, 4 Atl. 248; Rowell v. Jewett, 69 Maine 293; Brookings v. White, 49 Maine 479; Nourse v. Henshaw, 123 Mass. 96; Heburn v. Warner, 112 Mass. 271, 17 Am. Rep. 86; Willard v. Eastham, 15 Gray (Mass.) 328, 77 Am. Dec. 366; Athol Mach. Co. v. Fuller, 107 Mass. 437; Burns v. Lynde, 6 Allen (Mass.) 305; Graham v. Myers, 67 Mich. 277, 34 N. W. 710; Wilson v. Mills, 66 N. H. 315, 22 Atl. 455; Conway v. Wilson, 44 N. J. Eq. 457, 11 Atl. 734; Ledlie v. Vrooman, 41 Barb. (N. Y.) 109; White v. McNett, 33 N. Y. 371; Yale v. Dederer, 18 N. Y. 265, 17 How. Prac. (N. Y.) 165, 72 Am. Dec. 503.

[78] Williams v. Hayward, 117 Mass. 532.

[79] Thacher v. Churchill, 118 Mass. 108.

[80] Williams v. Walker, 111 N. Car. 604, 16 S. E. 706; Newhart v. Peters, 80 N. Car. 166.

[81] Hitz v. Jenks, 123 U. S. 297, 31 L. ed. 156, 8 Sup. Ct. 143.

[82] Short v. Battle, 52 Ala. 456; Collins v. Wassell, 34 Ark. 17; Marlow v. Barlew, 53 Cal. 456; Lynch v. Moser, 72 Conn. 714, 46 Atl. 153; Stafford Sav. Bank v. Underwood, 54 Conn. 2, 4 Atl. 248; De Roux v. Girard, 105 Fed. 798, affd. 112 Fed. 89, 50 C. C. A. 136; Dzialynski v. Bank of Jacksonville, 23 Fla. 346, 2

port the obligation if made by any one else is sufficient to sup-

So. 696; Low v. Anderson, 41 Iowa 476; Comegys v. Clarke, 44 Md. 108; Plummer v. Jarman, 44 Md. 632; Smith v. Osborn, 33 Mich. 410; Northwestern Mut. Life Ins. Co. v. Allis, 23 Minn. 337; Sandwich Mfg. Co. v. Zellmer, 48 Minn. 408, 51 N. W. 379; Conway v. Wilson, 44 N. J. Eq. 457, 11 Atl. 734; Robbins v. Abrahams, 5 N. J. Eq. 465; Tooker v. Sloan, 30 N. J. Eq. 394; Conover v. Grover, 31 N. J. Eq. 539; Campbell v. Tompkins, 32 N. J. Eq. 170, affd. 33 N. J. Eq. 362; Firemen's Ins. Co. v. Bay, 4 Barb. (N. Y.) 407; Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467; Newhart v. Peters, 80 N. Car. 166; Moore v. Fuller, 6 Ore. 272, 25 Am. Rep. 524; Siebert v. Valley Nat. Bank, 186 Pa. St. 233, 40 Atl. 472; Kuhn v. Ogilvie, 178 Pa. St. 303, 35 Atl. 957; In re Gabel's Appeal (Pa.), 7 Atl. 52; Cross v. Allen, 141 U. S. 528, 35 L. ed. 843, 12 Sup. Ct. 67; Parsons v. Denis, 2 McCrary (U. S.) 359, 7 Fed. 317; Stephen v. Beall, 22 Wall. (U. S.) 329, 22 L. ed. 786. Indiana: The Indiana statute provides that a married woman shall not enter into any contract of suretyship and under this statute it has been held that she is prohibited from mortgaging her property to secure the debt of any person. 3 Burns Ann. Statutes, 1908, § 7855; Boyd v. Radibaugh, 150 Ind. 394, 50 N. E. 301; Leschen v. Guy, 149 Ind. 17, 48 N. E. 344; Merchants' &c. Bldg. Assn. v. Scanlan, 144 Ind. 11, 42 N. E. 1008; Cole v. Temple, 142 Ind. 498, 41 N. E. 942. A mortgage properly executed by a married woman upon her separate real estate is a valid and binding security, unless it constitutes a contract of suretyship. Johnson v. Jouchert, 124 Ind. 105, 24 N. E. 580, 8 L. R. A. 795. Such mortgage by her of her land to secure a loan, the proceeds of which are partly used to purchase land, the title to which is taken in her name, is valid to the extent so used (Johnson v. Jouchert, 124 Ind. 105, 24 N. E. 580, 8 L. R. A. 795; Vogel v. Leichner, 102 Ind. 55, 1 N. E. 554; Noland v. State, 115 Ind. 529, 18 N. E. 26; Morgan v. Street, 28 Ind. App. 131, 62 N. E. 99); though invalid to the extent the proceeds are for the husband's benefit. The burden of proving that a wife's mortgage securing her own note is invalid under the statute is upon the party who contests its validity. (Field v. Noblett, 154 Ind. 357, 56 N. E. 841; Crisman v. Leonard, 126 Ind. 202, 25 N. E. 1101; Miller v. Shields, 124 Ind. 166, 24 N. E. 670, 8 L. R. A. 406.) If the mortgage upon the joint property of both husband and wife, is made to secure a loan obtained upon their joint application, the burden is upon them to show that the consideration was not obtained and used for the benefit of their joint estate. Security v. Arbuckle, 119 Ind. 69, 21 N. E. 469; Jenne v. Burt, 121 Ind. 275, 22 N. E. 256. Where one in good faith and without notice advances money on a mortgage executed by a married woman and her husband, on the faith of the representations of the mortgagors that the money is for the sole benefit of the wife, he is not affected by a secret agreement between the husband and the wife that the money should be used by the husband in his business. Ward v. Berkshire Life Insurance Co., 108 Ind. 301, 9 N. E. 361. Under this statute a mortgage by a married woman upon her separate real estate, owned by herself and husband by entireties is voidable by her. McCormick Harvesting Mach. Co. v. Scovell, 111 Ind. 551, 13 N. E. 58; Dodge v. Kinzy, 101 Ind. 102; Crooks v. Kennett, 111 Ind. 347, 12 N. E. 715; Bridges v. Blake, 106 Ind. 332, 6 N. E. 333; Fawkner v. Scottish-American Mortg. Co., 107 Ind. 555, 8 N. E. 689; Vogel v. Leichner, 102 Ind. 55, 1 N. E. 554; McLead v. Ætna Life Ins. Co., 107 Ind. 394, 8 N. E. 230. But a married woman, under this act, may convey her land to her husband to enable him to secure a loan by mortgage. Long v. Crossan, 119 Ind. 3, 21 N. E. 450, 4 L. R. A. 783; Trimple v. State, 145 Ind. 154, 44 N. E. 260, 57 Am. St. 163n; Grzesk v. Hibberd, 149 Ind. 354, 48 N. E. 361. In Kentucky a married woman may mortgage her separate estate to pay her own debt created for her benefit (Hounshell v. Clay F. M. Ins. Co., 81 Ky. 304, 5 Ky. L.

port her undertaking.[83] Her mortgage given to secure the payment of the bond of her husband, will not be regarded as having no validity simply because the consideration of the bond is an obligation merely moral, and not enforcible in law or in equity.[84] The mortgage of a married woman upon her separate property given to secure a debt of her husband but taken by the mortgagee in good faith and without fraud on his part, will seldom, if ever, be set aside, even on proof that her husband procured her execution of it by fraudulent representations.[85] But the court will refuse to enforce a mortgage, the execution of which by the wife was procured by threats and duress on the part of the husband so excessive as to subjugate and control the freedom of her will.[86] The mortgage of a married woman is not valid unless made for a valid consideration.[87] But a mortgage by a wife of her separate property to secure her husband's note is made for a sufficient consideration if there was a sufficient consideration for the note.[88] A wife who has mortgaged her separate property for her husband's debt is in the position of a surety.[89] She is entitled to

267); but she can not make such a mortgage to secure a debt of her husband. Merchants' &c. Loan Assn. v. Jarvis, 92 Ky. 566, 13 Ky. L. 797, 18 S. W. 454; Lane v. Traders' Deposit Bank, 14 Ky. 873, 21 S. W. 756; Miller v. Sanders, 98 Ky. 535, 17 Ky. L. 1114, 33 S. W. 621. Missouri: The wife may mortgage her property not held to her separate use for any purpose. Meads v. Hutchinson, 111 Mo. 620, 19 S. W. 1111; Roseheim v. Hartsock, 90 Mo. 357, 2 S. W. 473; Wilcox v. Todd, 64 Mo. 388; Ferguson v. Soden, 111 Mo. 208, 19 S. W. 727, 33 Am. St. 512. South Carolina: A mortgage by a married woman affecting her separate estate, is made a charge on the same whenever the intention to do so is declared in such mortgage and she is bound thereby though in fact the mortgage was given to secure her husband s debt and the mortgagee had knowledge of the fact. Acts 1887, p. 819; Scottish Amer. Mortg. Co. v. Mixson, 38 S. Car. 432, 17 S. E. 244; Ellis v. American Mortgage Co., 36 S. Car. 45, 15 S. E. 267; Reid v. Stevens, 38 S. Car. 519, 17 S. E. 358. Wisconsin: The husband may make a mortgage of his wife's land partly for his own benefit, there being no evidence of collusion between the husband and the mortgagee. Eaton v. Dewey, 79 Wis. 251, 48 N. W. 523.

[83] Short v. Battle, 52 Ala. 456; Low v. Anderson, 41 Iowa 476.

[84] Campbell v. Tompkins, 32 N. J. Eq. 170, affd. 33 N. J. Eq. 362.

[85] Collins v. Wassell, 34 Ark. 17; Spurgin v. Traub, 65 Ill. 170.

[86] Central Bank v. Copeland, 18 Md. 305, 81 Am. Dec. 597.

[87] Heller v. Groves (N. J.), 8 Atl. 652.

[88] Post v. First Nat. Bank, 138 Ill. 559, 28 N. E. 978; Eaton v. Dewey, 79 Wis. 251, 48 N. W. 523.

[89] Young v. Graff, 28 Ill. 20; Green v. Scranage, 19 Iowa 461, 87 Am. Dec. 447; Eaton v. Nason, 47 Maine 132; Bartlett v. Bartlett, 4 Allen (Mass.) 440; Watson v. Thurber, 11 Mich. 457; Wilcox v. Todd, 64 Mo. 388; Hawley v. Bradford, 9 Paige (N. Y.) 200, 37 Am. Dec. 390; Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467; Vartie v. Underwood, 18 Barb. (N. Y.) 561; Smith v. Townsend, 25 N. Y. 479; Purdy v. Huntington, 42 N. Y. 334,

all the rights of a surety, and her liability and the mortgage lien are discharged by the extension of the time of payment without her consent,[90] if the extension be a binding obligation upon the mortgagee,[91] or by anything that would discharge a surety who is personally bound.[92] A husband has not presumptive authority to consent to an extension of a mortgage given by his wife to secure his debt. The holder of such a mortgage is chargeable with notice of her ownership and that she stands in the relation of surety to the husband. The lien is therefore discharged by an extension of time of payment without her concurrence.[93] The law of the state where the land is situated governs as to the capacity of a married woman to execute a mortgage though it be executed in another state.[94]

§ 4668. Married women—Mortgages under statutes.—The American courts do not carry the doctrine to the extent of the English courts but as a general rule hold that a married woman's separate estate is not chargeable with her debts or obligations not relating to her separate estate, unless she specially makes them a charge upon it by some instrument in writing. Her contracts which do not concern her separate property and are not made upon its credit, usually remain void as they were at common law.[95] However as a general rule, equity, while holding her separate estate not to be answerable for any implied undertaking of hers, will enforce upon it her mortgage or other express contract, although it be not made for her benefit, but for the sole benefit of another.[96] Where a married woman is empowered by statute to

1 Am. Rep. 532; Cross v. Allen, 141 U. S. 528, 35 L. ed. 843, 12 Sup. Ct. 67. See also, Spear v. Ward, 20 Cal. 659; Bull v. Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. 235; Ellis v. Kenyon, 25 Ind. 134; Post v. Losey, 111 Ind. 74, 12 N. E. 121, 60 Am. Dec. 677; Philbrooks v. McEwen, 29 Ind. 347; Hubbard v. Ogden, 22 Kans. 363; Carley v. Fox, 38 Mich. 387.

[90] Spear v. Ward, 20 Cal. 659; Post v. Losey, 111 Ind. 74, 12 N. E. 121, 60 Am. Dec. 677; Bank of Albion v. Burns, 46 N. Y. 170; Coleman v. Van Rensselaer, 44 How. Pr. (N. Y.) 368; Smith v. Townsend, 25 N. Y. 479. See Newman v. Kling, 73 Miss. 312, 18 So. 685; Barrett v. Davis (Mo.), 15 S. W. 1010, revd. 104 Mo. 549, 16 S. W. 377.

[91] Frickee v. Donner, 35 Mich. 151.

[92] Cross v. Allen, 141 U. S. 528, 35 L. ed. 843, 12 Sup. Ct. 67.

[93] Bank of Albion v. Burns, 2 Lans. (N. Y.) 52, affd. 46 N. Y. 170; Smith v. Townsend, 25 N. Y. 479.

[94] Swank v. Hufnagle, 111 Ind. 453, 13 N. E. 105, 12 N. E. 303; Brown v. First Nat. Bank, 44 Ohio St. 269, 6 N. E. 648.

[95] Pickens' Exrs. v. Kniseley, 36 W. Va. 794.

[96] Nourse v. Henshaw, 123 Mass.

bargain, sell, and convey her real estate, and enter into contracts in reference to it she may deal with the property itself, by sale or otherwise, and assume obligations in connection therewith; and she may bind herself to pay money for property purchased, as the property will become hers by purchase, and the obligation to pay is in reference to her separate property.[97] But this is the limit of her power. She cannot, under most of such statutes, contract as surety for her husband or for any one else. The character of a note or other contract made by her is not affected as a contract applying to her separate property by reason that it is secured by a mortgage on her land. The mortgage is collateral for the note; the one is the principal, the other the incident; when the note is void the mortgage is void also.[98] In some states the wife's separate property is in equity held liable generally for her debts.[99] As to her separate property she is regarded as a feme sole, and is allowed to make any contract in relation to it she may choose; and if she executes a note secured by a mortgage upon her separate property, her promise to pay is construed as relating not only to the

96; Willard v. Eastham, 15 Gray (Mass.) 328, 77 Am. Dec. 366; Taylor v. Barker, 30 S. Car. 238, 9 S. E. 115. See Young v. Graff, 28 Ill. 20; Rogers v. Ward, 8 Allen (Mass.) 387, 85 Am. Dec. 710; Willard v. Eastham, 15 Gray (Mass.) 328, 77 Am. Dec. 366; Heburn v. Warner, 112 Mass. 271, 17 Am. Rep. 86; Corn Exchange Ins. Co. v. Babcock, 42 N. Y. 613, 9 Abb. Pr. (N. S.) (N. Y.) 156, 1 Am. Rep. 601, where the English and American cases are reviewed; Dyett v. Central Trust Co., 140 N. Y. 54, 35 N. E. 341; Ledlie v. Vrooman, 41 Barb. (N. Y.) 109; White v. Story, 43 Barb. (N. Y.) 124, 28 How. Prac. (N. Y.) 173; White v. McNett, 33 N. Y. 371; Ballin v. Dillaye, 37 N. Y. 35, 35 How. Pr. (N. Y.) 216; Cruger v. Cruger, 5 Barb. (N. Y.) 225; Curtis v. Engel, 2 Sandf. Ch. (N. Y.) 287; Jacques v. Methodist Epis. Ch., 17 Johns. (N. Y.) 548, 8 Am. Dec. 447; Gardner v. Gardner, 7 Paige (N. Y.) 112, revd. 22 Wend. (N. Y.) 526, 34 Am. Dec. 340; Knowles v. McCamly, 10 Paige (N. Y.) 342; Owen v. Cawley, 36 N. Y. 600; Yale v. Dederer, 18 N. Y. 265, 17 How. Prac. (N. Y.) 165, 72 Am. Dec. 503, 22 N. Y. 450, 20 How. Prac. (N. Y.) 242, 78 Am. Dec. 216.

[97] Heburn v. Warner, 112 Mass. 271, 17 Am. Rep. 86.

[98] Denny v. Dana, 2 Cush. (Mass.) 160, 48 Am. Dec. 655; Brigham v. Potter, 14 Gray (Mass.) 522.

[99] Alexander v. Bouton, 55 Cal. 15; Cummings v. Sharpe, 21 Ind. 331; Deering v. Boyle, 8 Kans. 525, 12 Am. Rep. 480; Hobson v. Hobson, 8 Bush (Ky.) 665; Sharp's Admr. v. Proctor's Admr., 5 Bush (Ky.) 396; Johnston v. Ferguson, 2 Metc. (Ky.) 503; Smith v. Wilson, 2 Metc. (Ky.) 235; Webb v. Hoselton, 4 Nebr. 308, 19 Am. Rep. 638; Pentz v. Simonson, 13 N. J. Eq. 232; Wheaton v. Phillips, 12 N. J. Eq. 221; Johnson v. Cummins, 16 N. J. Eq. 97, 84 Am. Dec. 142; Glass v. Warwick, 40 Pa. St. 140, 80 Am. Dec. 566; Heath v. VanCott, 9 Wis. 516; Todd v. Lee, 15 Wis. 365.

mortgaged premises but to her separate property generally.[1] In other states the capacity of married women has been enlarged by statute, so that in effect she is enabled to bind herself and her property as if she were sole. In such states her mortgage of her separate real estate is effectual whether executed by her alone or jointly with her husband.[2]

§ 4669. **Partners.**—The rights of the creditors of a copartnership to have their claim against the firm satisfied first out of the property of the copartnership, extends to the real estate of a firm against all who acquired an interest in such real estate with notice of its partnership character. The creditors are, in such case, entitled to priority out of it in preference to the creditors of the individual members of the firm.[3] But if one member of the copartnership mortgages his apparent interest as tenant in common of such land for a consideration paid to him at the time, the mortgagee having no notice of the character of the property, he is held entitled to hold it under his mortgage. He may rely upon the legal effect of the conveyance to his mortgagor, and his apparent title upon record. A person taking a mortgage without notice that it covers partnership property is a purchaser and is usually subject to no equity in favor of the partnership or of its creditors.[4] Whether real property is partnership assets generally depends upon the intention or agreement of the partners. Such intention may be expressed or implied. In the absence of express

[1] Marlow v. Barlew, 53 Cal. 456; Alexander v. Bouton, 55 Cal. 15.

[2] McComb v. Spangler, 71 Cal. 418, 12 Pac. 347; Parry v. Kelley, 52 Cal. 334. As to community property see Rosenberg v. Ford, 85 Cal. 610, 24 Pac. 779. In Louisiana a married woman cannot mortgage her estate, without judicial authority. Stuffler v. Puckett, 30 La. Ann. 811. Ætna Ins. Co. v. Brodinax, 48 Fed. 892, affd. 128 U. S. 236, 32 L. ed. 445, 9 Sup. Ct. 61; Planters' Loan & Sav. Bank v. Dickenson, 83 Ga. 711, 10 S. E. 446; Harrold v. Westbrook, 78 Ga. 5, 2 S. E. 695; Tift & Co. v. Mayo, 61 Ga. 246; Hawkins v. Taylor, 61 Ga. 171; Brick v. Scott, 47 Ind. 299; Layman v. Shultz. 60 Ind. 541; Nourse v. Henshaw, 123 Mass. 96; Frickee v. Donner, 35 Mich. 151; Sandwich Mfg. Co. v. Zellmer, 48 Minn. 408, 51 N. W. 379; Northwestern Mut. Life Ins. Co. v. Allis, 23 Minn. 337.

[3] Pollock's Dig. of Law of Partnership, ch. 6; Story on Partnership, Par. 92, 93; Hewitt v. Rankin, 41 Iowa 35; Hogle v. Lowe, 12 Nev. 286; Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; Tarbel v. Bradley, 7 Abb. N. Cas. (N. Y.) 273, affd. 86 N. Y. 280; Meily v. Wood, 71 Pa. St. 488, 10 Am. Rep. 719.

[4] Hewitt v. Rankin, 41 Iowa 35; Seeley v. Mitchell's Assignee, 85 Ky. 508, 9 Ky. L. 86, 4 S. W. 190; Hiscock v. Phelps, 49 N. Y. 97. See also, McMillan v. Hadley, 78 Ind. 590;

agreement, parol evidence may be resorted to for the determination of the question. The manner in which the members of the firm have treated and used the property is important in determining its character.[5] A mortgage made by a partner of his interest in partnership real estate, to one who knows it to be such, is not a mortgage of the partner's undivided interest in such real estate but of his interest in the portion mortgaged after the payment of the firm debts upon a settlement of the partnership accounts. The mortgage is not available until the partnership debts have been paid and the partnership accounts have been discharged, if the other partner chooses to assert his equity, or if subsequent partnership mortgagees assert their priority,[6] or if creditors of the partnership attach the property or levy an execution upon it as belonging to the partnership.[7] There would in such case be no distinction between debts incurred prior to the mortgage and those incurred subsequently.[8] A valid mortgage may be made by one partner to secure a partnership debt upon partnership property.[9] And such mortgage is valid as against creditors of the firm whose lien attaches afterward.[10] An exception to the general rule, that an authority to bind another by an instrument under seal must itself be created by a like instrument seems to have been established in case of partners; they may give each other authority by parol to bind each other by instruments under seal.[11] An unauthorized mortgage of partnership property made by one partner using the name of his copartner may be ratified by the latter by parol, or any act showing his recognition of the mortgage.[12] A mortgage of such real estate by one partner to se-

Jewett v. Meech, 101 Ind. 289; Purple v. Farrington, 119 Ind. 164, 21 N. E. 543. But compare Booher v. Perrill, 140 Ind. 529, 40 N. E. 36.

[5] Brown v. Morrill, 45 Minn. 483, 48 N. W. 328; Riedeburg v. Schmitt, 71 Wis. 644, 38 N. W. 336.

[6] Goldthwaite v. Janney, 102 Ala. 431, 15 So. 560, 28 L. R. A. 161, 48 Am. St. 56; Beecher v. Stevens, 43 Conn. 587; Seeley v. Mitchell's Assignee, 85 Ky. 508, 9 Ky. L. 86, 4 S. W. 190; Rockefeller v. Dellinger, 22 Mont. 418, 56 Pac. 822, 74 Am. St. 613; Page v. Thomas, 43 Ohio St. 38, 1 N. E. 79, 54 Am. Rep. 788.

[7] Fargo v. Ames, 45 Iowa 491; Seaman v. Huffaker, 21 Kans. 254; Lovejoy v. Bowers, 11 N. H. 404; French v. Lovejoy, 12 N. H. 458.

[8] Lovejoy v. Bowers, 11 N. H. 404.

[9] Wilson v. Hunter, 14 Wis. 683, 80 Am. Dec. 795.

[10] Citizens' Nat. Bank v. Johnson, 79 Iowa 290, 44 N. W. 551.

[11] Cady v. Shepherd, 11 Pick. (Mass.) 400, 22 Am. Dec. 379; Swan v. Stedman, 4 Metc. (Mass.) 548; Smith v. Kerr, 3 N. Y. 144; Wilson v. Hunter, 14 Wis. 683, 80 Am. Dec. 95.

[12] Holbrook v. Chamberlin, 116 Mass. 155, 17 Am. Rep. 146.

cure a copartnership debt may be valid;[13] but such a mortgage has been held invalid when made in opposition to the will of another partner with the knowledge of the creditor.[14] Some authorities hold, indeed, that such a mortgage, made without the previous authority of the other partner, binds only the interest of the partner executing it.[15] On the other hand, if a partner mortgage his separate property to secure a partnership debt, he becomes a surety for the firm, and his separate creditors, upon his bankruptcy or insolvency, have a right to insist that the partnership property be first applied to the payment of the debt so secured.[16] A mortgage by an individual partner of his interest in the partnership real estate is relieved of all equities in favor of the partnership as soon as the business of the partnership is closed without requiring the application of it to the firm debts.[17]

§ 4670. Corporations.—A corporation has the power to mortgage its real estate as an incident to the power to acquire and hold it and to make contracts in regard to it, when the power is not expressly denied, and is not inconsistent with the public obligation of the corporation.[18] This right may, of course, be circumscribed by statutes,[19] or by the charter under which the corporation is organized; and it is the case, generally, that corporations, to which are given large powers and valuable privileges, from the exercise of which it is expected the public will derive advantage, are impliedly restrained in their power of alienation. Railroad companies are of this class; they cannot mortgage their franchises or property essential to the continued operation of the roads without legislative authority.[20] But this

[13] Cooley v. Hobart, 8 Iowa 358.

[14] Bull v. Harris, 18 B. Mon. (Ky.) 195.

[15] Sutlive v. Jones, 61 Ga. 676.

[16] Averill v. Loucks, 6 Barb. (N. Y.) 470.

[17] Hewitt v. Rankin, 41 Iowa 35; Shearer v. Shearer, 98 Mass. 107.

[18] Thomp. Corp. (2d ed.), § 2527; Aurora Agricultural & Horticultural Soc. v. Paddock, 80 Ill. 263; Thompson v. Lambert, 44 Iowa 239; Fitch v. Lewiston Steam-Mill Co., 80 Maine 34, 12 Atl. 732; Curtis v. Leavitt, 15 N. Y. 9; Jones v. Guaranty & Indemnity Co., 101 U. S. 622, 25 L. ed. 1030. See also, Vol. 1, ch. 18.

[19] Greenpoint Sugar Co. v. Whitin, 69 N. Y. 328; Carpenter v. Black Hawk Gold Mining Co., 65 N. Y. 43; Moran v. Strauss, 6 Ben. (U. S.) 249, Fed. Cas. No. 9787.

[20] Kelly v. Alabama & C. R. Co., 58 Ala. 489; Commonwealth v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672; Atkinson v. Marietta & C. R. Co., 15 Ohio St. 21; Coe v. Columbus, P. & I. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518. See also, Vol. 1, ch. 19.

limitation of the power of a railroad corporation to mortgage its real estate does not apply to lands not required to enable it to carry on the business which it was chartered to do for the benefit of the public, and not needed or used for that purpose. The alienation of such land in no wise impairs or affects the usefulness of the company as a railroad corporation or its ability to exercise any of its corporate franchises.[21] An unauthorized mortgage, or one defectively executed, or securing bonds not properly drawn, may be subsequently confirmed by the legislature.[22] A mortgage by a corporation de facto is good until the state has interposed and declared its exercise of corporate powers a usurpation. Until this is done it is assumed that the corporation de facto rightfully possessed and exercised corporate powers.[23] A mortgage made by a solvent corporation to one who is at the time a director and stockholder, to secure a loan made by him, is not invalid on account of the relation between the parties.[24] The power to mortgage resides primarily in the body corporate, or in other words, in the stockholders; they may authorize the execution of the deed by any agents they may, by special vote or general by-laws, constitute for that purpose. The directors of a corporation without authority either expressly or impliedly derived from the stockholders have no right to execute a mortgage or to authorize any one to do so.[25] The stockholders may restrain the directors or other officers in any attempt to transcend their powers; but if they remain silent, permitting them to execute mortgages upon their property and receiving the benefits of the loan, they are estopped to say that the officers were not authorized to do these acts.[26] A corporation rati-

[21] Hendee v. Pinkerton, 14 Allen (Mass.) 381. See Vol. 1, chaps. 18, 19.

[22] Chapin v. Vermont & M. R. Co., 8 Gray (Mass.) 575; Shaw v. Norfolk County R. Co., 5 Gray (Mass.) 162.

[23] Duggan v. Colorado Mortgage &c. Co., 11 Colo. 113, 17 Pac. 105; Collins v. Rea, 127 Mich. 273, 86 N. W. 811; Briar Hill Coal & Iron Co. v. Atlas Works, 146 Pa. St. 290, 23 Atl. 326; Eliot v. Himrod, 108 Pa. St. 569.

[24] Mullanphy Bank v. Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. 401; Beach v. Miller, 130 Ill. 162, 22 N. E. 464, 17 Am. St. 291; Roseboom v. Whittaker, 132 Ill. 81, 23 N. E. 339.

[25] Graves v. Mono Lake Hydraulic M. Co., 81 Cal. 303, 22 Pac. 665; Campbell v. Argenta Gold &c. Mining Co., 51 Fed. 1; McElroy v. Nucleus Assn., 131 Pa. St. 393, 18 Atl. 1063.

[26] Aurora Agricultural & Horticultural Soc. v. Paddock, 80 Ill. 263; Ottawa Northern Plank Road Co. v. Murray, 15 Ill. 336; Bradley v. Ballard, 55 Ill. 413, 8 Am. Rep. 656;

fies a mortgage made by its directors by issuing bonds under it and paying interest upon them.[27] The ratification may be through any act which shows that the corporation accepts the acts of its officers or agents.[28] A statute or by-law of a corporation, providing that, in the management of its affairs, the directors shall have all the powers which the corporation itself possesses, invests them with power to borrow money, issue bonds, and convey in mortgage the lands of the corporation as security.[29] If the directors have power to execute a mortgage of corporate property, it has been held that neither the president nor any other officer can execute a mortgage without a resolution of the board of directors duly assembled.[30] A corporation cannot make a valid mortgage of its real estate except by an instrument under its corporate seal.[31] But an impression of the seal of a corporation stamp upon and into the substance of the paper upon which the instrument is written is a good seal, although no wax, wafer, or other adhesive substance be used.[32] Where an instrument purports to be sealed with the corporate seal, and is shown to have been signed by the proper officers of the corporation, a presumption arises that the seal was affixed by the proper authority, and the instrument will be held valid until its invalidity is shown.[33]

§ 4671. **Power to mortgage.**—As a general rule, the power to sell and convey real estate does not confer a power to mortgage, and a mortgage, executed under a power of attorney authorizing the attorney to sell and convey only, is void.[34] The

Beach v. Wakefield, 107 Iowa 567, 76 N. W. 688, 78 N. W. 197; McCurdy's Appeal, 65 Pa. St. 290; Hotel Co. v. Wade, 97 U. S. 13, 24 L. ed. 917.

[27] Campbell v. Argenta Gold &c. Mining Co., 51 Fed. 1; In re McCurdy's Appeal, 65 Pa. St. 290.

[28] Holbrook v. Chamberlin, 116 Mass. 155, 17 Am. Rep. 146.

[29] Hendee v. Pinkerton, 14 Allen (Mass.) 381; Saltmarsh v. Spaulding, 147 Mass. 224, 17 N. E. 316; Lyceum v. Ellis, 57 N. Y. Super. Ct. 532, 30 N. Y. St. 242, 8 N. Y. S. 867.

[30] Alta Silver Min. Co. v. Alta Placer Mining Co., 78 Cal. 629, 21 Pac. 373.

[31] Eagle Woolen Mills Co. v. Monteith, 2 Ore. 277; McElroy v. Nucleus Assn., 131 Pa. St. 393, 18 Atl. 1063; In re St. Helen Mill Co., 3 Sawy. (U. S.) 88, Fed. Cas. No. 12222; Koehler v. Black River Falls Iron Co., 2 Black. (U. S.) 715, 17 L. ed. 339. See Vol. 1, § 544.

[32] Hendee v. Pinkerton, 14 Allen (Mass.) 381. And see article 1 Am. Law Rev. 638.

[33] Wood v. Whelen, 93 Ill. 153; Mullanphy Bank v. Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. 401; Fidelity Ins. Trust &c. Co. v. Shenandoah Val. R. Co., 32 W. Va. 244, 9 S. E. 180.

[34] De Bouchout v. Goldsmid, 5 Ves. 211; Australian Auxiliary Steam

power should expressly declare the intention that the agent should have authority to mortgage the property. A general power may be sufficient if it appears that the principal intended his agent should have authority to raise money on mortgage, and the nature of the business intrusted to him is such as to make it proper for him to exercise this power.[35] A power to lease or mortgage real estate for the purpose of procuring money thereon, in case the attorney cannot sell the property, gives him the option to mortgage it, in the event he cannot sell at a reasonable price.[36] A power to mortgage given in general terms, without specifying the provisions the deed shall contain, includes the power to make it in the form and with the provisions customarily used in the state or country where the land is situated.[37] A mortgage made under a power of attorney must be executed in the name of the principal.[38] A mortgage by a corporation must be executed in its name by the agent or officer authorized to act for it. Although it may purport to be the mortgage of a corporation, yet, if executed by its attorney or officer in his individual name, it is not the legal mortgage of the corporation, and does not bind it except in equity.[39] While the principal may not be bound by the act of his attorney in giving a mortgage, he may ratify it by taking the benefit of it, or may otherwise so act with reference to the exercise of the power as to preclude himself from attempting to invalidate the security.[40]

Clipper Co. v. Mounsey, 4 K. & J. 733; Haldenby v. Spofforth, 1 Beav. 390; Stroughill v. Anstey, 1 De G. M. & G. 635; Colesbury v. Dart, 61 Ga. 620; Switzer v. Wilvers, 24 Kans. 384, 36 Am. Rep. 259; Jeffrey v. Hursh, 49 Mich. 31, 12 N. W. 898; Morris v. Watson, 15 Minn. 212; Kinney v. Mathews, 69 Mo. 520; Bloomer v. Waldron, 3 Hill (N. Y.) 361; Morris v. Ewing, 8 N. Dak. 99, 76 N. W. 1047. A devise of so much of the testator's estate as may be sufficient for the maintenance of the devisee during his life, "he having full power to sell and convey any and all of my real estate, at any time, if necessary to secure such maintenance," does not give to the devisee the right to mortgage the estate in fee. Hoyt v. Jaques, 129 Mass. 286.

[35] Coutant v. Servoss, 3 Barb. (N. Y.) 128.

[36] Mylius v. Copes, 23 Kans. 617.

[37] Monroe Mercantile Co. v. Arnold, 108 Ga. 449, 34 S. E. 176.

[38] Combe's case, 9 Coke 75; Copeland v. Mercantile Ins. Co., 6 Pick. (Mass.) 198; Elwell v. Shaw, 16 Mass. 42, 8 Am. Dec. 126.

[39] Love v. Sierra Nevada, L. W. & Mining Co., 32 Cal. 639, 91 Am. Dec. 602; Brinley v. Mann, 2 Cush. (Mass.) 337, 48 Am. Dec. 669; Sargent v. Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743.

[40] Perry v. Holl, 2 Giff. 138, 2 De G. F. & J. 38; Fitch v. Lewiston Steam-Mill Co., 80 Maine 34, 12 Atl. 732.

§ 4672. **Who may take a mortgage.**—In general, any one capable of holding real estate may be a mortgagee. The disabilities which prevent the making of a valid mortgage do not prevent the taking of a mortgage, which is for the benefit of the mortgagee. Thus an infant may take a mortgage and be bound by the conditions of the deed.[41] A director or stockholder of a private corporation is not debarred by his relation to the corporation from loaning money to it, and taking a mortgage from it for security; but he must act fairly and in good faith.[42] A receiver, however, by reason of the fiduciary capacity in which he acts, is debarred upon grounds of public policy from taking a mortgage upon property which he holds as receiver, to secure a loan or advances made by him to the owner of the property.[43] At common law a married woman could take a mortgage and she has this power in this country although in some states her remedies in relation thereto are limited.[44] And a corporation, whether private[45] or municipal, though not expressly authorized by its charter or by statute to take a mortgage, if not prohibited may do so, provided only it be in furtherance of the object for which it was created.[46] A railroad company when not forbidden to take anything but money in payment for its stock, may take mortgages of real estate securing notes or bonds given for the stock.[47] A corporation de facto, though defectively organized, may take a mortgage, and a junior mortgagee cannot defeat it by showing such defective organization.[48]

A bank organized under the National Banking Act is authorized to take and hold a mortgage of real estate by way of security for debt previously contracted,[49] but not to take such a mortgage as

[41] Parker v. Lincoln, 12 Mass. 16.

[42] Harts v. Brown, 7 Ill. 226.

[43] Thompson v. Holladay, 15 Ore. 34, 14 Pac. 725.

[44] Campbell v. Galbreath, 12 Bush (Ky.) 459; Tucker v. Fenno, 110 Mass. 311.

[45] Jackson v. Brown, 5 Wend. (N. Y.) 590; Gordon v. Preston, 1 Watts (Pa.) 385, 26 Am. Dec. 75; Madison &c. Plank Road Co. v. Watertown &c. Plank Road Co., 5 Wis. 173.

[46] Vanarsdall v. State, 65 Ind. 176; State Bank v. Chapelle, 40 Mich. 447; Alexander v. Knox, 6 Sawy. (U. S.) 54, Fed. Cas. No. 170.

[47] Clark v. Farrington, 11 Wis. 306; Blunt v. Walker, 11 Wis. 334, 78 Am. Dec. 709; Cornell v. Hichens, 11 Wis. 353; Lyon v. Ewings, 17 Wis. 61; Andrews v. Hart, 17 Wis. 297; Western Bank v. Tallman, 17 Wis. 530. See also, Massey v. Citizen's Building & Loan Assn., 22 Kans. 624; National Trust Co. v. Murphy, 30 N. J. Eq. 408; Vol. 1, § 546.

[48] Williamson v. Kokomo Building & Loan Assn., 89 Ind. 389.

[49] Heath v. Second Nat. Bank, 70

security for a debt contracted at the time or for future advances. While such a loan is prohibited, it is not void. A mortgage taken in violation of the prohibition is valid between the parties and may be enforced. The remedy for the violation is a forfeiture of the bank's charter.[50] The statute authorizes banks to hold real estate in mortgage for debts previously contracted. It does not in terms, but only by implication, prohibit a loan on real estate. It does not declare such a security void.[51] Where a foreign corporation takes a mortgage upon real estate, without having complied with the requirements of the statutes of the state in which the loan was made, it is held that the mortgage is void and cannot be enforced.[52] But if the mortgagor comes into a court of equity to obtain a cancelation of such mortgage, on the ground that the mortgagee had not complied with the statutory requirements as to the right to do business in the state, he must offer to repay the money received with interest.[53]

§ 4673. Joint mortgagees.—A mortgage given to secure a joint debt creates a joint estate in the mortgagees.[54] The payment to either satisfies the mortgage.[55] In case of the death of one of such mortgagees, an action to recover the debt or enforce the mortgage may be maintained in the name of the survivor.[56] But a mortgage given to two or more persons to secure their several debts is several and not joint; each mortgagee has a right to enforce his claim under the mortgage, in a form adapted to the case,

Ind. 106; Scofield v. State Nat. Bank, 9 Nebr. 316, 2 N. W. 888, 31 Am. Rep. 412; Allen v. First Nat. Bank, 23 Ohio St. 97.

[50] Camp v. Land, 122 Cal. 167, 54 Pac. 839; First Nat. Bank v. Elmore, 52 Iowa 541, 3 N. W. 547; Fifth Nat. Bank v. Pierce, 117 Mich. 376, 75 N. W. 1058; Thornton v. Nat. Exchange Bank, 71 Mo. 221; George v. Somerville, 153 Mo. 7, 54 S. W. 491; Myers v. Campbell, 64 N. J. L. 186, 44 Atl. 863; National Bank v. Matthews, 98 U. S. 621, 25 L. ed. 188, 19 Alb. L. J. 132, 8 Cent. L. J. 131; National Bank v. Whitney, 103 U. S. 99, 26 L. ed. 443; Kesner v. Trigg, 98 U. S. 50, 25 L. ed. 83; Wroten's Assignee v. Armat, 31 Grat. (Va.) 228.

[51] Silver Lake Bank v. North, 4 Johns. Ch. (N. Y.) 370; Graham v. Nat. Bank of N. Y., 32 N. J. Eq. 804; Baird v. Bank of Washington, 11 Serg. & R. (Pa.) 411.

[52] Farrior v. New England Mortg. Security Co., 88 Ala. 275, 7 So. 200; Dudley v. Collier, 87 Ala. 431, 6 So. 304, 13 Am. St. 55; Black v. Caldwell, 83 Fed. 880; Miller v. Gates, 22 Mont. 305, 56 Pac. 356. See Vol. 1, § 267.

[53] George v. New England Mortg. Security Co., 109 Ala. 548, 20 So. 331; Hartly v. Matthews, 96 Ala. 224, 11 So. 452; Ross v. New Eng. Mtg. Sec. Co., 101 Ala. 362, 13 So. 564.

[54] Appleton v. Boyd, 7 Mass. 131.

[55] Wright v. Ware, 58 Ga. 150.

[56] Webster v. Vandeventer, 6 Gray

and the surviving mortgagee cannot maintain an action on the mortgage to enforce payment of the debt due the deceased mortgagee.[57] Whether the deeds secured be joint or several, after foreclosure the mortgagees become tenants in common of the land.[58]

E. Consideration.—Void and Usurious Mortgages.

§ 4674. **In general.**—A mortgage, like every other contract, must be founded on a valuable consideration. The consideration need not be one moving directly from the mortgagee to the mortgagor; but any benefit to the mortgagor (or, perhaps, even to a stranger), or damage or loss to the mortgagee, rendered or sustained at the request of the mortgagor, is sufficient.[59] An agreement to extend the time of payment of a debt is a sufficient consideration.[60] In a mortgage of indemnity, the liability of the mortgagee to loss or damage is a sufficient consideration for the mortgage.[61] It is not necessary that there should be a money consideration. Any valuable consideration sufficient to uphold the conveyance is a sufficient consideration to support a mortgage.[62] The real consideration may always be shown if it becomes material.[63] If the consideration is valuable it need not be adequate. If there be no fraud or imposition, a mortgage deliberately made for the least consideration, with full knowledge by the mortgagor of all the

(Mass.) 428; Mutual Life Ins. Co. v. Sturges, 32 N. J. Eq. 678, revd. 33 N. J. Eq. 328.

[57] Brown v. Bates, 55 Maine 520, 92 Am. Dec. 613; Gilson v. Gilson, 2 Allen (Mass.) 115; Burnett v. Pratt, 22 Pick. (Mass.) 556.

[58] Goodwin v. Richardson, 11 Mass. 469; Donnels v. Edwards, 2 Pick. (Mass.) 617; Burnett v. Pratt, 22 Pick. (Mass.) 556; Randall v. Phillips, 3 Mas. (U. S.) 378, Fed. Cas. No. 11555.

[59] 1 Selwyn's N. P. 43; Magruder v. State Bank, 18 Ark. 9; Popple v. Day, 123 Mass. 520; Parsons v. Clark, 132 Mass. 569; Harlan v. Harlan, 20 Pa. St. 303. See also, Sykes v. Lafferry, 27 Ark. 407; Rockafellow v. Peay, 40 Ark. 69.

[60] Hill v. Yarborough, 62 Ark. 320, 35 S. W. 433; First Nat. Bank v. Davis, 146 Ill. App. 462; First Nat. Bank v. Keller, 127 App. Div. (N. Y.) 435, 111 N. Y. S. 729; Pennsylvania Coal Co. v. Blake, 85 N. Y. 226; Forrester v. Parker, 14 Daly (N. Y.) 208; Maclaren v. Percival, 102 N. Y. 675, 1 Silvernail Ct. App. (N. Y.) 65, 6 N. E. 582.

[61] Simpson v. Robert, 35 Ga. 180; Griffis v. First Nat. Bank (Ind.), 79 N. E. 230; Haden v. Buddensick, 4 Hun (N. Y.) 649.

[62] DeCelis v. Porter, 65 Cal. 3, 2 Pac. 257, 3 Pac. 120; Ray v. Hallenbeck, 42 Fed. 381.

[63] Flynn v. Flynn, 68 Mich. 20, 35 N. W. 817.

circumstances, is valid. A recital in the mortgage of a consideration of one dollar, the receipt of which is acknowledged by the mortgagor, prima facie shows a valuable and real consideration, and its actual payment; and, in the absence of opposing proof, such a consideration is sufficient to support the mortgage.[64] It is not necessary that any consideration should pass at the time of the execution of the mortgage. That may be either a prior or subsequent matter. Mortgages are very frequently given to secure existing debts, in which case, though the consideration is generally altogether a past one, the mortgages are valid.[65] A mortgage given to indemnify a surety against loss is founded upon a sufficient consideration, although it is given after the surety has incurred the obligation.[66] The renewal of a note, or extension of the time of payment of a debt, is a sufficient consideration for a mortgage by a third person to secure such debt.[67] Generally, the consideration for which the mortgage is given is named in the instrument but it is not essential that any consideration be expressed.[68] If it is expressed it is never conclusive as to the real consideration.[69] The real consideration is the debt or obligation which the mortgage is given to secure, and upon that depends the validity of the mortgage so far as the consideration is concerned. The seal implies a consideration. The amount of the debt is in no way fixed or controlled by the nominal consideration. The condition of the mortgage describes the debt and fixes the amount of it either specifically or in general terms.[70]

[64] Bolling v. Munchus, 65 Ala. 558; Grimball v. Mastin, 77 Ala. 553; Kenney v. Streeter, 88 Ark. 406, 114 S. W. 923; Lawrence v. McCalmont, 2 How. (U. S.) 426, 11 L. ed. 326.

[65] Magruder v. State Bank, 18 Ark. 9; Usina v. Wilder, 58 Ga. 178; Evans v. Pence, 78 Ind. 439; Wright v. Bundy, 11 Ind. 398; Cooley v. Hobart, 8 Iowa 358; Duncan v. Miller, 64 Iowa 223, 20 N. W. 161; Adams v. Adams, 70 Iowa 253, 30 N. W. 795; Moore v. Fuller, 6 Ore. 272, 25 Am. Rep. 524; Wright v. Shumway, 1 Biss. (U. S.) 23, Fed. Cas. No. 18093.

[66] Williams v. Silliman, 74 Tex. 626, 12 S. W. 534.

[67] Magruder v. State Bank, 18 Ark. 9; Bank of Muskingum v. Carpenter's Admr., Wright (Ohio) 729.

[68] In re Farmers' Supply Co., 170 Fed. 502; Robinson v. Williams, 22 N. Y. 380. The obligation may be an implied promise of the mortgagor to repay money loaned him by the mortgagee. Todd v. Todd (Cal.), 128 Pac. 413.

[69] Shoemaker v. Smith, 80 Iowa 655, 45 N. W. 744; McAteer v. McAteer, 31 S. Car. 313, 9 S. E. 966; Keyes v. Bump, 59 Vt. 391, 9 Atl. 598.

[70] Gray v. Bennett (Iowa), 105 N. W. 377; Miller v. Lockwood, 32 N. Y. 293; Hall v. Thomas, 111 N. Y. S. 979.

§ 4675. Failure of consideration.—Want of consideration or the failure of it is a good defense for the mortgagor or his grantee in good faith to an action upon the mortgage.[71] A mortgage for a fixed sum, founded on no consideration except an undertaking to furnish goods which were never furnished, cannot be enforced except in the hands of a bona fide assignee for value.[72] A mortgage given for future credit, if no advances are made upon it and no further credit is given, is without consideration. If taken for that purpose it cannot be enforced for a different purpose.[73] A mortgage under seal implies consideration at common law, and none need be proved, and it may be good although it is shown that none was given. As a general rule neither courts of law nor equity will allow the consideration to be inquired into for the sake of declaring the instrument void for want of consideration, but they will for the purpose of ascertaining what is due upon it.[74] A mortgage imports a consideration, so that the burden is upon the party who sets up the want of consideration to prove that it was made without consideration or was procured by fraud.[75] There is also a presumption that the consideration stated in the mortgage is correctly stated, and very convincing proof is said to be required to

[71] Brown v. Witts, 57 Cal. 304; Smith v. Newton, 38 Ill. 230; Scott v. Magloughlin, 133 Ill. 33, 24 N. E. 1030; Conwell v. Clifford, 45 Ind. 392; Kramer v. Williamson, 135 Ind. 655, 35 N. E. 388; Cotton v. Graham, 84 Ky. 672, 8 Ky. L. 658, 2 S. W. 647; Hannan v. Hannan, 123 Mass. 441, 25 Am. Rep. 121; Wearse v. Peirce, 24 Pick. (Mass.) 141; Anderson v. Lee, 73 Minn. 397, 76 N. W. 24; Devlin v. Quigg, 44 Minn. 534, 47 N. W. 258, 10 L. R. A. 665, 20 Am. St. 592; Newman v. Overbaugh, 116 N. Y. S. 369; Briggs v. Langford, 107 N. Y. 680, 1 Silvernail Ct. App. 553, 14 N. E. 502, revg. 35 Hun (N. Y.) 667. See also, King Lumber Co. v. Spragner (Ala.), 58 So. 920.

[72] Fisher v. Meister, 24 Mich. 447.

[73] Mizner v. Kussel, 29 Mich. 229; Fisher v. Meister, 24 Mich. 447; McDowell's Exrs. v. Fisher, 25 N. J. Eq. 93.

[74] Farnum v. Burnett, 21 N. J. Eq. 87; Calkins v. Long, 22 Barb. (N. Y.) 97; Parker v. Parmele, 20 Johns. (N. Y.) 130, 11 Am. Dec. 253; Maxwell v. Hartmann, 50 Wis. 660, 8 N. W. 103. In New Jersey it is provided by statute that the defense of fraud in the consideration of a deed may be made as fully as if the instrument was not under seal. 2 N. J. Comp. Stat. 2225, p. 15. See Feldman v. Gamble, 26 N. J. Eq. 494. In New York a seal affords only presumptive evidence of a sufficient consideration; and this presumption may be rebutted in the same manner and to the same extent as if the instrument were not under seal. 3 N. Y. Rev. Stat. 1775, p. 672; Craver v. Willson, 47 N. Y. 673, 14 Abb. Pr. (N. S.) (N. Y.) 374; Gray v. Barton, 55 N. Y. 68, 14 Am. Rep. 181; Best v. Thiel, 79 N. Y. 15; Torry v. Black, 58 N. Y. 185; First Nat. Bank v. Keller, 127 App. Div. (N. Y.) 435, 111 N. Y. S. 729. See also, Thackaberry v. Johnson, 131 Ill. App. 463, affd. 228 Ill. 149, 81 N. E. 828; Quackenbush v. Mapes, 123 App. Div. (N. Y.) 242, 107 N. Y. S. 1047.

[75] Commercial Exchange Bank v. McLeod, 67 Iowa 718, 25 N. W. 894.

rebut this presumption.[76] A mortgage may be made by way of gift when the rights of creditors are not thereby interfered with.[77] When executed and delivered it is as valid as if it were based upon a full consideration. It is not open to the objection that it is a voluntary executory agreement, but may be enforced according to its terms as an executed conveyance.[78] A mortgagor may be estopped to deny a consideration for his mortgage. He is not, however, estopped from showing a failure or want of consideration for the notes secured by the mortgage as against the mortgagee, except by his own representations, or those made by others with his knowledge or consent.[79] But this defense cannot be taken against an assignee for value before maturity.[80] Such mortgage, though void between the original parties, is valid in the hands of a bona fide assignee without notice of the illegal consideration for which it was given.[81] A note or mortgage deposited in an escrow, and afterward fraudulently taken and put in circulation, without the terms and conditions of the deposit having been complied with, is doubtless void in the hands of a purchaser or assignee for value without notice. In such case the mortgage never has a legal existence, and the rules of commercial paper have no application to the note accompanying it, although it be negotiable in form.[82]

§ 4676. Illegal consideration.—Illegality of consideration avoids a mortgage, whether it consists in a violation of the com-

[76] Wiswall v. Ayres, 51 Mich. 324, 16 N. W. 667.

[77] Gale v. Gould, 40 Mich. 515.

[78] Peabody v. Peabody, 59 Ind. 556; Brooks v. Dalrymple, 12 Allen (Mass.) 102; Campbell v. Tompkins, 32 N. J. Eq. 170, affd. 33 N. J. Eq. 362; Bucklin v. Bucklin, 40 N. Y. (1 Keyes) 141, 1 Abb. Dec. (N. Y.) 242.

[79] Jones v. Jones, 20 Iowa 388; Wearse v. Peirce, 24 Pick. (Mass.) 141.

[80] Cornell v. Hichens, 11 Wis. 353; Stilwell v. Kellogg, 14 Wis. 461.

[81] Cazet v. Field, 9 Gray (Mass.) 329; Brigham v. Potter, 14 Gray (Mass.) 522; Taylor v. Page, 6 Allen (Mass.) 86; Earl v. Clute, 1 Keyes (N. Y.) 36, 2 Abb. Dec. (N. Y.) 1. In North Carolina it is provided by statute that no conveyance or mortgage, made to secure the payment of a debt, shall be void in the hands of a purchaser for value without notice, for the reason that consideration of the debt was forbidden by law. Battle's Revisal 1873, ch. 50, par. 5. This statute applies to usurious mortgages. Coor v. Spicer, 65 N. Car. 401.

[82] Chipman v. Tucker, 38 Wis. 43, 20 Am. Rep. 1; Andrews v. Thayer, 30 Wis. 228; Tisher v. Beckwith, 30 Wis. 55, 11 Am. Rep. 546. See also, Burson v. Huntington, 21 Mich. 415, 4 Am. Rep. 497; Powell v. Conant, 33 Mich. 396; Cressinger v. Dessenburg, 42 Mich. 580, 4 N. W. 269.

mon law or of a statute,[83] or is contrary to public policy.[84] A mortgage and note given to secure a wagering contract, such as the purchase of stock on margins without any intention to complete the purchase by an actual delivery and receipt of the stock and the payment of the price therefor are illegal and void, and a bill in equity will lie to restrain a foreclosure of the mortgage and compel the surrender and cancelation of the note.[85] A mortgage or a deed in the nature of a mortgage, given to secure the performance of a contract contrary to the policy of the law, will not be enforced by a court of equity, such, for instance, as a gambling contract,[86] or a contract which is subject to the objection of champerty.[87] The mortgage may be upheld, however, for such part of the consideration as was free from the taint of illegality, when the consideration of a mortgage is made up of several distinct transactions, some of which are legal and others are not, and the one can be separated with certainty from the other.[88] A mortgage may be valid in part and void in part and, where possible to separate the legal part from the illegal, the legal part may be enforced.[89] The burden of proof is upon the party who sets

[83] Gilber v. Holmes, 64 Ill. 548; Baker v. Collins, 9 Allen (Mass.) 253; Bradshaw v. Farnsworth, 65 W. Va. 28, 63 S. E. 755.

[84] Johnson v. Graham Bros. Co., 98 Ark. 274, 135 S. W. 853; Benicia Agricultural Works v. Estes, 98 Cal. 17, 32 Pac. 938; Estudillo v. Meyerstein, 72 Cal. 317, 13 Pac. 869; Small v. Williams, 87 Ga. 681, 13 S. E. 589; Crowder v. Reed, 80 Ind. 1; Wildey v. Collier, 7 Md. 273, 61 Am. Dec. 346; Atwood v. Fisk, 101 Mass. 363, 100 Am. Dec. 124; Rice v. Maxwell, 13 Sm. & M. (Miss.) 289, 53 Am. Dec. 85; Bell v. Leggett, 7 N. Y. 176; Pearce v. Wilson, 111 Pa. St. 14, 2 Atl. 99, 56 Am. Rep. 243. See also, Collins v. Blantern, 2 Wils. 341, 350.

[85] Rice v. Winslow, 182 Mass. 273, 65 N. E. 366; Lyons v. Coe, 177 Mass. 382, 59 N. E. 59; Harvey v. Merrill, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. 159; Sampson v. Shaw, 101 Mass. 145, 3 Am. Rep. 327; Thompson v. Brady, 182 Mass. 321, 65 N. E. 419.

[86] Krake v. Alexander, 86 Va. 206, 9 S. E. 991.

[87] Gilbert v. Holmes, 64 Ill. 548.

[88] Robinson v. Bland, 2 Burr. 1077; Warren v. Chapman, 105 Mass. 87; Carradine v. Wilson, 61 Miss. 573; Feldman v. Gamble, 26 N. J. Eq. 494; Carleton v. Woods, 28 N. H. 290; Williams v. Fitzhugh, 37 N. Y. 444 (applied to usury); McCraney v. Alden, 46 Barb. (N. Y.) 272, affd. 53 Barb. (N. Y.) 350, 27 How. Pr. (N. Y.) 181; Cook v. Barnes, 36 N. Y. 520; Yundt v. Roberts, 5 Serg. & R. (Pa.) 139; Corbett v. Woodward, 5 Sawy. (U. S.) 403, Fed. Cas. No. 3223; Shaw v. Carpenter, 54 Vt. 155, 41 Am. Rep. 837.

[89] McMurray v. Connor, 2 Allen (Mass.) 205; Rood v. Winslow, 68 Walk. Ch. (Mich.) 340; Johnson v. Richardson, 38 N. H. 353; Leeds v. Cameron, 3 Sumn. (U. S.) 488, Fed. Cas. No. 8206; Lepper v. Conradt, 15 Wyo. 394, 89 Pac. 575.

up the defense of want of consideration or illegality of it, to make it out by clear and strong proof.[90]

§ 4677. Mortgage obtained by fraud.—A mortgage obtained by fraud is void, and a discharge of it may be decreed in equity.[91] When a deed of land has been procured by fraud and the grantee has conveyed it to a purchaser in good faith so that the land itself is beyond the reach of the grantor, yet, if such purchaser has given a mortgage for a portion of the purchase-money to the party who fraudulently obtained the deed, it has been held that he may in equity be compelled to transfer the mortgage to the party defrauded.[92] It is an established doctrine, that when the legal estate has been acquired by fraud, the taker may, in equity, be regarded as trustee for the party defrauded, who may recover the estate or its avails when these can be distinctly identified.[93] A mortgage is void when made by one who has obtained title to the property by fraud or undue influence, the mortgagee having full knowledge of the acts leading up to the execution of the deed to the mortgagor and of the fraudulent means by which the mortgagor obtained title.[94] The fact that the mortgagor is in possession, and can maintain his possession against the mortgagee at law, does not prevent his maintaining a bill to set aside a fraudulent mortgage.[95] But he can only take advantage of the fraud by making prompt complaint.[96] A fraudulent intent on the part of the mortgagee in obtaining the mortgage must be shown to render it void.[97] To have this effect, it is necessary that there should be something more than mere folly on the part of the mortgagor. Where the mortgagee denies the fraud, the weight to be given the evidence

[90] Stuart v. Phelps, 39 Iowa 14; Brigham v. Potter, 14 Gray (Mass.) 522; Feldman v. Gamble, 26 N. J. Eq. 494.

[91] Shirk v. Williamson, 50 Ark. 562, 9 S. W. 307; Richardson v. Barrick, 16 Iowa 407; Terry v. Tuttle, 24 Mich. 206; Wartemberg v. Spiegel, 31 Mich. 400; Mason v. Daly, 117 Mass. 403; Silver Val. Min. Co. v. Baltimore &c. Co., 99 N. Car. 445, 6 S. E. 735; Prescott v. Brown, 30 Okla. 428, 120 Pac. 991; Wright v. Morgan, 4 Baxt. (Tenn.) 385.

[92] Jordan v. McNeil, 25 Kans. 459.

[93] Cheney v. Gleason, 117 Mass. 557.

[94] Brummond v. Krause, 8 N. Dak. 573, 80 N. W. 686.

[95] Marston v. Brackett, 9 N. H. 336.

[96] Wright v. Peet, 36 Mich. 213.

[97] Christian v. Green (Miss.), 45 So. 425; Clarke v. Forbes, 9 Nebr. 476, 4 N. W. 58; Murphy v. Moore, 23 Hun (N. Y.) 95, affd. 89 N. Y. 446; Johnston v. Derr, 110 N. Car. 1, 14 S. E. 641. See also, Mohr v. Griffin, 137 Ala. 456, 34 So. 378.

is a question for the jury.[98] A fraudulent misrepresentation as to the value of the property sold by the mortgagee, in payment of which he has taken the mortgage, does not ordinarily avoid the mortgage if there was any value at all in the property sold. The property which was a subject of the sale and mortgage must first be restored to the vendor, or a reconveyance tendered before the mortgage can be rescinded.[99] A defense of fraud as to the value of the property cannot be sustained where the mortgagor acted upon his own investigation and judgment in buying the property.[1]

§ 4678. Mortgage obtained by duress.—A mortgage obtained by duress is voidable or void according to the nature of the duress.[2] The duress must be something more than the exercise of undue influence.[3] A mortgage obtained through threats of prosecution, whether groundless or not, is voidable,[4] and a court of chancery will restrain its collection, or will order it to be canceled, as a cloud on the title.[5] A mortgage executed by a wife on her separate property, to secure a debt of her husband's under his threat to abandon her if she refused, may be avoided by her if the mortgagee was aware of such threat at the time the mortgage was executed.[6] But the fraud or duress of the husband

[98] Blackwell v. Cummings, 68 N. Car. 121.

[99] Sanborn v. Osgood, 16 N. H. 112.

[1] San Jose Ranch Co. v. San Jose L. & W. Co., 132 Cal. 582, 64 Pac. 1097.

[2] 1 Jones Real Prop., Par. 93; Bogue v. Franks, 199 Ill. 411, 65 N. E. 346; Nebraska Central Building & Loan Assn. of Lincoln v. McCandless, 83 Nebr. 536, 120 N. W. 134.

[3] Moog v. Strang, 69 Ala. 98; Post v. First Nat. Bank, 138 Ill. 559, 28 N. E. 978; Winfield Nat. Bank v. Croco, 46 Kans. 620, 26 Pac. 939; Gabbey v. Forgeus, 32 Kans. 62, 15 Pac. 866; Benedict v. Roome, 106 Mich. 378, 64 N. W. 193; Weber v. Barrett, 125 N. Y. 18, 25 N. E. 1068; Edwards v. Bowden, 103 N. Car. 50, 9 S. E. 194; Loud v. Hamilton (Tenn.), 51 S. W. 140, 45 L. R. A. 400; Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417.

[4] Smith v. Steely, 80 Iowa 738, 45 N. W. 912; Lee v. Ryder, 1 Kans. App. 293, 41 Pac. 221; Hargreaves v. Korcek, 44 Nebr. 660, 62 N. W. 1086.

[5] Small v. Williams, 87 Ga. 681, 13 S. E. 589; Eyster v. Hatheway, 50 Ill. 521, 99 Am. Dec. 537; Lightfoot v. Wallis, 12 Bush (Ky.) 498; Meech v. Lee, 82 Mich. 274, 46 N. W. 383; Schoener v. Lessauer, 107 N. Y. 111, 13 N. E. 741, revg. 36 Hun (N. Y.) 100; James v. Roberts, 18 Ohio 548. A mortgage executed by a wife upon her property to secure a debt of the husband, under the inducement of false and fraudulent charges of embezzlement against the husband, and threats to institute criminal proceedings against him is void. It is immaterial that the property was purchased by the husband with money of the party making the threats and fraudulently conveyed to the wife. Singer Mfg. Co. v. Rawson, 50 Iowa 634.

[6] Line v. Blizzard, 70 Ind. 23; Wallach v. Hoexter, 17 Abb. N. Cas. (N. Y.) 267, 3 How. Pr. (N. S.) (N. Y.) 196. As to what threats and commands on the part of the husband

in procuring his wife's release of homestead does not invalidate the mortgage unless the mortgagee has knowledge of or shared in the wrongful act of the husband.[7] Although the general rule is, that one person cannot avoid an obligation by reason of duress of another, there are exceptions to this in case the duress be of the husband or wife, or of parent or child. Thus a parent may avoid a mortgage which he or she has been induced to sign by threats of the prosecution and imprisonment of a son,[8] or a wife may avoid the mortgage of her property which she has executed under threats of the arrest of her husband.[9]

§ 4679. Mortgage fraudulent as to creditors.—Except under bankrupt and insolvent laws a mortgage made with the intent to prefer one creditor to another is valid.[10] A mortgage made with the intent upon the part of the mortgagor to hinder, delay and defraud his creditors is void at common law and by statute, generally, except in case the mortgagee did not participate in or have

amount to duress, see Gabbey v. Forgeus, 32 Kans. 62, 15 Pac. 866.

[7] Moog v. Strang, 69 Ala. 98; Ætna Life Ins. Co. v. Franks, 53 Iowa 618, 6 N. W. 9; Edgell v. Hagens, 53 Iowa 223, 5 N. W. 136. See also, J. M. Robinson &c. v. Randall, 147 Ky. 45, 143 S. W. 769.

[8] Williams v. Bayley, L. R. 1 H. L. 200; Bayley v. Williams, 4 Giff. 638; Brooks v. Berryhill, 20 Ind. 97; Russell v. Durham, 17 Ky. L. 35, 303, 29 S. W. 635; Harris v. Carmody, 131 Mass. 51, 41 Am. Rep. 188; Meech v. Lee, 82 Mich. 274, 46 N. W. 383; Benedict v. Roome, 106 Mich. 378, 64 N. W. 193; Beindorff v. Kaufman, 41 Nebr. 824, 60 N. W. 101; Hargreaves v. Korcek, 44 Nebr. 660, 62 N. W. 1086; Fisher v. Bishop, 108 N. Y. 25, 15 N. E. 331, 2 Am. St. 357; Strang v. Peterson, 56 Hun (N. Y.) 418, 31 N. Y. St. 462, 10 N. Y. S. 139; Dodd v. Averill, 7 App. Div. (N. Y.) 290, 39 N. Y. S. 1097; Foley v. Greene, 14 R. I. 618, 51 Am. Rep. 419; Coffman v. Lookout Bank, 5 Lea (Tenn.) 232, 40 Am. Rep. 31.

[9] Mack v. Prang, 104 Wis. 1, 79 N. W. 770, 45 L. R. A. 407, 76 Am. St. 848.

[10] Hollingsworth v. Johns, 92 Ga. 428, 17 S. E. 621; Southern White Lead Co. v. Haas, 73 Iowa 399, 33 N. W. 657, 35 N. W. 494; Perry v. Vezina, 63 Iowa 25, 18 N. W. 657; Aulman v. Aulman, 71 Iowa 124, 32 N. W. 240, 60 Am. Rep. 783; Gage v. Parry, 69 Iowa 605, 29 N. W. 822; Groetzinger v. Wyman, 105 Iowa 574, 75 N. W. 512; Manton v. Seiberling, 107 Iowa 534, 78 N. W. 194; Giddings v. Sears, 115 Mass. 505; Benson v. Maxwell, 105 Pa. St. 274; Coates v. Wilson, 20 R. I. 106, 37 Atl. 537; Perkins v. Hutchinson, 17 R. I. 450, 22 Atl. 1111; Austin v. Sprague Mfg. Co., 14 R. I. 464; Colt v. Sears Commercial Co., 20 R. I. 64, 37 Atl. 311; Magovern v. Richard, 27 S. Car. 272, 3 S. E. 340; Monaghan Bay Co. v. Dickson, 39 S. Car. 146, 17 S. E. 696, 39 Am. Rep. 704; Estes v. Gunter, 122 U. S. 450, 30 L. ed. 1228, 7 Sup. Ct. 1275; Bannister v. Phelps, 81 Wis. 256, 51 N. W. 417; Mehlhop v. Pettibone, 54 Wis. 652, 11 N. W. 553, 12 N. W. 443; Stevens v. Breen, 75 Wis. 595, 44 N. W. 645; Anstedt v. Bentley, 61 Wis. 629, 21 N. W. 807. See also, Levering v. Bimel, 146 Ind. 545, 45 N. E. 775; Smith v. Wells &c. Co., 148 Ind. 333, 46 N. E. 1000.

knowledge of such intent.[11] Such mortgage can be declared void as to him where there is a valuable consideration only upon proof of his knowledge of the fraudulent intent.[12] A mortgage made with the intent to defraud the mortgagor's creditors, even though it is founded on a perfect consideration, if taken by the mortgagee with knowledge of the fraudulent purpose, and with the view of aiding the execution of it, is void as to creditors.[13] Though a mortgage be fraudulent and void as to a creditor, the mortgagor cannot avoid it.[14] Such a mortgage conveys the property, and is binding between the parties.[15] Although the mortgagee has participated in the fraudulent intent, it is voidable only at the election of the creditors. If they do not intervene the conveyance stands.[16] The mortgagor may redeem without showing that the transaction has been purged of the fraud, because the mortgage is voidable only by the creditors, and valid as between the parties.[17] A mortgagor is not estopped from setting up the invalidity of his mortgage unless there has been some fraud, misrepresentation, or concealment on his part.[18] But he is estopped from setting up a defense which is inconsistent with representations made by him in obtaining the loan which the mortgage was given to secure when the lender

[11] Price v. Masterson's Exr., 35 Ala. 483; Preusser v. Henshaw, 49 Iowa 41; McMaster v. Campbell, 41 Mich. 513, 2 N. W. 836; State v. Nauert, 2 Mo. App. 296; Thorpe v. Thorpe, 12 S. Car. 154.

[12] Hall v. Heydon, 41 Ala. 242; Tickner v. Wiswall, 9 Ala. 305; Wiley Banks & Co. v. Knight, 27 Ala. 336; Shideler v. Fisher, 13 Colo. App. 106, 57 Pac. 864; Farrand v. Caton, 69 Mich. 235, 37 N. W. 199; Lewis v. Dudley, 70 N. H. 594, 49 Atl. 572.

[13] O'Kane v. Terrell, 144 Ind. 599, 46 N. E. 1000; Jones v. Light, 86 Maine 437, 30 Atl. 71; Wyman v. Brown, 50 Maine 139; Moore v. Williamson, 44 N. J. Eq. 496, 15 Atl. 587, 1 L. R. A. 336; Green v. Tantum, 19 N. J. Eq. 105, affd. 19 N. J. Eq. 574, 21 N. J. Eq. 364.

[14] Stores v. Snow, 1 Root (Conn.) 181; Abbe v. Newton, 19 Conn. 20; Salmon v. Bennett, 1 Conn. 525, 7 Am. Dec. 237; Barwick v. Moyse, 74 Miss. 415, 21 So. 238, 60 Am. St. 512; Risley v. Parker, 50 N. J. Eq. 284, 23 Atl. 424; Bonesteel v. Sullivan, 104 Pa. St. 9; Gill v. Henry, 95 Pa. St. 388.

[15] Parkhurst v. McGraw, 24 Miss. 134.

[16] Upton v. Craig, 57 Ill. 257; Harvey v. Varney, 98 Mass. 118; Colt v. Sears Commercial Co., 20 R. I. 64, 37 Atl. 311.

[17] Pierce v. LeMonier, 172 Mass. 508, 53 N. E. 125; Sillings v. Turner, 153 Mass. 534, 27 N. E. 671; Stratton v. Edwards, 174 Mass. 374, 54 N. E. 886; Harvey v. Varney, 98 Mass. 118.

[18] Brewster v. Madden, 15 Kans. 249; Wilson v. Watts, 9 Md. 356; Radican v. Radican, 22 R. I. 405, 48 Atl. 143.

has relied upon these representations in making the loan and taking the mortgage.[19]

§ 4680. **Usury.**—Usury laws apply to mortgages in the same manner that they apply to contracts in general and the same principles of law are applicable to the inquiry whether they are usurious or not. The intent to take usury is the important factor in all cases, and the court will look into the whole transaction to determine what the intent was, not only into the acts of the party at the time of the transaction, but also into subsequent acts.[20] Usury, to affect a mortgage, must relate directly to the mortgage debt. A valid mortgage is not affected by a subsequent usurious agreement, or the payment of usurious interest for a renewal.[21] And if a mortgage not affected by usury be assigned as collateral security for a debt of the mortgagee, usury taken by the assignee on the latter debt cannot be set up as a defense to the mortgage.[22] A stipulation in a mortgage to secure a loan, to pay a reasonable attorney's fee in case of foreclosure does not render a contract usurious.[23] A provision for the payment of damages in a reasonable amount in case of a sale for a breach of conditions is in effect only a stipulation to allow compensation for extra and incidental trouble and expense in consequence of the sale.[24] An agreement to pay the taxes on the mortgaged property,[25] or on the mortgage

[19] Kelley v. Fisk, 110 Ind. 552, 11 N. E. 453; Rogers v. Union Cent. Life Ins. Co., 111 Ind. 343, 12 N. E. 495, 60 Am. Rep. 701.

[20] Dozier v. Mitchell, 65 Ala. 511; Lurton v. Jacksonville Loan & Building Assn., 187 Ill. 141, 58 N. E. 218, affg. 87 Ill. App. 395; White v. Lucas, 46 Iowa 319; Robinson v. Blaker, 85 Minn. 242, 88 N. W. 845, 89 Am. St. 541; Stelle v. Andrews, 19 N. J. Eq. 409; Bardwell v. Howe, Clarke Ch. (N. Y.) 281; Fox v. Lipe, 24 Wend. (N. Y.) 164; Guggenheimer v. Geiszler, 81 N. Y. 293; Knickerbocker Life Ins. Co. v. Nelson, 78 N. Y. 137, 7 Abb. N. Cas. (N. Y.) 170.

[21] Dotterer v. Freeman, 88 Ga. 479, 14 S. E. 863; Richardson v. Campbell, 34 Nebr. 181, 51 N. W. 753, 33 Am. St. 633; Allison v. Schmitz, 31 Hun (N. Y.) 106, affd. 98 N. Y. 657.

[22] Conrad v. Gibbon, 29 Iowa 120; Weyrich v. Hobelman, 14 Nebr. 432, 16 N. W. 436; Richardson v. Campbell, 34 Nebr. 181, 51 N. W. 753, 33 Am. St. 633.

[23] Barton v. Farmers' &c. Bank, 122 Ill. 352, 13 N. E. 503; Fowler v. Equitable Trust Co., 141 U. S. 411, 35 L. ed. 794, 12 Sup. Ct. 8; Vol. 2, § 975, n. 70, and additional cases there cited.

[24] Munter v. Linn, 61 Ala. 492; Gambril v. Doe, 8 Blackf. (Ind.) 140, 44 Am. Dec. 760; Billingsley v. Dean, 11 Ind. 331; Siegel v. Drumm, 21 La. Ann. 8; Huling v. Drexell, 7 Watts (Pa.) 126; Fowler v. Equitable Trust Co., 141 U. S. 384, 35 L. ed. 786, 12 Sup. Ct. 1, affd. 141 U. S. 418, 35 L. ed. 793, 12 Sup. Ct. 80.

[25] Dutton v. Aurora, 114 Ill. 138, 28 N. E. 461.

debt,[26] or the insurance premiums on the mortgaged property, in addition to interest, is also held not to be usurious.[27]

§ 4681. **Commissions.**—If the agent of the mortgagee, in making the loan, exacts a payment to himself by way of commission for making the loan, the agent having special and limited authority, and having no regular and established connection with the lender, the loan is not necessarily nor usually rendered usurious.[28] The brokerage in excess of legal interest cannot affect the principal, when it is paid without his knowledge, and he derives no benefit from it.[29] But where the agent is the lender's general agent having full authority to make loans, if he exacts a commission the lender will be presumed to have knowledge of such

[26] Banks v. McClellan, 24 Md. 62, 87 Am. Dec. 594; Detroit v. Board of Assessors, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59; Rauch v. Seip, 112 Mich. 612, 71 N. W. 144. In California such an agreement is by the constitution, made null and void. But a contract on the part of the mortgagee to credit the mortgagor with a certain per cent. of the interest if he should produce each year the proper official receipts showing the payment of all taxes against the property, is not within this provision. Constitution of California, art. 13, § 5. A clause in a mortgage, providing that payments to the mortgagor of taxes upon the mortgaged premises shall be secured by the mortgage, is not within the constitutional provision. Marye v. Hart, 76 Cal. 291, 18 Pac. 325. The California Pol. Code, § 3627, which gives the owner of the property the privilege of deducting the amount of the taxes paid by him from the mortgage debt, is permissive, and not mandatory, and does not prohibit an action to recover the same from the mortgage. San Gabriel Valley Land & Water Co. v. Witmer Bros. Co., 96 Cal. 623, 29 Pac. 500, 31 Pac. 588, 18 L. R. A. 465.

[27] New England Mortgage Security Co. v. Gay, 33 Fed. 636.

[28] Rogers v. Buckingham, 33 Conn. 81; Phillips v. Roberts, 90 Ill. 492; Jennings v. Hunt, 6 Bradw. (Ill.) 523; Landis v. Saxton, 89 Mo. 375, 1 S. W. 359; Guardian Mut. Life Ins. Co. v. Kashaw, 66 N. Y. 544; Wyeth v. Branif, 14 Hun (N. Y.) 537, revd. 84 N. Y. 627; Bell v. Day, 32 N. Y. 165; Condit v. Baldwin, 21 N. Y. 219, 78 Am. Dec. 137; Guggenheimer v. Geiszler, 81 N. Y. 293; Van Wyck v. Walters, 16 Hun (N. Y.) 209, 81 N. Y. 352; Fowler v. Equitable Trust Co., 141 U. S. 384, 35 L. ed. 786, 12 Sup. Ct. 1, affd. 141 U. S. 418, 35 L. ed. 793, 12 Sup. Ct. 80. See also, Vol. 2, §§ 975, 976.

[29] American Freehold Mortg. Co. v. Sewall, 92 Ala. 163, 9 So. 143, 13 L. R. A. 299; Ginn v. New England Sec. Co., 92 Ala. 135, 8 So. 388; May v. Flint, 54 Ark. 573, 16 S. W. 575; New England Mortgage Security Co. v. Gay, 33 Fed. 636; Hughes v. Griswold, 82 Ga. 299, 9 S. E. 1092; Merck v. American F. L. Mortgage Co., 79 Ga. 213, 7 S. E. 265; Hoyt v. Pawtucket Inst., 110 Ill. 390; Telford v. Garrels, 132 Ill. 550, 24 N. E. 573; Sanford v. Kane, 133 Ill. 199, 24 N. E. 414, 8 L. R. A. 724, 23 Am. St. 602; Ryan v. Sanford, 133 Ill. 291, 24 N. E. 428; Pass v. New England Mortgage Security Co., 66 Miss. 365, 6 So. 239; Conover v. Van Mater, 18 N. J. Eq. 481; Muir v. Newark Savings Inst., 16 N. J. Eq. 537; Spring v. Reed, 28 N. J. Eq. 345; Gray v. Van Blarcom, 29 N. J. Eq. 454; Fowler v. Equitable Trust Co., 141 U. S. 384, 35 L. ed. 786, 12 Sup. Ct. 1, affd. 141 U. S. 418, 35 L. ed. 793, 12 Sup. Ct. 80.

exaction and to have authorized it, and the contract will be held to be usurious.[30] If the broker or intermediary between the borrower and the lender is not the agent of the lender, the latter is not affected by payments made by the borrower to the broker.[31]

§ 4682. Proof and defense of usury.—The burden of proof that the mortgage is usurious is usually upon the mortgagor. He is impeaching his own obligation formally executed under seal, and must establish the facts to constitute the usury beyond a reasonable doubt. An even balance of the testimony is held not sufficient; there must be a clear preponderance.[32] When the contract is upon its face for legal interest only, usury can be established only by proof of a corrupt agreement. It is a defense not favored in equity and when the consequence is to forfeit the whole debt and is considered unconscientious.[33] While it has been held in some states that the defense of usury is personal and cannot be made by any one but the mortgagor or his privies in blood, estate or contract, and that a subsequent encumbrancer or purchaser cannot

[30] Stevens v. Meers, 11 Ill. App. 138, affd. 106 Ill. 549.

[31] Sherwood v. Roundtree, 32 Fed. 113; Payne v. Newcomb, 100 Ill. 611, 39 Am. Rep. 69; Brigham v. Myers, 51 Iowa 397, 1 N. W. 613; Nichols v. Osborn, 41 N. J. Eq. 92, 3 Atl. 155; Bonus v. Trefz, 40 N. J. Eq. 502, 2 Atl. 369; Demarest v. Vandenberg, 41 N. J. Eq. 63, 3 Atl. 69; Boyd v. Engelbrecht, 36 N. J. Eq. 612; Brown v. Brown, 38 S. Car. 173, 17 S. E. 452; Call v. Palmer, 116 U. S. 98, 29 L. ed. 559, 6 Sup. Ct. 301. See also, Vol. 2, § 976.

[32] New England Mortgage Security Co. v. Gay, 33 Fed. 636; Hotel Co. v. Wade, 97 U. S. 13, 24 L. ed. 917. The defense of usury, involving a crime, can not be established by surmise and conjecture, or by inference entirely uncertain. Baldwin v. Doying, 114 N. Y. 452, 457, 21 N. E. 1007; Stillman v. Northrup, 109 N. Y. 473, 17 N. E. 379; Culver v. Pullman, 59 Hun (N. Y.) 15, 35 N. Y. St. 849, 12 N. Y. S. 663; Sweny v. Peaslee, 62 Hun (N. Y.) 621, 42 N. Y. St. 485, 17 N. Y. S. 225. If, upon the whole case, the evidence is as consistent with the absence as with the presence of usury, the party alleging the usury must fail. Morrison v. Verdenal, 53 Hun (N. Y.) 63, 5 N. Y. S. 606, 24 N. Y. St. 194, affd. 126 N. Y. 630, 27 N. E. 410; Booth v. Swezey, 8 N. Y. 276, Seld. Notes (N. Y.) 153; Smith v. Marvin, 27 N. Y. 137, 25 How. Pr. (N. Y.) 317; Sweny v. Peaslee, 62 Hun (N. Y.) 621, 42 N. Y. St. 485, 17 N. Y. S. 225. See also, Gillette v. Ballard, 25 N. J. Eq. 491, affd. 27 N. J. Eq. 489; Homeopathic Mut. Life Ins. Co. v. Crane, 25 N. J. Eq. 418; Berdan v. Trustees of School-Dist. No. 38, 47 N. J. Eq. 8, 21 Atl. 40. "Usury must be strictly proved. It is not sufficient for the party who sets it up to make out a probable case." It is not enough that the circumstances proved render it highly probable that there was a corrupt bargain. Such a bargain must be proved and not left to conjecture. Brolasky v. Miller, 8 N. J. Eq. 789. Barcalow v. Sanderson, 17 N. J. Eq. 460; Conover v. Van Mater, 18 N. J. Eq. 481; Morris v. Taylor, 22 N. J. Eq. 438, affd. 22 N. J. Eq. 606; Rowland v. Rowland, 40 N. J. Eq. 281.

[33] Conover v. Van Mater, 18 N. J. Eq. 481.

set it up,[34] yet the doctrine adopted in other states is that not only the mortgagor, but any person who is seized of his estate and vested with his rights, unless he has assumed the payment of the mortgage, may interpose this defense although a mere stranger cannot.[35] A bonus paid to secure the extension of the time of payment of an existing mortgage does not invalidate the mortgage as a security for the original debt.[36] When a mortgage is free from usury in its inception, no subsequent usurious contract in relation to it can affect the mortgage itself. It is only the subsequent contract that is affected by the usury. The mortgage not being usurious in its origin is not made so retrospectively by the receipt of usurious interest under an agreement to forbear demand of payment, though the penalty of the statute may be incurred.[37] But if the usury goes back to the original transaction, the mortgage is rendered void.[38]

[34] Baskins v. Calhoun, 45 Ala. 582; Fenno v. Sayre, 3 Ala. 458; McGuire v. VanPelt, 55 Ala. 344; Butts v. Broughton, 72 Ala. 294; Moses v. Home Bldg. & Loan Assn., 100 Ala. 465, 14 So. 412; Darst v. Bates, 95 Ill. 493; Safford v. Vail, 22 Ill. 326; Mason v. Pierce, 142 Ill. 331, 31 N. E. 503; Union Nat. Bank v. International Bank, 123 Ill. 510, 14 N. E. 859; Sellers v. Botsford, 11 Mich. 59; Cheney v. Dunlap, 27 Nebr. 401, 43 N. W. 178, 5 L. R. A. 465; Holladay v. Holladay, 13 Ore. 523, 11 Pac. 260, 12 Pac. 821; Lamoille County Nat. Bank v. Bingham, 50 Vt. 105, 28 Am. Rep. 490; Barbour v. Tompkins, 31 W. Va. 410, 7 S. E. 1, 3 L. R. A. (N. S.) 715; Bensley v. Homier, 42 Wis. 631; Ready v. Huebner, 46 Wis. 692, 1 N. W. 344, 32 Am. Rep. 749. Nor by mortgagor's wife claiming under a subsequent voluntary conveyance (Cain v. Gimon, 36 Ala. 168); nor by a terre-tenant of the mortgaged premises. In Hunt v. Acre, 28 Ala. 580, it was assumed that the defense of usury might be set up by the heirs of the mortgagor. Union Nat. Bank v. International Bank, 123 Ill. 510, 14 N. E. 859; Hartley v. Harrison, 24 N. Y. 170; Bullard v. Raynor, 30 N. Y. 197; Chamberlain v. Dempsey, 36 N. Y. 144; Williams v. Tilt, 36 N. Y. 319; Ready v. Huebner, 46 Wis. 692, 1 N. W. 344, 32 Am. Rep. 749; Newman v. Kershaw, 10 Wis. 333; Ludington v. Harris, 21 Wis. 239. See Vol. 2, § 961, et seq.

[35] Butts v. Broughton, 72 Ala. 294; Crawford v. Nimmons, 180 Ill. 143, 54 N. E. 209; Maher v. Lanfrom, 86 Ill. 513; Union Nat. Bank v. International Bank, 123 Ill. 510, 14 N. E. 859; Mason v. Pierce, 142 Ill. 331, 31 N. E. 503; Brolasky v. Miller, 9 N. J. Eq. 807; Westerfield v. Bried, 26 N. J. Eq. 357; Devlin v. Shannon, 65 How. Pr. (N. Y.) 148; Mason v. Lord, 40 N. Y. 476; Williams v. Tilt, 36 N. Y. 319; Johnson v. Lasker Real Estate Assn. (Tex.), 21 S. W. 961.

[36] Mahoney v. Mackubin, 54 Md. 268; Donnington v. Meeker, 11 N. J. Eq. 362; Trusdell v. Jones, 23 N. J. Eq. 121, affd. 23 N. J. Eq. 554; Terhune v. Taylor, 27 N. J. Eq. 80; Real Estate Trust Co. v. Keech, 7 Hun (N. Y.) 253, affd. 69 N. Y. 248, 25 Am. Rep. 181; Abrahams v. Claussen, 52 How. Pr. (N. Y.) 241; Langdon v. Gray, 52 How. Pr. (N. Y.) 387; Sweny v. Peaslee, 62 Hun (N. Y.) 621, 42 N. Y. St. 485, 17 N. Y. S. 225.

[37] Hawhe v. Snydaker, 86 Ill. 197; Lindsay v. Hill, 66 Maine 212, 22 Am. Rep. 564; Thompson v. Woodbridge, 8 Mass. 256.

[38] Smith v. Hathorn, 88 N. Y. 211, revg. 25 Hun (N. Y.) 159.

§ 4683. **Compound interest.**—There is considerable conflict among the authorities as to whether an executory contract for compound interest can be enforced; but the payment of such interest by the debtor, with knowledge and without oppression, does not constitute usury.[39] While there is no law prohibiting such a contract, the courts have adopted the rule from notions of policy,[40] and although it may be demanded and recovered as it becomes due, it is held in a number of cases that an agreement to pay interest on the interest after it becomes due cannot be enforced.[41] According to this view so long as the agreement for compound interest is executory merely, the courts will not lend their aid to enforce it; but when the contract has been acted upon by the parties, and such interest has been paid, the courts will not require a repayment, nor will they hold the transaction to be in any degree tainted with usury by reason of such payment. Such an agreement does not render a mortgage usurious, though the contract so far as it provided for usurious interests, is void; but it has been held that the mortgage may be enforced for the debt and interest, even where usury makes void the contract.[42] An agreement to pay interest on interest, made after the interest has accrued, is valid and may be enforced.[43] Accrued interest is a debt; and even where an agreement made at the time of the loan for converting the interest into principal, from time to time when it shall become due, is not allowed because it is regarded as offensive and injurious, yet when it has become due there is no objection to the parties converting such interest into principal, and securing it by a further mortgage. It is regarded as in the nature of a further advance, and not only may it form the consideration of a second

[39] Culver v. Bigelow, 43 Vt. 249. See generally, Vol. 2, §§ 978, 979.

[40] Force v. Elizabeth, 28 N. J. Eq. 403, revd. 29 N. J. Eq. 587.

[41] Connecticut v. Jackson, 1 Johns. Ch. (N. Y.) 13, 7 Am. Dec. 471; Van Benschooten v. Lawson, 6 Johns. Ch. (N. Y.) 313, 10 Am. Dec. 333; Stewart v. Petree, 55 N. Y. 621, 14 Am. Rep. 352. See article in 16 Albany L. J. 252.

[42] Mowry v. Bishop, 5 Paige (N. Y.) 98.

[43] Stickney v. Moore, 108 Ala. 590, 19 So. 76; Ginn v. New England Mtg. & Sec. Co., 92 Ala. 135, 8 So. 388; Paulling v. Creagh's Admrs., 54 Ala. 646; Thayer v. Star Mining Co., 105 Ill. 540; Drury v. Wolfe, 134 Ill. 294, 25 N. E. 626; Gilmore v. Bissell, 124 Ill. 488, 16 N. E. 925; Force v. Elizabeth, 28 N. J. Eq. 403, revd. 29 N. J. Eq. 587; Tylee v. Yates, 3 Barb. (N. Y.) 222; Fobes v. Cantfield, 3 Ohio 17.

or further mortgage but as between the parties it may be tacked to the first mortgage.[44]

F. What May Be the Subject of a Mortgage.

§ 4684. **In general.**—Every kind of interest in real estate may be mortgaged if it be subject to sale and assignment.[45] It does not matter that it is a right in remainder or reversion, a contingent interest, or a possibility coupled with an interest, if it be an interest in the land itself.[46] Such, for instance, is held to be the interest of one in a mining claim located upon public land;[47] the interest of one entitled to redeem from a foreclosure sale;[48] the interest of one who holds an agreement for bond or title;[49] the interest of one in possession under a parol contract to purchase;[50] or the interest of the holder of a certificate of stock in an unincorporated company representing an interest in real estate.[51] An easement appurtenant to the land described, and all rights, privileges and easements subsequently acquired, which are essential to the full enjoyment of the property, will usually pass by the mortgage, though not specifically mentioned.[52] A contract for an

[44] Eslava v. Lepretre, 21 Ala. 504, 56 Am. Dec. 266; Pinckard v. Ponder, 6 Ga. 253; Fitzhugh v. McPherson, 3 Gill (Md.) 408; Banks v. McClellan, 24 Md. 62, 87 Am. Dec. 594; Quimby v. Cook, 10 Allen (Mass.) 32; Wilcox v. Howland, 23 Pick. (Mass.) 167; Townsend v. Corning, 1 Barb. (N. Y.) 627; Williams v. Hance, 7 Paige (N. Y.) 581; Hale v. Hale, 1 Cold. (Tenn.) 233, 78 Am. Dec. 490; Parham v. Pulliam, 5 Cold. (Tenn.) 497; Barbour v. Tompkins, 31 W. Va. 410, 7 S. E. 1, 3 L. R. A. (N. S.) 715; Vol. 2, § 979.

[45] Miller v. Tipton, 6 Blackf. (Ind.) 238; Dorsey v. Hall, 7 Nebr. 460; Neligh v. Michenor, 11 N. J. Eq. 539; Bourn v. Robinson, 49 Tex. Civ. App. 157, 107 S. W. 873; Clark v. Altizer (Tex. Civ. App.), 145 S. W. 1041. The Code of California states the general rule of law upon this subject in the provision that any interest in real property which is capable of being transferred may be mortgaged. Civil Code (1906), § 2947.

[46] Wilson v. Russ, 17 Fla. 691; Wilson v. Wilson, 32 Barb. (N. Y.) 328; In re John & Cherry Streets, 19 Wend. (N. Y.) 659.

[47] Alexander v. Sherman (Ariz.), 16 Pac. 45.

[48] San Jose &c. Bank v. Bank of Madera, 121 Cal. 539, 54 Pac. 83, 270.

[49] Davis v. Davis, 88 Ala. 523, 6 So. 908; Houghton v. Allen, 75 Cal. 102, 16 Pac. 532; Baker v. Bishop Hill Colony, 45 Ill. 264; Laughlin v. Braley, 25 Kans. 147; McPherson v. Hayward, 81 Maine 329, 17 Atl. 164; Crane v. Turner, 7 Hun (N. Y.) 357, affd. 67 N. Y. 437; Farmers' Loan & Trust Co. v. Curtis, 7 N. Y. 466, Seld. Notes (N. Y.) 7; Smith v. Patton, 12 W. Va. 541.

[50] Sinclair v. Armitage, 12 N. J. Eq. 174; Titcomb v. Fonda J. & G. R. Co., 38 Misc. (N. Y.) 630, 78 N. Y. S. 226; Hagar v. Brainerd, 44 Vt. 294; Scott v. Farnum, 55 Wash. 336, 104 Pac. 639; Bull v. Sykes, 7 Wis. 449.

[51] Durkee v. Stringham, 8 Wis. 1.

[52] Barnard v. Wilson, 74 Cal. 512, 16 Pac. 307; Hyde Park &c. Light Co. v. Brown, 172 Ill. 329, 50 N. E.

option to purchase land at an agreed price within a time limited based on a sufficient consideration, is held to be an interest in real estate that may be sold or assigned, and therefore may be mortgaged.[53] It has also been held that a widow who has an unassigned right of dower in land can make a mortgage of such land which will cover her interest in it.[54] And a devisee who has a vested interest in the land devised may mortgage that interest.[55] A mere possibility or expectancy, however, not coupled with any interest in or growing out of the property, cannot be made the subject of a mortgage. A mere expectancy of acquiring property without a present interest in it is not a subject of sale and therefore not of mortgage.[56]

§ 4685. Vested, contingent and future interests.—An estate tail may be mortgaged by the life tenant. Such tenant cannot prejudice the right of the remaindermen, but can convey whatever interest he has.[57] A vested interest in remainder may be conveyed in mortgage,[58] and it has been held that a contingent or possible interest may also be the subject of a mortgage.[59] Reversions and remainders, being capable of assignment, may be the subject of a mortgage.[60] When the estate mortgaged is a contingent remainder, the mortgage, of course, becomes void or

127; Swedish-American Nat. Bank v. Connecticut &c. Life Ins. Co., 83 Minn. 377, 86 N. W. 420; In re Bull, 15 R. I. 534, 10 Atl. 484.

[53] Bank of Louisville v. Baumiester, 87 Ky. 6, 7 S. W. 170.

[54] Mutual Life Insurance Company v. Shipman, 119 N. Y. 324, 24 N. E. 177. In Rhode Island it is held that a doweress can mortgage her unassigned dower interest to the terretenants only and that her mortgage of such interest to a stranger conveys no title. Ritt v. Dodge, 20 R. I. 133, 37 Atl. 810; Maxon v. Gray, 14 R. I. 641; Weaver v. Sturtevant, 12 R. I. 537.

[55] Drake v. Paige, 127 N. Y. 562, 28 N. E. 407. See also, Davis v. Willson, 115 Ky. 639, 25 Ky. L. 21, 74 S. W. 696.

[56] Skipper v. Stokes, 42 Ala. 255, 94 Am. Dec. 646; Purcell's Admr. v. Mather, 35 Ala. 570, 76 Am. Dec. 307; Low v. Pew, 108 Mass. 347, 11 Am. Rep. 357; Hoff v. Burd, 17 N. J. Eq. 201. In Miles v. Miles, 78 Miss. 904, 30 So. 2, it was held that a deed by a son to his brother of his interest in particular land of their father during his life, but not disclosing this fact, with a reservation of a lien for the purchase-money, is not void, but may be enforced after the father's death, the father having in confirmation of the deed made a conveyance of this land to the grantee above.

[57] Lehndorf v. Cope, 122 Ill. 317, 13 N. E. 505; Hosmer v. Carter, 68 Ill. 98.

[58] Flanders v. Greely, 64 N. H. 357, 10 Atl. 686.

[59] Wilson v. Wilson, 32 Barb. (N. Y.) 328.

[60] Curtis v. Root, 20 Ill. 518; E. A. Beall Co. v. Weston, 83 S. Car. 491, 65 S. E. 823.

ineffective as such upon the happening of the contingency which divests the mortgagor.[61]

§ 4686. **Interest conveyed.**—A mortgage passes the interest of the mortgagor whatever it may be.[62] "When a mortgage is made of an estate or interest already encumbered in any manner, the mortgage of course attaches only to the interest then remaining in the mortgagor. Upon the discharge of any prior encumbrance, the mortgage interest has the full advantage of the discharge. If the mortgagor acquires any title after making the mortgage, that, as a general rule, accrues to the benefit of the mortgage title."[63] If the mortgage purports to convey a fee when the mortgagor had only an equitable estate it passes an equitable estate only;[64] and if it purports to convey a fee when he has only a life estate, a life estate only will pass.[65] Unless the conveyance in mortgage be limited in its operation, it passes all the interest of the mortgagor in the property described.[66] A mortgage may even be made of an imperfect title and will pass whatever interest the mortgagor had under such title.[67] A person may mortgage an interest in real estate which he himself holds in mortgage.[68] He conveys all the interest he has; and if he afterward acquires an absolute title, the second mortgagee by foreclosing his mortgage acquires an absolute estate.[69] A mortgage may be made of rents due under a lease, and, although a right of entry be given to the mortgagee, the mortgage is merely a security, like any other mortgage of real estate, and the mortgagor remains the real

[61] L'Etourneau v. Henquenet, 89 Mich. 428, 50 N. W. 1077, 28 Am. St. 310.

[62] Baker v. Shephard, 30 Ga. 706; Cross v. Weare Commission Co., 153 Ill. 499, 38 N. E. 1038, 46 Am. St. 902; Knapp v. Jones, 143 Ill. 375, 32 N. E. 382; Miller v. Michoud, 11 Rob. (La.) 225; French v. Prescott, 61 N. H. 27; Brockschmidt v. Archer, 64 Ohio St. 502, 60 N. E. 623; Hagar v. Brainerd, 44 Vt. 294.

[63] 1 Jones Mortg. (6th ed.), § 138.

[64] Christian v. American Freehold Land Mtg. Co., 92 Ala. 130, 9 So. 219; Laughlin v. Braley, 25 Kans. 147; Lovering v. Fogg, 18 Pick. (Mass.) 540; Lincoln &c. Sav. Assn. v. Hass, 10 Nebr. 581, 7 N. W. 327.

[65] Mixter v. Woodcock, 154 Mass. 535, 28 N. E. 907.

[66] McGuire v. Van Pelt, 55 Ala. 344; Smith v. Provin, 4 Allen (Mass.) 516; Laverty v. Moore, 33 N. Y. 658.

[67] Massey v. Papin, 24 How. (U. S.) 362, 16 L. ed. 734.

[68] Cutts v. York Mfg. Co., 18 Maine 190; Hudson City Sav. Inst. v. McArthur, 8 N. Y. Wkly. Dig. 63.

[69] Murdock v. Chapman, 9 Gray (Mass.) 156; Power v. Lester, 23 N. Y. 527.

owner until foreclosure and sale.[70] A mortgage given by one part owner of land upon purchasing the remaining portion which describes the whole parcel, is construed to embrace the entire interest, and not merely the undivided interest conveyed by the mortgagee.[71]

§ 4687. **Buildings.**—The mortgage of a building carries with it the land on which it stands which is essential to its use if such appears to have been the intention of the parties.[72] The right which the grantor has in the foundation, stone work and building is not merely or mostly a right to the materials of which they are composed, but the right of having them on the land as part of a structure, with the right to use and occupy them for a long period of time. It is a grant of his right to use and occupy the land under the lease.[73] As a general rule, a building erected upon the land of the owner by another becomes a part of the realty and a removal of such building will not ordinarily divest the mortgagee of his interest therein.[74]

§ 4688. **Fixtures—In general.**—A mortgage of real property, as a general rule, carries as part of the security all fixtures belonging to the realty, without any special mention of them being made in the conveyance. In determining what chattels when annexed to the land become fixtures and therefore bound by a mortgage, very much the same rules apply as between a grantor and his grantee in case of an absolute conveyance.[75] "But al-

[70] Potts v. Blanchard, 19 La. Ann. 167.

[71] Van Rensselaer v. Dennison, 35 N. Y. 393; Shirras v. Caig, 7 Cranch (U. S.) 34, 3 L. ed. 260.

[72] Esty v. Baker, 48 Maine 495; Doyle v. Lord, 64 N. Y. 432, 21 Am. Rep. 629; Whitney v. Olney, 3 Mason (U. S.) 280, Fed. Cas. No. 17595; Wilson v. Hunter, 14 Wis. 683, 80 Am. Dec. 795.

[73] Greenwood v. Murdock, 9 Gray (Mass.) 20, 69 Am. Dec. 272. Thus a mortgage, made to secure advances to enable the mortgagor to erect a building on leased land, of "all the right, title, and interest which the grantor now has in the foundation or stone-work of said building," and which he "may have in and unto said building during its erection and completion, and after it is completed," passes the land on which the building stands. Greenwood v. Murdock, 9 Gray (Mass.) 20, 69 Am. Dec. 272.

[74] Peirce v. Goddard, 22 Pick. (Mass.) 559, 33 Am. Dec. 764; Hamlin v. Parsons, 12 Gil. (Minn.) 59, 90 Am. Dec. 284; Betz v. Muench (N. J.), 13 Atl. 622, revd. 46 N. J. Eq. 256, 19 Atl. 206, 7 L. R. A. 630, 19 Am. St. 387; Betz v. Verner, 46 N. J. Eq. 256, 19 Atl. 206, 7 L. R. A. 630, 19 Am. St. 387; Hutchins v. King, 1 Wall. (U. S.) 53.

[75] Longstaff v. Meagoe, 2 Adol. & El. 167; Ward v. Yarnelle, 173 Ind. 535, 91 N. E. 7; Elliott & Barry En-

though in the case of a deed the construction is generally favorable to holding that things attached to the land are part and parcel of the realty rather than personalty, yet in the construction of a mortgage even greater favor in the same way seems to be shown the mortgagee."[76] All buildings and other fixtures annexed to the freehold become part of it, and inure to the benefit of those who are entitled to it; both to the mortgagee as an increased security for his debt, and to the mortgagor to the same extent as enhancing the value of his equity of redemption.[77] The latter can obtain the full benefit of all improvements he has made by paying his debt and regaining his estate by redemption. This rule, and the exceptions to it as well, are applicable to deeds of trust equally with mortgages.[78] A building erected upon the mortgaged land without the consent of the mortgagee may be sold by him as a part of the mortgaged property, and his right is not affected by the fact that the building was erected under an agreement with the mortgagor that it should be and remain the personal property of the party erecting it.[79] The authorities are divided upon the question of whether fixtures severed from the realty become personal property, and when taken away from the same are freed from the lien of the mortgage.[80] But what the effect of the severance is depends very largely upon the view taken as to the

gineering Co. v. Baker, 134 Mo. App. 95, 114 S. W. 71; Main v. Schwarzwaelder, 4 E. D. Smith (N. Y.) 273; Robinson v. Preswick, 3 Edw. Ch. (N. Y.) 246; Snedeker v. Warring, 12 N. Y. 170; Gardner v. Finley, 19 Barb. (N. Y.) 317; Laflin v. Griffiths, 35 Barb. (N. Y.) 58; McFadden v. Allen, 134 N. Y. 489, 32 N. E. 21, 19 L. R. A. 446; Foote v. Gooch, 96 N. Car. 265, 1 S. E. 525, 60 Am. Rep. 411.

[76] 1 Jones Mtg. (6th ed.), § 428.

[77] Williams v. Chicago Exhibition Co., 188 Ill. 19, 58 N. E. 611; Wood v. Whelen, 93 Ill. 153; Baird v. Jackson, 98 Ill. 78; Hunt v. Hunt, 14 Pick. (Mass.) 374, 25 Am. Dec. 400; Butler v. Page, 7 Metc. (Mass.) 40, 39 Am. Dec. 757; Graeme v. Cullen, 23 Grat. (Va.) 266.

[78] Moore v. Vallentine, 77 N. Car. 188; Graeme v. Cullen, 23 Grat. (Va.) 266.

[79] Meagher v. Haynes, 152 Mass. 228, 25 N. E. 105, 23 Am. St. 819; Butler v. Page, 7 Metc. (Mass.) 40, 39 Am. Dec. 757; Cole v. Stewart, 11 Cush. (Mass.) 181; Guernsey v. Wilson, 134 Mass. 482.

[80] Hill v. Gwin, 51 Colo. 47, and Gardner v. Finley, 19 Barb. (N. Y.) 317, hold that the lien is lost. Contra, Buckout v. Swift, 27 Cal. 433, 87 Am. Dec. 90; Dorr v. Dudderar, 88 Ill. 107; Hutchins v. King, 1 Wall. (U. S.) 53. See Gore v. Jenness, 19 Maine 53. A building, severed and removed from mortgaged lands of which lands it forms a part when the mortgage is given is disincumbered of the lien, substantially on the same principle that a building, erected upon the lands after the giving of the mortgage, is subject to the lien. In the first case the building is withdrawn from the operation of the mortgage, for the reason that it has

nature and effect of a mortgage; whether it be regarded as a conveyance of the legal title to the property, giving the mortgagee also the right of possession, or whether it be regarded merely as a lien, so that the mortgagor is protected in his possession until foreclosure. On the one hand, the mortgagee's legal ownership or his actual or constructive possession enables him to follow and recover the property severed; but on the other hand, he has merely a right to restrain the removal of the property by injunction, or after the removal, at most, only a right to recover damages for wrongfully impairing his security.[81] Growing wood or timber is a portion of the realty and is embraced in a mortgage of the land, but a mortgage of wood not standing on the land of the mortgagor is a mortgage of personal property.[82] It has been held that the mortgage of improvements does not convey any title to the land itself,[83] but the lien of a mortgage on land extends to all improvements and repairs subsequently made on the mortgaged premises, whether made by the mortgagor or by a purchaser from him without actual notice of the existence of the mortgage.[84]

§ 4689. Rule for determining whether fixtures are covered by mortgage.—The intention with which an article of personal property is attached to the realty, whether for temporary use or for permanent improvement, has within certain limits quite as much to do with the determination of the question whether it has thereby become a permanent fixture as has the way and manner in which it is attached.[85] In the modern cases the intention

ceased to be a thing real; in the other, mere materials are brought under the lien, for the reason that they have become a structure by combination, and the structure has become a thing real by position.

[81] Verner v. Betz, 46 N. J. Eq. 256, 19 Atl. 206, 7 L. R. A. 630, 19 Am. St. 387.

[82] Douglas v. Shumway, 13 Gray (Mass.) 498.

[83] Mitchell v. Black, 64 Maine 48. A mortgage of a building erected on leased land under an agreement that the lessee might remove it, or the lessor should pay for it at its appraised value, is a mortgage of realty falling within the designation of a chattel real of common law. Griffin v. Marine Co. of Chicago, 52 Ill. 130.

[84] Martin v. Beatty, 54 Ill. 100; Mutual Ben. Life Ins. Co. v. Huntington, 57 Kans. 744, 48 Pac. 19; Rice v. Dewey, 54 Barb. (N. Y.) 455; Gibson v. American Loan & Trust Co., 58 Hun (N. Y.) 443, 35 N. Y. St. 192, 12 N. Y. S. 444; Wharton v. Moore, 84 N. Car. 479, 37 Am. Rep. 627; Grosvenor v. Bethell, 93 Tenn. 577, 28 S. W. 1096.

[85] Rogers v. Prattville Mfg. Co., 81 Ala. 483, 1 So. 643, 60 Am. Rep. 171; Tillman v. De Lacy, 80 Ala. 103; Lavenson v. Standard Soap Co., 80 Cal. 245, 22 Pac. 184, 13 Am. St. 147; Fratt v. Whittier, 58 Cal. 126, 41 Am. Rep. 251; Holly Manuf. Co.

with which a chattel is attached to the realty has become more and more the decisive test whether or not the chattel has become a part of the realty.[86] If the article is something necessary for the proper enjoyment of the estate, it may generally be presumed that it was annexed for its permanent improvement, and therefore that it goes to the benefit of the mortgagee. The fixtures may be so adapted to the building in which they are placed and to the purposes for which the building is to be used as to show clearly that they were designed to be permanent.[87] The questions which will determine whether a personal article after being attached to the realty still remains a chattel are first, the mode and degree of the annexation, and second, the purpose of it.[88] The fact that a chattel has been mortgaged before, or at the time, it was attached to the realty, has weight as an implied agreement between the parties in leading to the determination that such mortgage carries the fixture as against a mortgage of the realty already existing but

v. New Chester Water Co., 48 Fed. 879, affd. 53 Fed. 19, 3 C. C. A. 399; Seedhouse v. Broward, 34 Fla. 509, 16 So. 425; Kelly v. Austin, 46 Ill. 156, 92 Am. Dec. 243; Jones v. Ramsey, 3 Bradw. (Ill.) 303; Arnold v. Crowder, 81 Ill. 56, 25 Am. Rep. 260; Williams v. Chicago Exhibition Co., 188 Ill. 19, 58 N. E. 611; Ottumwa Woolen Mill Co. v. Hawley, 44 Iowa 57, 24 Am. Rep. 719; Johnson v. Moser, 82 Iowa 29, 47 N. W. 996; Smith Paper Co. v. Servin, 130 Mass. 511; Manwaring v. Jenison, 61 Mich. 117, 27 N. W. 899; Robertson v. Corsett, 39 Mich. 777; Wolford v. Baxter, 33 Minn. 12, 21 N. W. 744, 53 Am. Rep. 1; Perkins v. Swank, 43 Miss. 349; Quinby v. Manhattan Cloth & Paper Co., 24 N. J. Eq. 260; Rogers v. Brokaw, 25 N. J. Eq. 496, affd. 27 N. J. Eq. 563; Bishop v. Bishop, 11 N. Y. 123, 62 Am. Dec. 68, as to hop poles; Voorhees v. McGinnis, 48 N. Y. 278; Potter v. Cromwell, 40 N. Y. 287, 100 Am. Dec. 485; McRea v. Central Nat. Bank, 66 N. Y. 489; Sullivan v. Toole, 26 Hun (N. Y.) 203; Hart v. Sheldon, 34 Hun (N. Y.) 38; Foote v. Gooch, 96 N. Car. 265, 1 S. E. 525, 60 Am. Rep. 411; In re Morris' Appeal, 88 Pa. St. 368; Harmony Building Assn. v. Berger, 99 Pa. St. 320; Kisterbock v. Lanning (Pa.), 7 Atl. 596; Padgett v. Cleveland, 33 S. Car. 339, 11 S. E. 1069; Hill v. Wentworth, 28 Vt. 428; Sweetzer v. Jones, 35 Vt. 317, 82 Am. Dec. 639; Taylor v. Collins, 51 Wis. 123, 8 N. W. 22.

[86] Choate v. Kimball, 56 Ark. 55, 19 S. W. 108; The Ottumwa Mill Co. v. Hawley, 44 Iowa 57, 24 Am. Rep. 719n; Hopewell Mills v. Taunton Sav. Bank, 150 Mass. 519, 23 N. E. 327, 6 L. R. A. 249, 15 Am. St. 235; Southbridge Sav. Bank v. Exeter Machine Works, 127 Mass. 542; Turner v. Wentworth, 119 Mass. 459; Allen v. Mooney, 130 Mass. 155; Smith Paper Co. v. Servin, 130 Mass. 511; Hubbell v. East Cambridge Five Cents Sav. Bank, 132 Mass. 447, 42 Am. Rep. 446; Maguire v. Park, 140 Mass. 21, 1 N. E. 750; McRea v. Central Nat. Bank, 66 N. Y. 489; Cooper v. Harvey, 62 Hun (N. Y.) 618, 41 N. Y. St. 594, 16 N. Y. S. 660; Hill v. Bank, 97 U. S. 450, 24 L. ed. 1051.

[87] Equitable Trust Co. v. Christ, 2 Flipp. (U. S.) 599.

[88] Hellawell v. Eastwood, 6 Exch. 295; Clarke v. Crownshaw, 3 B. & Ad. 804.

is not by any means conclusive.[89] If a person who takes a mortgage upon real property has actual notice of a mortgage upon chattels which are afterward annexed to the mortgaged realty, he cannot hold such annexed chattels under his mortgage as against the holder of the chattel mortgage.[90] If the real estate is subject to a mortgage when chattels are annexed to it, which are not at the time subject to any personal mortgage, or to any equitable agreement for their subsequent removal, the chattels, if of the nature to become fixtures, become so immediately upon being attached to the land; and any chattel mortgage or agreement that the articles should be considered personal property will usually have no effect. The chattels once having been annexed to the realty and become bound by a mortgage of the realty cannot be dissevered except with the consent of the mortgagee.[91] But by agreement of the persons interested, the character of personalty may be reimpressed upon chattels after this has been lost by annexation to the land so that the chattels have become fixtures, but have not been so incorporated with the realty as to lose their identity provided the reconversion of the fixtures into personalty does not interfere with the rights of creditors or third persons.[92] The parties to a mortgage may by agreement at the time of the execution of a mortgage determine that such articles upon the

[89] Tibbetts v. Moore, 23 Cal. 208; Eaves v. Estes, 10 Kans. 314, 15 Am. Rep. 345; Sword v. Low, 122 Ill. 487, 13 N. E. 826; Binkley v. Forkner, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33; Miller v. Wilson, 71 Iowa 610, 33 N. W. 128; First Nat. Bank v. Elmore, 52 Iowa 541, 3 N. W. 547; Carpenter v. Allen, 150 Mass. 281, 22 N. E. 900; Carpenter v. Walker, 140 Mass. 416, 5 N. E. 160; Burrill v. Wilcox Lumber Co., 65 Mich. 571, 32 N. W. 824; Arlington Mill & Elevator Co. v. Yates, 57 Nebr. 286, 77 N. W. 677; Edwards & Bradford Lumber Co. v. Rank, 57 Nebr. 323, 77 N. W. 765, 73 Am. St. 514; Hart v. Sheldon, 34 Hun (N. Y.) 38; Henry v. Von Brandenstein, 12 Daly (N. Y.) 480; Ford v. Cobb, 20 N. Y. 344; Sheldon v. Edwards, 35 N. Y. 279; Case Mfg. Co. v. Garver, 45 Ohio St. 289, 13 N. E. 493; United States v. New Orleans Railroad, 12 Wall. (U. S.) 362, 20 L. ed. 434.

[90] "On the question of notice, it is undoubtedly true that, so far as the plaintiff was dealing with real estate in taking her mortgage, she was not affected with notice by the filing of the chattel mortgage. As the court said at the circuit, as the purchaser of real estate she need only to inquire at the county clerk's office * * * in search of chattel mortgages. * * * Upon the facts in this case the filing of the defendant's chattel mortgage was notice to the plaintiff that the lien existed." Rowland v. West, 17 N. Y. S. 330.

[91] Vanderpoel v. Van Allen, 10 Barb. (N. Y.) 157; United States v. New Orleans Railroad, 12 Wall. (U. S.) 362, 20 L. ed. 434.

[92] Tyson v. Post, 108 N. Y. 217, 15 N. E. 316, 2 Am. St. 409.

mortgaged land shall not be covered by the mortgage as fixtures, and the agreement will control even if, as a matter of law, such articles will generally pass with the land as fixtures.[93]

It has been held that the intention of the parties as to fixtures may be shown by evidence of other transactions between the parties.[94] The intention may be shown by parol as such an agreement does not relate to an interest in the land.[95] But after the fixture has once been attached to the realty its personal character cannot be established by parol evidence as against the mortgagee of the land.[96] The general rules relating to the mortgagee's interest in fixtures upon the mortgaged premises do not apply to fixtures hired by the mortgagor and annexed to the premises for his use.[97] Buildings erected on the mortgaged premises by the mortgagor are annexed to the freehold and cannot ordinarily be removed by him or by any one under his authority, or without his authority, while the debt remains unpaid.[98] When, however, the building is erected merely for temporary use, and it is apparent that there was an intention that it should not become attached to the land, the mortgagee of the land will acquire no interest in it, although placed there by the mortgagor.[99]

A mortgage of a house passes the fixtures in and about the house, such as presses, cupboards, movable partitions, grates, ranges, window blinds, door keys, and furnaces that are so

[93] Richards v. Gilbert, 116 Ga. 382, 42 S. E. 715; Foster v. Prentiss, 75 Maine 279; Elliott v. Wright, 30 Mo. App. 217; Ford v. Cobb, 20 N. Y. 344; Sisson v. Hibbard, 75 N. Y. 542; Tyson v. Post, 108 N. Y. 217, 15 N. E. 316, 2 Am. St. 409.

[94] Fortman v. Goepper, 14 Ohio St. 558.

[95] Broaddus v. Smith, 121 Ala. 335, 26 So. 34, 77 Am. St. 61; Tyson v. Post, 108 N. Y. 217, 15 N. E. 316, 2 Am. St. 409; Dubois v. Kelly, 10 Barb. (N. Y.) 496.

[96] Gibbs v. Estey, 15 Gray (Mass.) 587; Noble v. Bosworth, 19 Pick. (Mass.) 314; Western N. Car. R. Co. v. Deal, 90 N. Car. 110.

[97] Hill v. Sewald, 53 Pa. St. 271, 91 Am. Dec. 209; Stell v. Paschal, 41 Tex. 640.

[98] Dorr v. Dudderar, 88 Ill. 107; Matzon v. Griffin, 78 Ill. 477; Wood v. Whelen, 93 Ill. 153; Baird v. Jackson, 98 Ill. 78; New Orleans Nat. Bank v. Raymond, 29 La. Ann. 355, 29 Am. Rep. 335; Cole v. Stewart, 11 Cush. (Mass.) 181; Winslow v. Merchants' Ins. Co., 4 Metc. (Mass.) 306, 38 Am. Dec. 368; Butler v. Page, 7 Metc. (Mass.) 40, 39 Am. Dec. 757; Guernsey v. Wilson, 134 Mass. 482; Tarbell v. Page, 155 Mass. 256, 29 N. E. 585; Burnside v. Twitchell, 43 N. H. 390; Sweetzer v. Jones, 35 Vt. 317, 82 Am. Dec. 639; Frankland v. Moulton, 5 Wis. 1.

[99] Kelly v. Austin, 46 Ill. 156, 92 Am. Dec. 243.

constructed that they cannot be removed from the house without injury.[1] But articles of furniture are not fixtures although attached to the building.[2] Trees and shrubs, however, planted in a nursery garden, for the temporary purpose of cultivation and growth until they are fit for market, and then to be taken up and sold, have been held to pass by a mortgage of the land, so that neither the mortgagor nor his assignee nor creditors can remove them as personal property.[3] A fixture annexed to the land before the execution of the mortgage will pass by the mortgage without any special mention of it, and even without any general description of it, or other evidence of intention to include it.[4] Chattels attached to the realty after the execution of a mortgage to it become a part of the mortgage security if they are attached for the permanent improvement of the estate and not for a temporary purpose and are adapted to the use to which the realty is devoted;[5] or if they are such as are regarded as

[1] Longstaff v. Meagoe, 2 Ad. & El. 167; Colegrave v. Dias Santos, 2 B. & C. 76; Liford's Case, 11 Coke 46; Stockwell v. Campbell, 39 Conn. 362, 12 Am. Rep. 393; Snedeker v. Warring, 12 N. Y. 170; Main v. Schwarzwaelder, 4 E. D. Smith (N. Y.) 273. Whether a portable furnace set in brick is a part in realty, is a question of fact, or of mixed law and fact. Allen v. Mooney, 130 Mass. 155; Turner v. Wentworth, 119 Mass. 459; Towne v. Fiske, 127 Mass. 125, 34 Am. Rep. 353; Maguire v. Park, 140 Mass. 21, 1 N. E. 750; Rahway Sav. Inst. v. Irving St. Baptist Church, 36 N. J. Eq. 61.

[2] Guthrie v. Jones, 108 Mass. 191; Towne v. Fiske, 127 Mass. 125, 34 Am. Rep. 353; Wall v. Hinds, 4 Gray (Mass.) 256, 64 Am. Dec. 64; Capehart v. Foster, 61 Minn. 132, 63 N. W. 257, 52 Am. St. 582; Shaw v. Lenke, 1 Daly (N. Y.) 487; McKeage v. Hanover Fire Ins. Co., 81 N. Y. 38, 37 Am. Rep. 471, affg. 16 Hun (N. Y.) 239; Lawrence v. Kemp, 1 Duer (N. Y.) 363; Vaughen v. Haldeman, 33 Pa. St. 522, 75 Am. Dec. 622; Montague v. Dent, 10 Rich. L. (S. Car.) 135, 67 Am. Dec. 572; Hall v. Law Guarantee & Trust Soc., 22 Wash. 305, 60 Pac. 643, 79 Am. St. 935.

[3] Maples v. Millon, 31 Conn. 598; Adams v. Beadle, 47 Iowa 439, 29 Am. Rep. 487; Bank of Lansingburgh v. Crary, 1 Barb. (N. Y.) 542; King v. Wilcomb, 7 Barb. (N. Y.) 263.

[4] Hamilton v. Huntley, 78 Ind. 521, 41 Am. Rep. 593; Union Bank v. Emerson, 15 Mass. 159; Southbridge Sav. Bank v. Stevens Tool Co., 130 Mass. 547; Hunt v. Mullanphy, 1 Mo. 508, 14 Am. Dec. 300. (A kettle annexed in like manner to the freehold was held not to be covered by the mortgage, on the ground that it was not permanently annexed.).

[5] Ex parte Belcher, 4 Dea. & Chit. 703; Hubbard v. Bagshaw, 4 Sim. 326; Ex parte Reynal, 2 Mont. Dea. & DeG. 443; Tibbetts v. Moore, 23 Cal. 208; Williams v. Chicago Exhibition Co., 188 Ill. 19, 58 N. E. 611; Wood v. Whelen, 93 Ill. 153; Eaves v. Estes, 10 Kans. 314, 15 Am. Rep. 345; Bank of Louisville v. Baumiester, 87 Ky. 6, 9 Ky. L. 845, 7 S. W. 170; Wight v. Gray, 73 Maine 297; Winslow v. Merchants' Ins. Co., 4 Metc. (Mass.) 306, 38 Am. Dec. 368; Dutro v. Kennedy, 9 Mont. 101, 22 Pac. 763; Snedeker v. Warring, 12 N. Y. 170; Cooper v. Harvey, 62 Hun (N. Y.) 618, 41 N. Y. St. 594, 16 N. Y. S. 660; Gardner v. Finley,

permanent in their nature;[6] or, generally, if they are so fastened or attached to the realty that the removal of them would be an injury to it.[7] A mortgagor left in possession, who improves the premises by the erection of new work, or by the introduction of new machinery intended to be permanent, is not at liberty to impair the increased security by removing them.[8] The same rule applies to articles annexed to the premises by a subsequent grantee or vendee in possession under an executory contract to purchase.[9]

§ 4690. Effect of chattel mortgage in determining whether fixtures covered.—There are two well-defined and contrary views as to the effect of a chattel mortgage upon personal articles which are attached to the mortgaged realty. Although a chattel mortgage of things about to be annexed to the realty is a contract, express or implied, between the owner of the chattels and the owner of the realty that these things shall retain their chattel character after their annexation to the realty and may be removed if necessary to enforce the chattel mortgage, yet according to one line of authorities such things even if they can be removed without injury to the realty are a part of the security of the mortgagee of the realty, and cannot be removed without his consent.[10] The contrary doctrine that chattels permanently annexed to the mortgaged realty can, by agreement with the mortgagor or by the

19 Barb. (N. Y.) 317; Rice v. Dewey, 54 Barb. (N. Y.) 455; Sullivan v. Toole, 26 Hun (N. Y.) 203; Phœnix Mills v. Miller, 42 Hun (N. Y.) 654, 4 N. Y. St. 787; McFadden v. Allen, 134 N. Y. 489, 32 N. E. 21, 19 L. R. A. 446; Bond v. Coke, 71 N. Car. 97; Foote v. Gooch, 96 N. Car. 265, 1 S. E. 525, 60 Am. Rep. 411; Roberts v. Dauphin Deposit Bank, 19 Pa. St. 71; Davenport v. Shants, 43 Vt. 546.

[6] Coleman v. Sterns Mfg. Co., 38 Mich. 30.

[7] Clore v. Lambert, 78 Ky. 224.

[8] Foote v. Gooch, 96 N. Car. 265, 1 S. E. 525, 60 Am. Rep. 411.

[9] Ogden v. Stock, 34 Ill. 522, 85 Am. Dec. 332; Poor v. Oakman, 104 Mass. 309; Eastman v. Foster, 8 Metc. (Mass.) 19; Lynde v. Rowe, 12 Allen (Mass.) 100; Cooper v. Adams, 6 Cush. (Mass.) 87; Glidden v. Bennett, 43 N. H. 306; McFadden v. Allen, 134 N. Y. 489, 32 N. E. 21, 19 L. R. A. 446.

[10] Watertown Steam Engine Co. v. Davis, 5 Houst. (Del.) 192; Evans v. Kister, 92 Fed. 828, 35 C. C. A. 28; Phœnix I. W. Co. v. New York Sec. & Tr. Co., 83 Fed. 757, 28 C. C. A. 76; Beeler v. C. C. Mercantile Co., 8 Idaho 644, 70 Pac. 943, 60 L. R. A. 283; Fifield v. Farmers' Nat. Bank, 148 Ill. 163, 35 N. E. 802, 39 Am. St. 166; Bass Foundry & Machine Works v. Gallentine, 99 Ind. 525; Hamilton v. Huntley, 78 Ind. 521, 41 Am. Rep. 593; Miller v. Walson, 71 Iowa 610, 33 N. W. 128; Stillman v. Flenniken, 58 Iowa 450, 10 N. W. 842, 43 Am. Rep. 120; Hawkins v. Hersey, 86 Maine 394, 30 Atl. 14; Ekstrom v. Hall, 90 Maine 186, 38 Atl. 106; Wight v. Gray, 73 Maine 297; Clary v. Owen, 15 Gray (Mass.) 522; Winslow v. Merchants' Ins. Co.,

implied agreement arising from the chattel mortgage, be made to preserve their character as personalty, as against the mortgagee of the realty, obtains in several states.[11] But to preserve the personal character of fixtures as against an existing mortgage of the realty, an agreement that the fixtures may be removed should be made prior to their annexation to the realty.[12] When such mortgaged personal property is attached to the mortgaged realty, the mortgagor has only an equity of redemption therein, to which the mortgage on the realty at once attaches.[13] When a mortgage of real estate is made after chattels are annexed thereto under a chattel mortgage, or under an agreement that they shall retain their personal character, such mortgagee of the realty having no notice of such chattel mortgage or agreement is not bound thereby. The chattel mortgage is not of itself notice to such subsequent mortgagee of the realty.[14] There are some decisions, however, which hold in such a case that the chattel character of

4 Metc. (Mass.) 306, 38 Am. Dec. 368; Meagher v. Hayes, 152 Mass. 228, 25 N. E. 105, 23 Am. St. 819; Hunt v. Bay State Iron Co., 97 Mass. 279; Pierce v. George, 108 Mass. 78, 11 Am. Rep. 310; McConnell v. Blood, 123 Mass. 47, 25 Am. Rep. 12; Smith Paper Co. v. Servin, 130 Mass. 511; Southbridge Sav. Bank v. Mason, 147 Mass. 500, 18 N. E. 406, 1 L. R. A. 350; McFadden v. Allen, 134 N. Y. 489, 32 N. E. 21, 19 L. R. A. 446; Porter v. Pittsburg Bessemer Steel Co., 120 U. S. 649, 30 L. ed. 830, 7 Sup. Ct. 741; Frankland v. Moulton, 5 Wis. 1; Fuller-Warren Co. v. Harter, 110 Wis. 80, 85 N. W. 698, 53 L. R. A. 603, 84 Am. St. 867; Kendall Mfg. Co. v. Rundel, 78 Wis. 150, 47 N. W. 364; Smith v. Waggoner, 50 Wis. 155, 6 N. W. 568; Taylor v. Collins, 51 Wis. 123, 8 N. W. 22; Homestead Land Co. v. Becker, 96 Wis. 206, 71 N. W. 117; Gunderson v. Swarthout, 104 Wis. 186, 80 N. W. 465, 76 Am. St. 860.

[11] Miller v. Griffin, 102 Ala. 610, 15 So. 238; Warren v. Liddell, 110 Ala. 232, 20 So. 89; Broadus v. Smith, 121 Ala. 335, 26 So. 34, 77 Am. St. 61; Miller v. Walson, 71 Iowa 610, 33 N. W. 128.

[12] First Nat. Bank v. Elmore, 52 Iowa 541, 3 N. W. 547; Sowden v. Craig, 26 Iowa 156, 96 Am. Dec. 125; Davenport v. Shants, 43 Vt. 546.

[13] Sword v. Low, 122 Ill. 487, 13 N. E. 826; Eaves v. Estes, 10 Kans. 314, 15 Am. Rep. 345; Campbell v. Roddy, 44 N. J. Eq. 244, 14 Atl. 279, 6 Am. St. 889; Ford v. Cobb, 20 N. Y. 344; Sisson v. Hibbard, 75 N. Y. 542; Tifft v. Horton, 53 N. Y. 377, 13 Am. Rep. 537; Hurxthal's Exrx. v. Hurxthal's Heirs, 45 W. Va. 584, 32 S. E. 237.

[14] Seedhouse v. Broward, 34 Fla. 509, 16 So. 425; Cunningham v. Cureton, 96 Ga. 489, 23 S. E. 420; Matzon v. Griffin, 78 Ill. 477; Wood v. Whelen, 93 Ill. 153; Baird v. Jackson, 98 Ill. 78; New Orleans Nat. Bank v. Raymond, 29 La. Ann. 355, 29 Am. Rep. 335; Wight v. Gray, 73 Maine 297; Hawkins v. Hersey, 86 Maine 394, 30 Atl. 14; Southbridge Sav. Bank, 150 Mass. 519, 23 N. E. 327, Mass. 542; Southbridge Sav. Bank v. Stevens Tool Co., 130 Mass. 547; Hunt v. Bay State Iron Co., 97 Mass. 279; Hopewell Mills v. Taunton Sav. Bank, 150 Mass. 519, 23 N. E. 327, 6 L. R. A. 249, 15 Am. St. 235; Thompson v. Vinton, 121 Mass. 139; Carpenter v. Allen, 150 Mass. 281, 22 N. E. 900; Carpenter v. Walker, 140 Mass. 416; 5 N. E. 160; Wickes

fixtures may be retained even against a subsequent mortgagee of the realty without notice.[15] A subsequent purchaser or mortgagee of the realty knowing at the time of his purchase or mortgage of the existence of a chattel mortgage upon the fixtures, or of an agreement by the owner that the fixtures might be removed, may be regarded as having taken his deed or mortgage subject to such chattel mortgage or agreement.[16] Fixtures annexed to the freehold by a tenant for the purposes of trade or manufacture may be removed by him at the expiration of his term, whenever the removal of them is not contrary to any prevailing practice and the articles can be removed without causing material injury to the freehold.[17]

§ 4691. **Accessions to mortgaged property.**—At common law, nothing can be mortgaged that does not belong to the mortgagor at the time the mortgage is made.[18] The mortgagor must have a present property, either actual or potential.[19] Therefore at law although a mortgage in terms is made to cover after-acquired property, yet after such property is acquired, an execu-

v. Hill, 115 Mich. 333, 73 N. W. 375; Watson v. Alberts, 120 Mich. 508, 79 N. W. 1048; Dutro v. Kennedy, 9 Mont. 101, 22 Pac. 763; Tibbetts v. Horne, 65 N. H. 242, 23 Atl. 145, 15 L. R. A. 56, 23 Am. St. 31; Burnside v. Twitchell, 43 N. H. 390; Bond v. Coke, 71 N. Car. 97; Foote v. Gooch, 96 N. Car. 265, 1 S. E. 529, 60 Am. Rep. 411; Brennan v. Whitaker, 15 Ohio St. 446; Davenport v. Shants, 43 Vt. 546; Sweetzer v. Jones, 35 Vt. 317, 82 Am. Dec. 639; Wade v. Donau Brewing Co., 10 Wash. 284, 38 Pac. 1009.

[15] Warren v. Liddell, 110 Ala. 232, 20 So. 89; Adams Machine Co. v. Interstate Bldg. Assn., 119 Ala. 97, 24 So. 857; Case v. L'Oeble, 84 Fed. 582; Richardson v. Copeland, 6 Gray (Mass.) 536, 66 Am. Dec. 424; Deane v. Hutchinson, 40 N. J. Eq. 83, 2 Atl. 292; Hirsch v. Graves Elevator Co., 24 Misc. (N. Y.) 472, 53 N. Y. S. 664; Brennan v. Whitaker, 15 Ohio St. 446; Case Mfg. Co. v. Garver, 45 Ohio St. 289, 13 N. E. 493.

[16] Greither v. Alexander, 15 Iowa 470; Warner v. Kenning, 25 Minn. 173; Rowland v. West, 62 Hun (N. Y.) 583, 43 N. Y. St. 698, 17 N. Y. S. 330; Fryatt v. Sullivan Co., 5 Hill (N. Y.) 116, affd. 7 Hill (N. Y.) 529; Waller v. Bowling, 108 N. Car. 289, 12 S. E. 990, 12 L. R. A. 261; Simons v. Pierce, 16 Ohio St. 215; San Antonio Brewing Assn. v. Arctic Ice Mach. Mfg. Co., 81 Tex. 99, 16 S. W. 797.

[17] Trappes v. Harter, 3 Tyrw. 603; Coombs v. Beaumont, 5 Born & Ad. 72; Holbrook v. Chamberlin, 116 Mass. 155, 17 Am. Rep. 146; Gutherie v. Jones, 108 Mass. 191; McConnell v. Blood, 123 Mass. 47, 25 Am. Rep. 12; Polle v. Rouse, 73 Miss. 713, 19 So. 481.

[18] Lunn v. Thornton, 1 Com. B. 379; Ross v. Wilson, 7 Bush (Ky.) 29; Amonett v. Amis, 16 La. Ann. 225; Moody v. Wright, 13 Metc. (Mass.) 17, 46 Am. Dec. 706; Jones v. Richardson, 10 Metc. (Mass.) 481; Pierce v. Emery, 32 N. H. 484. See Coe v. Columbus &c. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

[19] Looker v. Peckwell, 38 N. J. L. 253, affd. 39 N. J. L. 134; Smithurst v. Edmunds, 14 N. J. Eq. 408.

tion levied upon it as the property of the mortgagor, or a sale by him, will prevail over the mortgage.[20] But the rule is different in equity,[21] and it is held that where the parties intend by their contract to create a positive lien upon real property whether it is then owned by the mortgagor or not, such lien attaches in equity as a charge upon the property as soon as the mortgagor acquires title thereto.[22]

§ 4692. **Products of the soil.**—Upon the principle of accessions to property a valid mortgage may be made by an owner or lessee of land of a crop to be raised by him the coming season or of crops to be grown in a certain period.[23] Such mortgage may be made before the crop is raised,[24] and even before the seed has been sown or planted.[25] But it has been held that a landlord has no such interest in or title to, crops grown on rented lands as can be made the subject of a valid mortgage.[26] A party sowing certain land upon shares with the owner may, after sowing such grain, make a valid mortgage of his interest in the crop;[27] but such mortgage will only cover his share.[28] The mortgage in

[20] Looker v. Peckwell, 38 N. J. L. 253, affd. 39 N. J. L. 134. So, it is said generally that a provision that the mortgage shall cover after-acquired property can be given effect only in equity. Knickerbocker Trust Co. v. Carteret Steel Co., 79 N. J. Eq. 501, 82 Atl. 146.

[21] Langton v. Horton, 1 Hare 549; Little Rock & Ft. S. R. Co. v. Page, 35 Ark. 304; Frank v. Hicks, 4 Wyo. 502, 35 Pac. 475, 1025.

[22] Jarvis v. State Bank, 22 Colo. 309, 45 Pac. 505, 55 Am. St. 129; Smithurst v. Edmunds, 14 N. J. Eq. 408; Mitchell v. Winslow, 2 Story (U. S.) 630, Fed. Cas. No. 9673.

[23] Lehman v. Marshall, 47 Ala. 362; Jones v. Webster, 48 Ala. 109; Arques v. Wasson, 51 Cal. 620, 21 Am. Rep. 718; Van Hoozer v. Cory, 34 Barb. (N. Y.) 9; Stover v. Eyeleshimer, 46 Barb. (N. Y.) 84, affd. 42 N. Y. 620, 4 Abb. Dec. (N. Y.) 309. See contra at law, Milliman v. Neher, 20 Barb. (N. Y.) 37. See also, Booker v. Jones' Admx., 55 Ala. 266; Hutchinson v. Ford, 9 Bush. (Ky.) 318, 15 Am. Rep. 711; Barnard v. Eaton, 2 Cush. (Mass.), 294; Comstock v. Scales, 7 Wis. 159. Under a mortgage of a greenhouse and nursery together, with shrubs and plants belonging to the same, new plants and shrubs, growth of cuttings from those growing at the time of the mortgage, pass to the mortgagee by accession. Bryant v. Pennell, 61 Maine 108, 14 Am. Rep. 550.

[24] Robinson v. Mauldin, 11 Ala. 977; Grand Forks Nat. Bank v. Minneapolis & N. Elevator Co., 6 Dak. 357, 43 N. W. 806; Everman v. Robb, 52 Miss. 653, 24 Am. Rep. 682; Ellett v. Butt, 1 Woods (U. S.) 214, Fed. Cas. No. 4384, affd. 19 Wall. (U. S.) 544, 22 L. ed. 183.

[25] Shows v. Brantley, 127 Ala. 352, 28 So. 716; Woods v. Rose, 135 Ala. 297, 33 So. 41; Apperson v. Moore, 30 Ark. 56, 21 Am. Rep. 170; Sillers v. Lester, 48 Miss. 513; Ellett v. Butt, 1 Woods (U. S.) 214, Fed. Cas. No. 4384, affd. 19 Wall. (U. S.) 544, 22 L. ed. 183; Comstock v. Scales, 7 Wis. 159.

[26] Broughton v. Powell, 52 Ala. 123.

[27] Shuart v. Taylor, 7 How. Prac. (N. Y.) 251.

[28] McGee v. Fitzer, 37 Tex. 27.

equity attaches as soon as the crop comes into existence.[29] A mortgage of a growing crop when such crop is considered an interest in real estate should be recorded as a mortgage of real property.[30] When properly recorded, one who purchases and removes the crop, without the knowledge of the mortgagee, takes it subject to the rights of the mortgagee, who may recover the property if it can be identified and if not, he may recover the value of it from such purchaser.[31] It has been held that the mortgagee is entitled to the possession of the crop when it is matured and gathered, and may then maintain an action to recover its value.[32] Such a mortgage passes a mere equitable interest while the crop is growing, but after severance the equitable interest ripens into a legal title.[33]

§ 4693. After-acquired property.—A conveyance of what does not exist does not operate as a present transfer in equity any more than it does in law. The difference is merely that at law, the conveyance, having nothing to operate upon is void; while in equity what is in form a conveyance operates, by way of present contract, to take effect and attach to the subject of it as soon as it comes into being; the agreement to convey then ripens into an actual transfer.[34] Equity considers as done that which the mortgagor has distinctly agreed to do, and is in consequence bound to do. Upon every acquisition of property within the description contained in the mortgage, a decree might be obtained that the mortgagor should execute a mortgage of such property; but instead of actually following out this troublesome process, equity

[29] Lehman, Durr & Co. v. Marshall, 47 Ala. 362; Apperson v. Moore, 30 Ark. 56, 21 Am. Rep. 170; Butt v. Ellett, 19 Wall. (U. S.) 544, 22 L. ed. 183.

[30] Butler v. Hill, 1 Baxt. (Tenn.) 375.

[31] Duke v. Strickland, 43 Ind. 494.

[32] Lehman, Durr & Co. v. Marshall, 47 Ala. 362; Adams v. Tanner, 5 Ala. 740; Robinson v. Mauldin, 11 Ala. 977..

[33] Mauldin v. Armistead, 14 Ala. 702.

[34] Wood v. Holly Mfg. Co., 100 Ala. 326, 13 So. 948, 46 Am. St. 56; Rust v. Electric L. Co., 124 Ala. 202, 27 So. 263; Christy v. Dana, 34 Cal. 548; Hubbard v. Mulligan, 13 Colo. App. 116, 57 Pac. 738; Moore v. Jaeger, 2 McAr. (O. C.) 465; Durant v. D'Auxy, 107 Ga. 456, 33 S. E. 478; Wender Blue Gem Coal Co. v. Louisville Property Co., 137 Ky. 339, 125 S. W. 732; Amonett v. Amis, 16 La. Ann. 225; Emerson v. European &c. R. Co., 67 Maine 387, 24 Am. Rep. 39; Brady v. Johnson, 75 Md. 445, 26 Atl. 49, 20 L. R. A. 737; Hickson Lumber Co. v. Gay Lumber Co., 150 N. Car. 281, 63 S. E. 1048; Mitchell v. Winslow, 2 Story (U. S.) 630, Fed. Cas. No. 9673.

treats the mortgage as already attaching to the newly-acquired property as it comes into the mortgagor's possession, or, in other words, considers that, of every article of property as acquired, there was an actual mortgage then executed in fulfilment of the mortgagor's contract.[35] The only question in such cases is whether or not the particular after-acquired property was intended to be covered by the mortgage.[36] A mortgage by a railroad company specifically covering after-acquired property is binding in equity upon real estate and personal property afterward purchased for the use of the road, as against the mortgagors' and all persons claiming under them, except purchasers for value and without notice; and especially will it bind such property as against claimants under a junior mortgage which by its terms is subject to the prior mortgage.[37] Such a mortgage covers property which the company may thereafter acquire although the

[35] In re Williamsburg Knitting Mill, 190 Fed. 871; Deshautel v. Parkins, 1 Mart. (N. S.) (La.) 547; Semple v. Scarborough, 44 La. Ann. 257, 10 So. 860; Peoples Trust Co. v. Schenck, 195 N. Y. 398, 88 N. E. 647; People's Trust Co. v. Schenck, 195 N. Y. 398, 88 N. E. 647; Stevens v. Watson, 45 How. Prac. (N. Y.) 104; Latta v. Catawba Electric Co., 146 N. Car. 285, 59 S. E. 1028; Cummings v. Consolidated Mineral Water Co., 27 R. I. 195, 61 Atl. 353; Dearing v. Jordan (Tex. Civ. App.), 130 S. W. 876.

[36] Omaha & N. W. R. Co. v. Wabash &c. R. Co., 108 Mo. 298, 18 S. W. 1101; Hickson Lumber Co. v. Gay Lumber Co., 150 N. Car. 281, 63 S. E. 1048.

[37] Mitchell v. Amador C. & M. Co., 75 Cal. 464, 17 Pac. 246; Parker v. New Orleans &c. R. Co., 33 Fed. 693, revd. 143 U. S. 42, 36 L. ed. 66, 12 Sup. Ct. 364; Frost v. Galesburg &c. R. Co., 167 Ill. 161, 47 N. E. 357; Beach v. Wakefield, 107 Iowa 567, 76 N. W. 688, 78 N. W. 197; Phillips v. Winslow, 18 B. Mon. (Ky.) 431, 68 Am. Dec. 729; Morrill v. Noyes, 56 Maine 458, 96 Am. Dec. 486; Howe v. Freeman, 14 Gray (Mass.) 566, revd. 24 How. (U. S.) 450, 16 L. ed. 749; Sillers v. Lester, 48 Miss. 513; Omaha & N. W. R. Co. v. Wabash &c. R. Co., 108 Mo. 298, 18 S. W. 1101; Benjamin v. Elmira &c. R. Co., 49 Barb. (N. Y.) 441, 54 N. Y. 675; Stevens v. Watson, 4 Abb. Dec. (N. Y.) 302; Seymour v. Canandaigua &c. R. Co., 25 Barb. (N. Y.) 284, 14 How. Prac. (N. Y.) 531; Hoyle v. Plattsburg & M. R. Co., 51 Barb. (N. Y.) 45, revd. 54 N. Y. 314, 13 Am. Rep. 595; Coopers v. Wolf, 15 Ohio St. 523; Philadelphia, Wilmington & Baltimore R. Co. v. Woelpper, 64 Pa. St. 366, 3 Am. Rep. 596; Mitchell v. Winslow, 2 Story (U. S.) 630, Fed. Cas. No. 9673; Dunham v. Cincinnati &c. R. Co., 1 Wall. (U. S.) 254, 17 L. ed. 584; Galveston, H. & H. R. Co. v. Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199; Calhoun v. Memphis &c. R. Co., 2 Flip. (U. S.) 442, Fed. Cas. No. 2309; Central Trust Co. v. Kneeland, 138 U. S. 414, 34 L. ed. 1014, 11 Sup. Ct. 357; Thompson v. White Water Valley R. Co., 132 U. S. 68, 33 L. ed. 256, 10 Sup. Ct. 29; Pennock v. Coe, 23 How. (U. S.) 117, 16 L. ed. 436; Pierce v. Milwaukee &c. R. Co., 24 Wis. 551, 1 Am. Rep. 203. A mortgage by a railroad company of "all the present and future to be acquired property of the company, including the right of way and land occupied, and all rails and other materials used therein or procured therefor," includes the rolling stock of the road. Pullan v. Cincinnati &c.

road was not built when the mortgage was given.[38] It attaches to the property as it comes into existence.[39] Even against a contractor, who has at his own expense finished a railroad under contract that he shall keep possession until he has been paid, a mortgage in such terms will pass the road afterward built and acquired.[40] After-acquired property may pass as an incident to the franchise and as an accession to the subject of the mortgage.[41] A mortgage by a railway company does not, however, by implication ordinarily cover property not essential to its business, unless it is specifically described or included by the terms of the mortgage.[42] But it has been held that any property connected with the use of its franchise, whether real or personal, either already or subsequently acquired, may be effectually mortgaged.[43] The authority of a company to bind its future acquisitions by mortgage is limited to such property as it has the power by law to acquire.[44] And any lands not embraced within the terms of such mortgage are not covered by it.[45] A mortgage on after-acquired property is subject to any lien there

R. Co., 4 Biss. (U. S.) 35, Fed. Cas. No. 11461.

[38] California Title Ins. &c. Co. v. Pauly, 111 Cal. 122, 43 Pac. 586; Parker v. New Orleans &c. R. Co., 33 Fed. 693, revd. 143 U. S. 42, 36 L. ed. 66, 12 Sup. Ct. 364; Hawkins v. Mercantile Trust & Deposit Co., 96 Ga. 580, 23 S. E. 498; Frost v. Galesburg &c. R. Co., 167 Ill. 161, 47 N. E. 357; Bell v. Chicago, St. Louis & New Orleans R. Co., 34 La. Ann. 785; Willink v. Morris &c. Banking Co., 4 N. J. Eq. 377; Calhoun v. Memphis &c. R. Co., 2 Flip. (U. S.) 442, Fed. Cas. No. 2309; Galveston, H. & H. R. Co. v. Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199.

[39] Boston Safe Deposit & Trust Co. v. Bankers' &c. Tel. Co., 36 Fed. 288, affd. 147 U. S. 431, 37 L. ed. 231, 13 Sup. Ct. 396.

[40] Dunham v. Cincinnati &c. R. Co., 1 Wall. (U. S.) 254, 17 L. ed. 584; Bear Lake and River Waterworks & Irr. Co. v. Garland, 164 U. S. 1, 41 L. ed. 327, 17 Sup. Ct. 7.

[41] Stevens v. Buffalo, Corning & N. Y. R. Co., 45 How. Pr. (N. Y.) 104. See Electric Lighting Co. v. Rust, 117 Ala. 680, 23 So. 751; Rowan v. Sharp's &c. Mfg. Co., 29 Conn. 282; Beack v. Wakefield, 107 Iowa 567, 76 N. W. 688, 78 N. W. 197; Pierce v. Emery, 32 N. H. 484; Chew v. Barnet, 11 Serg. & R. (Pa.) 389.

[42] A mortgage by a railroad company of its real estate, road, bridges, ferries, locomotives, engines, cars, and all other personal property belonging to it does not include canal boats run in connection with the road beyond its terminus. Parish v. Wheeler, 22 N. Y. 494; Shamokin Valley R. Co. v. Livermore, 47 Pa. 465, 86 Am. Dec. 552; Farmers' Loan & Trust Co. v. Commercial Bank, 11 Wis. 207.

[43] Raymond v. Clark, 46 Conn. 129; Coe v. Peacock, 14 Ohio St. 187. But for limitations on this doctrine in case of franchises and property essential thereto, see ante, §§ 4670, 4671; 1 Elliott Railroads (2d ed.), § 488.

[44] Meyer v. Johnston, 53 Ala. 237.

[45] Dinsmore v. Racine &c. R. Co., 12 Wis. 649. See Walsh v. Barton, 24 Ohio St. 28.

may be upon the property when acquired. The mortgage attaches to the property in the condition in which it comes into the mortgagor's hands. If it be at that time already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time.[46] A mechanic's lien for work done and materials furnished on such after-acquired property takes precedence of the mortgage.[47] And property subsequently acquired under a conditional sale comes under the mortgage subject to the terms of such sale.[48] A mortgage may be made of the future net earnings of a railroad company to secure the payment of interest upon its construction bonds.[49] A mortgage by a railroad company of its road and franchise, as security for debt, does not convey its corporate existence or its general corporate powers but only the franchise necessary to make the conveyance beneficial to the grantees, and to enable them to maintain and manage the road, and receive the profits to their own use.[50]

[46] General Electric Co. v. Transit Equipment Co., 57 N. J. Eq. 460, 42 Atl. 101; Bear Lake and River Waterworks & Irrigating Co. v. Garland, 164 U. S. 1, 41 L. ed. 327, 17 Sup. Ct. 7; Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 339.

[47] Jarvis v. State Bank, 22 Colo. 309, 45 Pac. 505, 55 Am. St. 129; Williamson v. New Jersey, S. R. Co., 28 N. J. Eq. 277, revd. 29 N. J. Eq. 311.

[48] Taylor v. Burlington, Cedar Rapids & Minnesota R. Co., 11 West Jur. 337; Haven v. Emery, 33 N. H. 66.

[49] Jessup v. Bridge, 11 Iowa 572, 79 Am. Dec. 513; Dunham v. Isett, 15 Iowa 284; Farmers' Loan & Trust Co. v. Cary, 13 Wis. 110.

[50] Meyer v. Johnston, 53 Ala. 237; Eldridge v. Smith, 34 Vt. 484; Miller v. Rutland &c. R. Co., 36 Vt. 452. See Article in 19 Am. Law Rev. 440. And see generally 1 Elliott R. R. (2d ed.), §§ 488-490, 495-498.

CHAPTER CXLI.

RESPECTIVE RIGHTS AND LIABILITIES OF PARTIES.

A. Mortgagor's Rights and Liabilities.

§ 4700. In general.
4701. Liability of equity of redemption to attachment and execution.
4702. Right to possession.
4703. Rights to rents and profits.
4704. Remedies against mortgagee.
4705. Right to convey equity of redemption.
4706. Personal liability.
4707. After-acquired title and improvements.
4708. Waste by mortgagor.
4709. Right to emblements.
4710. Right to redeem.

B. Mortgagee's Rights and Liabilities.

§ 4711. In general.
4712. Nature of mortgagee's interest.
4713. Right to possession.
4714. Accounting.
4715. Foreclosure.

C. Rights and Liabilities of Purchaser.

4716. Purchase subject to mortgage.
4717. Assumption of mortgage by purchaser.
4718. Personal liability of purchaser.

A. Mortgagor's Rights and Liabilities.

§ 4700. In general.—The owner of the equity of redemption is entitled to possession as against every one except the mortgagee and those claiming under him, and may, as against any others, maintain a real action to recover possession.[1] Against all other persons he has the same rights respecting the mortgaged premises that he ever had.[2] He may, so far as his interest goes, deal with it in every respect as the owner. He may devise it, sell it or lease it, or make any contract in respect to it.[3] His conveyance is so far a conveyance of the land that the covenants real are annexed to it, and pass with it to the

[1] Duval's Heirs v. McLoskey, 1 Ala. 708; Hall v. Lance, 25 Ill. 277; Huckins v. Straw, 34 Maine 166; Stinson v. Ross, 51 Maine 556, 81 Am. Dec. 591; Bird v. Decker, 64 Maine 550; Ellison v. Daniels, 11 N. H. 274.

[2] Wilkins v. French, 20 Maine 111; Delano v. Smith, 206 Mass. 365, 92 N. E. 500, 30 L. R. A. (N. S.) 474n; Orr v. Hadley, 36 N. H. 575.

[3] Grigg v. Bank, 59 Ala. 311; Chamberlain v. Thompson, 10 Conn. 243, 26 Am. Dec. 390; Bartlett v. Borden, 13 Bush (Ky.) 45; Kennett v. Plummer, 28 Mo. 142.

grantee and his assigns.[4] The wife of a mortgagor is entitled to dower, and the husband of a mortgagor to curtesy, in the mortgaged premises. The equity of redemption is subject to attachment and sale upon execution by the mortgagor's creditors.[5] He has the remedies of an owner as against every one, except the mortgagee, who interferes with his possession or enjoyment of the land, and may maintain an action for redemption.[6] So long as the mortgagor remains in possession, and does not commit waste, he may lawfully dispose of the products of the land.[7] He may recover damage for waste committed by a stranger in cutting and removing trees and such recovery is a bar to a subsequent suit by the mortgagee.[8] He may recover for any injury to the property.[9] As against the mortgagee he is entitled to receive the rents and profits of the mortgaged land, and to take the emblements, without being liable to account. The mortgagee has the remedies of an owner for the purpose of enforcing his lien against the mortgagor; but except as to such remedies, and as to all persons but the mortgagee, a mortgagor in possession is to be regarded and treated as the owner of the estate, subject merely to the lien or charge.[10] The legal title passes by the mortgage merely for the purpose of giving the mortgagee the full benefit of his security.[11] He may recover possession of the land in an action of ejectment from a stranger who has entered without right, and he may recover damages for injuries to his possession by such wrongdoer.[12]

[4] White v. Whitney, 3 Metc. (Mass.) 81.

[5] Coggswell v. Warren, 1 Curt. (U. S.) 223, Fed. Cas. No. 2958.

[6] Denby v. Mellgrew, 58 Ala. 147; Murray v. Blackledge, 71 N. Car 492; Farmer v. Daniel, 82 N. Car. 152.

[7] Kimball v. Lewiston Steam Mill Co., 55 Maine 494.

[8] Hamilton v. Griffin, 123 Ala. 600, 26 So. 243; Abney v. Austin, 6 Ill. App. 49; Bird v. Decker, 64 Maine 550.

[9] Watkins v. Kaolin Mfg. Co., 131 N. Car. 536, 42 S. E. 983, 60 L. R. A. 617.

[10] Greer v. Turner, 36 Ark. 17; Primeau v. Granfield, 184 ed. 480; Clark v. Reyburn, 1 Kans. 281; Willington v. Gale, 7 Mass. 138; Taylor v. Porter, 7 Mass. 355; Goodwin v. Richardson, 11 Mass. 469; Snow v. Stevens, 15 Mass. 278; Eaton v. Whiting, 3 Pick. (Mass.) 484; Blanchard v. Brooks, 12 Pick. (Mass.) 47; Fay v. Cheney, 14 Pick. (Mass.) 399; Collins v. Torry, 7 Johns. (N. Y.) 278, 5 Am. Dec. 273.

[11] Oldham v. Pfleger, 84 Ill. 102; Finlon v. Clark, 118 Ill. 32, 7 N. E. 475; Taylor v. Adams, 115 Ill. 570, 4 N. E. 837; Barrett v. Hinckley, 124 Ill. 32, 14 N. E. 863, 7 Am. St. 331; Bartlett v. Borden, 13 Bush (Ky.) 45; Glass v. Ellison, 9 N. H. 69.

[12] Bartlett v. Borden, 13 Bush (Ky.) 45.

Some of the rules stated in this section, and in other parts of this chapter as well, may not obtain in all jurisdictions, for, as will be shown in a subsequent section, there is a difference in the doctrine as to title or right to possession in different states. But it is believed that the propositions above stated are the law in most jurisdictions where it is not affected by statute.

§ 4701. Liability of equity of redemption to attachment and execution.—The mortgagor's equity of redemption may be seized upon execution by a third person, or even by the mortgagee, upon an execution obtained upon a debt not secured by mortgage either before or after default.[13] The levy of an execution by any other creditor, or by the mortgagee upon another debt, or the sale under it, does not affect the rights of the mortgagee.[14] A purchaser of the equity of redemption at execution sale succeeds to the equitable rights of the mortgagor, and may redeem the estate just as the mortgagor could.[15] It is immaterial as regards such sales whether the encumbrance be strictly a mortgage or a deed of trust with power of sale upon default, for such a deed is in legal effect a mortgage.[16] If there be a surplus of the purchase-price of the equity of redemption after paying the judgment and costs this should be paid to the judgment debtor and not to the mortgagee.[17] The mortgagor's interest may be sold although the mortgage secures the support of the mortgagee by the mortgagor.[18] If no account be taken of the mortgage in making the levy, the interest of the debtor, and nothing more passes by the proceedings.[19] The levy is not thereby rendered invalid.[20] The debtor in such case has no occasion to

[13] Bernstein v. Humes, 71 Ala. 260; Gassenheimer v. Moulton, 80 Ala. 521, 2 So. 652; Seaman v. Hax, 14 Colo. 536, 24 Pac. 461, 9 L. R. A. 341; Walters v. Defenbaugh, 90 Ill. 241; Finley v. Thayer, 42 Ill. 350; Cushing v. Hurd, 4 Pick. (Mass.) 253, 16 Am. Dec. 335.

[14] Atcheson v. Broadhead's Admr., 56 Ala. 414; Childress v. Monette, 54 Ala. 317; Porter v. Wheeler, 105 Ala. 451, 17 So. 221; Cotton v. Blocker, 6 Fla. 1; Northwestern Forwarding Co. v. Mahaffey, 36 Kans. 152, 12 Pac. 705; Crow v. Tinsley, 6 Dana (Ky.) 402; Febiger's Lessee v. Craighead, 4 Dall. (Pa.) 151, 2 Yeates (Pa.) 42, 1 L. ed. 778.

[15] Shaw v. Lindsey, 60 Ala. 344; Lovelace v. Webb, 62 Ala. 271; Turner v. Watkins, 31 Ark. 429; Jenkins v. Green, 22 Kans. 562.

[16] Turner v. Watkins, 31 Ark. 429.

[17] Bodwell Granite Co. v. Lane, 83 Maine 168, 21 Atl. 829.

[18] Jenkins v. Green, 22 Kans. 562.

[19] Dunbar v. Starkey, 19 N. H. 160.

[20] Pettee v. Peppard, 125 Mass. 66.

complain.[21] After a sale upon execution the mortgagor has no rights in the land unless he redeems it, or unless the judgment upon which the execution was issued be reversed.[22] If a mortgagee be in possession of the mortgaged premises, a sale under execution against the mortgagor does not divest him of possession, or enable the purchaser to recover possession in an action of ejectment. His only remedy is to redeem.[23] If an estate be subject to a mortgage when attached, but the mortgage be discharged before the levy of an execution in the suit, the estate cannot be levied upon and sold as an equity of redemption.[24] The sale is valid though there be a right of homestead in the debtor and the sale is not expressly made subject to it. The sale is necessarily subject to that right and whether declared so or not it is immaterial.[25]

§ 4702. **Right to possession.**—At common law the right of possession vested in the mortgagee immediately upon the execution of the mortgage, unless there was an agreement to the contrary. Such is still the rule in states where the mortgage is held to convey the legal title unless changed by statute, and the mortgagee may at any time enter and dispossess the mortgagor, or may recover possession by a writ of entry or ejectment.[26] Yet where the mortgagor is left in possession, he is in most respects regarded as the owner of the land, and he may occupy and improve, or may take the rents and profits to his own use, in the same manner as before he made the mortgage.[27] The com-

[21] Perrin v. Reed, 35 Vt. 2.

[22] Delano v. Wilde, 11 Gray (Mass.) 17, 71 Am. Dec. 687.

[23] Cotton v. Carlisle, 85 Ala. 175, 4 So. 670, 7 Am. St. 29; Shaw v. Lindsey, 60 Ala. 344; Bernstein v. Humes, 60 Ala. 582, 31 Am. Rep. 52; Hall v. Tunnell, 1 Houst. (Del.) 320; Dadmun v. Lamson, 9 Allen (Mass.) 85.

[24] Hackett v. Buck, 128 Mass. 369.

[25] Swan v. Stephens, 99 Mass. 7.

[26] Keech v. Hall, 1 Doug. 21; American Freehold Land-Mortg. Co. v. Turner, 95 Ala. 272, 11 So. 211; Watford v. Oates, 57 Ala. 290; Rockwell v. Bradley, 2 Conn. 1; Krausz v. Uedelhofen, 193 Ill. 477, 62 N. E. 239; Barrett v. Hinckley, 124 Ill. 32, 14 N. E. 863, 7 Am. St. 331; Moore v. Boagni, 111 La. 490, 35 So. 716; Brastow v. Barrett, 82 Maine, 456, 19 Atl. 916; Brown v. Cram, 1 N. H. 169; Hartshorn v. Hubbard, 2 N. H. 453; Simpson's Lessee v. Ammons, 1 Binn. (Pa.) 175, 2 Am. Dec. 425; Martin v. Jackson, 27 Pa. St. 504, 67 Am. Dec. 489; Smith v. Shuler, 12 S. & R. (Pa.) 240; Youngman v. Elmira & W. R. Co., 65 Pa. St. 278. For jurisdictions and cases in which the mortgagor retains possession and title, see 20 Am. & Eng. Ency. of Law (2d ed.) 977; also post, § 4711.

[27] Anderson v Strauss, 98 Ill. 485; Taliaferro v. Gay, 78 Ky. 496; Rer-

mencement of an action against him by the mortgagee to recover possession does not change his rights in this respect and he is not accountable for the rents and profits accruing afterward, and before the mortgagee is entitled to possession under the judgment. If the mortgagee wishes to receive the rents and profits he must take early means to obtain possession.[28] The mortgagor's reservation of the right of possession seldom extends his right beyond a breach of the condition by him; and therefore, even in those states in which by statute the mortgagee has no right of possession before foreclosure, it has been held that he may immediately, upon default, take possession.[29] The mortgagor's right of possession may be implied from the nature of the condition in the mortgage. If the mortgagee takes a lease of the premises from the mortgagor, and covenants to pay him rent until the condition be broken, this amounts to an agreement that the mortgagor shall retain possession, and receive the profits to his own use.[30] A provision in the mortgage, that the mortgagee may enter after default, implies that the mortgagor is entitled to possession until such default.[31] A stipulation that upon default the mortgagee may take possession and receive the rents and profits until the mortgage debt shall be paid, may be enforced by the mortgagee's taking possession and holding it; but the mortgagor is entitled to have the property again at any time upon paying the mortgage debt.[32] An express stipulation is not necessary to enable the mortgagor to retain possession until a breach of the condition, when the very purpose of the instrument is such that the mortgagor cannot fulfil his covenants without the possession of the property.[33] As has already been noticed the common-law right

nard v. Brown, 7 Nebr. 449; Huston v. Canfield, 57 Nebr. 345, 77 N. W. 763.

[28] Higgins v. York Building Co., 2 Atk. 107; Mead v. Orrery, 3 Atk. 244; Wilder v. Houghton, 1 Pick. (Mass.) 87; White v. Wear, 4 Mo. App. 341.

[29] Pratt v. Skolfield, 45 Maine 386; Stevens v. Brown, Walk. Ch. (Mich.) 41; Hill v. Robertson, 24 Miss. 368; Pierce v. Brown, 24 Vt. 165. See also, as to mortgagee's right to retain possession where he has lawfully obtained it without foreclosure, Cooke v. Cooper, 18 Ore. 142, 22 Pac. 945, 7 L. R. A. 273, 17 Am. St. 709, quoted in Jewett v. Tomlinson, 137 Ind. 326, 332, 36 N. E. 1106.

[30] Newall v. Wright, 3 Mass. 138, 3 Am. Dec. 98.

[31] Smith v. Taylor, 9 Ala. 633; McMillan v. Otis, 74 Ala. 560.

[32] McIntyre v. Whitfield, 13 Smedes & M. (Miss.) 88; Hyman v. Kelly, 1 Nev. 179.

[33] Soper v. Guernsey, 71 Pa. St. 219.

of the mortgagee to possession has been done away with by statute in many states and the mortgagee cannot obtain possession of the mortgaged premises, even after condition broken, except by purchasing them on a foreclosure suit. Even the foreclosure decree and sale under it do not divest the mortgagor of his right to possession; this is not lost till the deed under the sale is delivered to the purchaser. If the premises are occupied by tenants, the mortgagor may collect the rent until the purchaser is entitled to enter under his deed.[34] Such a statutory provision restraining a mortgagee from obtaining possession is by some courts held to apply in case the mortgage is in the form of an absolute deed.[35] But it is held otherwise by other courts.[36]

§ 4703. **Right to rents and profits.**—Where the mortgagor is by statute protected in his possession until foreclosure, his possession is a matter of right and not of sufferance as it is at common law unless it is assured to him by express agreement.[37] So long as the mortgagor is allowed to remain in possession he is entitled to receive and apply to his own use the income and profits of the mortgaged estate.[38] He is not liable for rent. His

[34] Moncrieff v. Hare, 38 Colo. 221; 87 Pac. 1082, 7 L. R. A. (N. S.) 1001n; Whitley v. Barnett, 151 Iowa 487, 131 N. W. 704; Barrett v. Blackmar, 47 Iowa 565; Seckler v. Delfs, 25 Kans. 159; Barson v. Mulligan, 191 N. Y. 306, 84 N. E. 75, 16 L. R. A. (N. S.) 151n; Gelston v. Burr, 11 Johns. (N. Y.) 482; Astor v. Turner, 11 Paige (N. Y.) 436, 43 Am. Dec. 766; Clason v. Corley, 7 N. Y. Super. Ct. 447; Mitchell v. Bartlett, 52 Barb. (N. Y.) 319, affd. 51 N. Y. 447; Argall v. Pitts, 78 N. Y. 239; Ferguson v. Dickinson (Tex. Civ. App.), 138 S. W. 221; Hunter v. Hays, 7 Biss. (U. S.) 362.

[35] Locke v. Moulton, 96 Cal. 21, 30 Pac. 957; Thompson v. Hickey, 8 Abb. N. Cas. (N. Y.) 159. See also, Bailey v. Frazier (Ore.), 124 Pac. 643.

[36] Broach v. Barfield, 57 Ga. 601; Allen v. Frost, 62 Ga. 659; Jeffery v. Hursh, 42 Mich. 563, 4 N. W. 303.

[37] Crippen v. Morrison, 13 Mich. 23; Kidd v. Teeple, 22 Cal. 255; Ladue v. Detroit & Milwaukee R. Co., 13 Mich. 380, 87 Am. Dec. 759; Witherell v. Wiberg, 4 Sawy. (U. S.) 232, Fed. Cas. No. 17917; Hooper v. Wilson, 12 Vt. 695.

[38] Mead v. Orrery, 3 Atk. 244; Chinnery v. Blackman, 3 Doug. 391; Green v. Thornton, 8 Cal. App. 160, 96 Pac. 382; Central Trust Co. v. Wabash, St. L. & P. R. Co., 30 Fed. 332; West v. Adams, 106 Ill. App. 114; McLester v. Rose, 104 Ill. App. 433; Georgetown Water Co. v. Fidelity Trust & Safety Vault Co., 117 Ky. 325, 25 Ky. L. 1739, 78 S. W. 113; Groos v. Chittin (Tex. Civ. App.), 100 S. W. 1006; Kountze v. Omaha Hotel Co., 107 U. S. 378, 27 L. ed. 609, 2 Sup. Ct. 911; Young v. Northern Ill. Coal and Iron Co., 9 Biss. (U. S.) 300, 13 Fed. 806; Teal v. Walker, 111 U. S. 242, 28 L. ed. 415, 4 Sup. Ct. 420; Gilman v. Ill. & Miss. Tel. Co., 91 U. S. 603, 23 L. ed. 405. See also, Lovelace v. Webb, 62 Ala. 271; Lehman v. Tallahassee Mfg. Co., 64 Ala. 567;

contract is to pay interest and not rent. Although the mortgagee may have the right to take possession upon a breach of the condition, if he does not exercise this right he cannot claim the profits.[39] Upon a bill in equity to obtain foreclosure and sale, he may, in proper cases, apply for the appointment of a receiver to take for his benefit the earnings of the property. He is then confined to the rents and profits accruing during the pendency of the suit. If he neglects to apply for a receiver, the final decree, if silent upon this subject, does not effect the mortgagor's possession or right to the earnings in the meantime. It is only after sale and decree, except where statutes provide otherwise, that the mortgagor is wholly divested of title and consequently of the right to possession.[40] Unless restrained by the terms of the mortgage, the mortgagor in possession may work mines and quarries upon the mortgaged property and whatever he severs from the realty becomes unencumbered personalty and his own property.[41] Even if the rents and profits of the mortgaged property are expressly pledged for the security of the mortgage debt, with the right in the mortgagee to take possession on default, the mortgagee is not entitled to the rents and profits until he takes actual possession, or until possession is taken in his behalf by a receiver;[42] or perhaps until the mortgagee makes a

Hall v. Mobile & Montgomery R. Co., 58 Ala. 10; Scott v. Ware, 65 Ala. 174; Falkner v. Campbell Printing Press &c. Co., 74 Ala. 359; Coffey v. Hunt, 75 Ala. 236; Johnston v. Riddle, 70 Ala. 219; Wooten v. Bellinger, 17 Fla. 289; Mississippi Valley & Western R. Co. v. United States Express Co., 81 Ill. 534; Moore v. Titman, 44 Ill. 367; Cross v. Will County Nat. Bank, 177 Ill. 33, 52 N. E. 322; Woolley v. Holt, 14 Bush (Ky.) 788; Mayfield v. Wright, 107 Ky. 530, 21 Ky. L. 1255, 54 S. W. 864; Noyes v. Rich, 52 Maine 115; Chelton v. Green, 65 Md. 272, 4 Atl. 271; Elmore v. Symonds, 183 Mass. 321, 67 N. E. 314; Boston Bank v. Reed, 8 Pick. (Mass.) 459; Mayo v. Fletcher, 14 Pick. (Mass.) 525; Wathen v. Glass, 54 Miss. 382; Huston v. Canfield, 57 Nebr. 345, 77 N. W. 763; Morse v. Whitcher, 64 N. H. 591, 15 Atl. 207; Leeds v. Gifford, 41 N. J. Eq. 464, 5 Atl. 795; Reeder v. Dargan, 15 S. Car. 175; Frierson v. Blanton, 1 Baxt. (Tenn.) 272; Johnston v. Lasker Real Estate Assn., 2 Tex. Civ. App. 494, 21 S. W. 961; Childs v. Hurd, 32 W. Va. 66, 9 S. E. 362; Cox v. Horner, 43 W. Va. 786, 28 S. E. 780.

[39] McKim v. Mason, 3 Md. Ch. 186.

[40] Argall v. Pitts, 78 N. Y. 239; Johnston v. Lasker Real Estate Assn., 2 Tex. Civ. App. 494, 21 S. W. 961.

[41] Brunswick-Balke-Collender Co. v. Herrick, 63 Vt. 286, 21 Atl. 918; Abbott v. Edgerton, 30 Vt. 208.

[42] Tilden v. Greenwood, 149 Mass. 567, 22 N. E. 45; Wilder v. Houghton, 1 Pick. (Mass.) 87; Teal v. Walker, 111 U. S. 242, 28 L. ed. 415, 4 Sup. Ct. 420; Grant v. Phœnix Mut Life Ins. Co., 121 U. S. 105, 30 L. ed. 905, 7 Sup. Ct. 841; Freedman's Sav. & Trust Co. v. Shepherd, 127 U. S. 494, 32 L. ed. 163, 8 Sup. Ct.

proper demand for possession and this is refused.[43]

§ 4704. Remedies against mortgagee.—The mortgagor's remedy to recover possession of the mortgagee after payment is in equity; and this has been held his only remedy.[44] If ejectment or a writ of entry would lie in such case, the mortgagee would have no remedy to recover for disbursements made by him for repairs; for his right to demand these depends upon the rules of equity, and not those of common law, under which the mortgagee is considered as the absolute owner.[45] A mortgagor cannot maintain ejectment against the mortgagee in possession so long as there is any question whether the mortgage debt has been paid in full, or there remains any question of account to be settled between the parties. He must resort to a bill to redeem.[46] He cannot, under the strict rule, maintain trespass against the mortgagee, or any one holding under him after entry for condition broken, although the mortgage debt be in fact paid, if it be not released.[47] Neither can he, when not entitled by the terms of the mortgage, on a fair construction of it to retain possession, maintain trespass against the mortgagee for entering and carrying away a fixture.[48] But the mortgagor may maintain an action for

1250; Clarke v. Curtis, 1 Grat. (Va.) 289; Beverley v. Brooke, 4 Grat. (Va.) 187; Childs v. Hurd, 32 W. Va. 66, 9 S. E. 362.

[43] Dow v. Memphis &c. R. Co., 124 U. S. 652, 31 L. ed. 565, 8 Sup. Ct. 673; Freedman's Sav. & Trust Co. v. Shepherd, 127 U. S. 494, 32 L. ed. 163, 8 Sup. Ct. 1250.

[44] Wilson v. Ring, 40 Maine 116; Rowell v. Mitchell, 68 Maine 21; Jewett v. Hamlin, 68 Maine 172; Rowell v. Jewett, 69 Maine 293.

[45] Blanchard v. Kenton, 4 Bibb (Ky.) 451; Parsons v. Welles, 17 Mass. 419; Hill v. Payson, 3 Mass. 559.

[46] Birch v. Wright, 1 T. R. 378, 1 R. R. 228; Dutton v. Warschauer, 21 Cal. 609, 82 Am. Dec. 765; Moulton v. Leighton, 33 Fed. 143; Oldham v. Pfleger, 84 Ill. 102; Dougherty v. Kercheval, 1 A. K. Marsh. (Ky.) 52; Hill v. Payson, 3 Mass. 559; Parsons v. Welles, 17 Mass. 419; Henry v. The Confidence Gold & Silver Mining Co., 1 Nev. 619; Jackson v. Minkler, 10 Johns. (N. Y.) 479; Beach v. Cooke, 28 N. Y. 508, 86 Am. Dec. 260; Kortright v. Cady, 21 N. Y. 343, 78 Am. Dec. 145; Phyfe v. Riley, 15 Wend. (N. Y.) 248, 30 Am. Dec. 55; Edwards v. Farmers' Fire Ins. & Loan Co., 21 Wend. (N. Y.) 467, affd. 26 Wend. (N. Y.) 541; Jackson v. Bowen, 7 Cow. (N. Y.) 13; Simpson's Lessee v. Ammons, 1 Binn. (Pa.) 175, 2 Am. Dec. 425; Bryan v. Kales, 162 U. S. 411, 40 L. ed. 1020, 16 Sup. Ct. 803; Bryan v. Pinney, 152 U. S. 419, 40 L. ed. 1023, 16 Sup. Ct. 804, affg. 3 Ariz. 412, 31 Pac. 548; Brobst v. Brock, 10 Wall. (U. S.) 519, 19 L. ed. 1002.

[47] Wilson v. Ring, 40 Maine 116; Howe v. Lewis, 14 Pick. (Mass.) 329; Parsons v. Welles, 17 Mass. 419; Taylor v. Townsend, 8 Mass. 411, 5 Am. Dec. 107.

[48] Mooney v. Brinkley, 17 Ark. 340; Chellis v. Stearns, 22 N. H. 312.

damages against a mortgagee not in possession where the latter does some act which results in an injury to the property;[49] and, in case damages will not adequately compensate the mortgagor, he may be entitled to an injunction to restrain the mortgagee especially where the acts of the latter are likely to produce a permanent injury to the mortgaged land.[50]

§ 4705. Right to convey equity of redemption.—A mortgagor has a perfect right to convey his equity of redemption or any interest in it; and although he thereby obliges the mortgagee to make his grantees parties to a suit to foreclose the mortgage, his conveyances cannot be considered fraudulent against the mortgagee as tending to delay and hinder him.[51] The mortgagee is not affected by any act of the mortgagor in passing any right of his in the premises to third persons, whether by deed or by confession of judgment, or otherwise.[52] He cannot bind the mortgagee by any contract or deed prejudicial to his title. He cannot create an easement in the land to the prejudice of the right of the mortgagee.[53] The mortgagor's assignee has not greater rights than the mortgagor himself; and the construction of the mortgage is the same in every respect, whether the mortgagor has conveyed the equity of redemption or not.[54] Neither can the mortgagor and his grantees, by any subsequent arrangement between themselves affect the mortgagee's lien, or prevent its operating to the full extent incurred by the mortgage.[55]

§ 4706. Personal liability.—An admission or recital of indebtedness in a mortgage will not create a personal liability by implication, unless it be express and unequivocal.[56] The mere recital of the consideration is not sufficient to create such liabilities.[57] Under such a mortgage there does not appear to be any

[49] Morse v. Whitcher, 64 N. H. 590, 15 Atl. 217; Great Falls Co. v. Worster, 15 N. H. 412.

[50] Morse v. Whitcher, 64 N. H. 590, 15 Atl. 217.

[51] Buchanan v. Monroe, 22 Tex. 537; Hodson v. Treat, 7 Wis. 263.

[52] Coker v. Whitlock, 54 Ala. 180; Flanagan v. Westcott, 11 N. J. Eq. 264; Ellithorp v. Dewing, 1 D. Chip. (Vt.) 141.

[53] Murphy v. Welch, 128 Mass. 489.

[54] Kruse v. Scripps, 11 Ill. 98; Anderson v. Strauss, 98 Ill. 485.

[55] Frost v. Shaw, 10 Iowa 491; Blair v. St. Louis, K. & N. W. R. Co., 92 Mo. App. 538; Hartley v. Harrison, 24 N. Y. 170.

[56] Shafer v. Bear River & A. W. Mining Co., 4 Cal. 294; Smith v. Rice, 12 Daly (N. Y.) 307.

[57] Henry v. Bell, 5 Vt. 393.

contract, either express or implied, for the payment of the mortgage money.[58] Although there be, in addition to the recital of consideration, a statement in the condition that the grant is intended as security for the payment of a certain amount with interest, no admission of indebtedness creating a personal liability is implied.[59] In several states it is provided by statute that no mortgage shall imply a covenant for the payment of the sum secured; and that when there is no express covenant for such payment, and no separate obligation for the debt, the remedy of the mortgagee is confined to the lands mortgaged. Under such a statute, when the mortgage contains no express covenant to pay the debt secured, and no bond, note or other separate instrument has been given for it, an action cannot be maintained upon a verbal agreement to pay the debt. The remedy is limited to the land described in the mortgage.[60] Of course an unqualified admission of indebtedness by the mortgagor may be equivalent to an express covenant.[61] But an intention to create a personal liability for the debt cannot be inferred from the circumstance that the mortgage is given to secure a part of the purchase-money of the mortgaged property; nor is a recital in such a mortgage that the mortgagor "is justly bound to the mortgagee in a certain sum," such an admission of indebtedness as to make the mortgagor personally liable.[62] But a note or bond, or other separate obligation already given for the payment of the debt, is not merged or extinquished by giving a mortgage, or a deed of land in the nature of a mortgage, for the same debt. The mortgage becomes merely collateral security for the payment of the prior obligation.[63]

§ 4707. **After-acquired titles and improvements.**—It is a well-settled rule of law, that a title subsequently acquired by the mortgagor inures to the benefit of the mortgagee and his assigns by virtue of a covenant of warranty in his mortgage, and is sub-

[58] Howell v. Price, 1 P. W. 291; Coleman v. Van Rensselaer, 44 How. Pr. (N. Y.) 368; Chase v. Ewing, 51 Barb. (N. Y.) 597; Culver v. Sisson, 3 N. Y. 264.

[59] Coleman v. Van Rensselaer, 44 How. Pr. (N. Y.) 368.

[60] Van Brunt v. Mismer, 8 Minn. 232.

[61] Elder v. Rouse, 15 Wend. (N. Y.) 218.

[62] Smith v. Rice, 12 Daly (N. Y.) 307.

[63] Williamson v. Andrew, 4 Har. & McH. (Md.) 482; Ligget v. Bank of Pa., 7 Serg. & R. (Pa.) 218.

ject to foreclosure;[64] and a subsequent purchaser from the mortgagor under his after-acquired title, having notice of such mortgage, stands in no better position than the mortgagor himself.[65] Neither can the heirs of the mortgagor claim the benefit of the subsequent title as against the mortgagee when the mortgagor himself could not do so.[66] Where a mortgagor gives a second mortgage with covenants of warranty as against the first mortgage, and the first mortgage is foreclosed, and the title obtained by the foreclosure is afterward conveyed to the mortgagor, his title thereby acquired inures to the benefit of the second mortgagee,[67] even though the mortgagor has in the interval been discharged in bankruptcy.[68] This rule as to after-acquired titles is not limited strictly to the effect of the covenant of title, but if from the whole instrument and the situation of the parties it appears that the mortgagor's intention was to convey a fee simple, when at the time of giving the mortgage he had no title or right of possession, he is estopped to set up any after-acquired title against his mortgagees.[69] A mortgagor or his grantee cannot, by acquiring a tax title upon the land, defeat the lien of the mort-

[64] Kline v. Ragland, 47 Ark. 111, 14 S. W. 474; Kirkaldie v. Larrabee, 31 Cal. 455, 89 Am. Dec. 205; Stewart v. Powers, 98 Cal. 514, 33 Pac. 486; Hubbard v. Mulligan, 13 Colo. App. 116, 57 Pac. 738; Jarvis v. State Bank, 22 Colo. 309, 45 Pac. 505, 55 Am. St. 129; Parker v. Jones, 57 Ga. 204; Wells v. Somers, 4 Ill. App. 297; Pratt v. Pratt, 96 Ill. 184; Gibbons v. Hoag, 95 Ill. 45; Iowa Loan & Trust Co. v. King, 58 Iowa 598, 12 N. W. 595; Rice v. Kelso, 57 Iowa 115, 7 N. W. 3, 10 N. W. 335; Corbett's Exrs. v. Howell's Admx., 10 Ky. L. 793, 10 S. W. 653; Levy v. Lane, 38 La. Ann. 252; Brayton v. Merithew, 56 Mich. 166, 22 N. W. 259; Toms v. Boyes, 50 Mich. 352, 15 N. W. 506; Clark v. Daniels, 77 Mich. 26, 43 N. W. 854; Gray v. Franks, 86 Mich. 382, 49 N. W. 130; Flynt v. Hubbard, 57 Miss. 471; Boyd v. Haseltine, 110 Mo. 203, 19 S. W. 822; Pearsons v. Little, 66 N. H. 339, 20 Atl. 958; Rank v. Dauphin & S. Coal Co., 1 Pearson (Pa.) 453; Wright v. Shumway, 1 Biss. (U. S.) 23, Fed. Cas. No. 18093; Bush v. Marshall, 6 How. (U. S.) 284, 12 L. ed. 440; Spiess v. Neuberg, 71 Wis. 279, 37 N. W. 417, 5 Am. St. 211; Cornish v. Frees, 74 Wis. 490, 43 N. W. 507.

[65] King v. Gilson's Admx., 32 Ill. 348, 83 Am. Dec. 269; Gochenour v. Mowry, 33 Ill. 331; Jones v. King, 25 Ill. 383; Cockrill v. Bane, 94 Mo. 444, 7 S. W. 480; Hitchcock v. Fortier, 65 Ill. 239; McCrackin v. Wright, 14 Johns. (N. Y.) 192; Tefft v. Munson, 57 N. Y. 97.

[66] Somes v. Skinner, 3 Pick. (Mass.) 52; Wark v. Willard, 13 N. H. 389.

[67] Ayer v. Philadelphia & Boston Face Brick Co., 157 Mass. 57, 31 N. E. 717.

[68] Russ v. Alpaugh, 118 Mass. 369, 19 Am. Rep. 464; Gibbs v. Thayer, 6 Cush. (Mass.) 30; Cole v. Raymond, 9 Gray (Mass.) 217; Ayer v. Philadelphia & Boston Face Brick Co., 157 Mass. 57, 31 N. E. 717; Bush v. Cooper's Admr., 18 How. (U. S.) 82, 15 L. ed. 273.

[69] Balch v. Arnold, 9 Wyo. 17, 59 Pac. 434.

gagee.[70] It is his duty to pay the taxes, and he is not allowed to acquire a title through his own defaults.[71] Improvements made by the mortgagor or owner generally inure to the benefit of the mortgagee;[72] and improvements made with the consent of the owner, by one who has notice of the mortgage, become subject to it in the same manner as if they had been made by the mortgagor himself, unless there be a covenant in the mortgage for such allowance in case of foreclosure.[73]

§ 4708. Waste by mortgagor.—A mortgagor in possession, or any one claiming under him, who is about to cut timber, remove fixtures or commit other waste on the land to an extent calculated to render the security inadequate, may be restrained by injunction; and it is not necessary to allege or prove his insolvency.[74] Whether the mortgage be regarded as passing the

[70] Fair v. Brown, 40 Iowa 209; Fuller v. Hodgdon, 25 Maine 243; Woodbury v. Swan, 59 N. H. 22; Middletown Sav. Bank v. Bacharach, 46 Conn. 513; Jordan v. Sayre, 29 Fla. 100, 10 So. 823; McAlpin v. Zitser, 119 Ill. 273, 10 N. E. 901; Stinson v. Connecticut Mut. Life Ins. Co., 174 Ill. 125, 51 N. E. 193, 66 Am. St. 262; Cooper v. Jackson, 99 Ind. 566; Stears v. Hollenbeck, 38 Iowa 550; Porter v. Lafferty, 33 Iowa 254; Maxfield v. Willey, 46 Mich. 252, 9 N. W. 271; Connecticut Mut. Life Ins. Co. v. Bulte, 45 Mich. 113, 7 N. W. 707; Chamberlain v. Forbes, 126 Mich. 86, 85 N. W. 253; Brown v. Avery, 119 Mich. 384, 78 N. W. 331; Lacey v. Davis, 4 Mich. 140, 66 Am. Dec. 524; Washington Loan & Trust Co. v. McKenzie, 64 Minn. 273, 66 N. W. 976; American Bapt. Missionary Union v. Hastings, 67 Minn. 303, 69 N. W. 1078; McEwen v. Beard, 58 Minn. 176, 59 N. W. 942; Allison v. Armstrong, 28 Minn. 276, 9 N. W. 806, 41 Am. Rep. 281; McLaughlin v. Green, 48 Miss. 175; Kezer v. Clifford, 59 N. H. 208; Ryan v. McGehee, 103 N. Car. 282, 9 S. E. 197, 104 N. Car. 176, 10 S. E. 169; Boyd v. Allen 15 Lea (Tenn.) 81.

[71] Kilpatrick v. Henson, 81 Ala. 464, 1 So. 188; Jordan v. Sayre, 29 Fla. 100, 10 So. 823; Dayton v. Rice, 47 Iowa 429; Beltram v. Villere (La.), 4 So. 506; Annely v. De Saussure, 12 S. Car. 488; Newton v. Marshall, 62 Wis. 8, 21 N. W. 803.

[72] Asher v. Mitchell, 9 Ill. App. 335.

[73] Alabama, G. S. R. Co. v. South & N. A. R. Co., 84 Ala. 570, 3 So. 286, 5 Am. St. 401; Coleman v. Witherspoon, 76 Ind. 285; Catterlin v. Armstrong, 79 Ind. 514; Holmes v. Morse, 50 Maine 102; Phillips v. Holmes, 78 N. Car. 191; Frierson v. Blanton, 1 Baxt. (Tenn.) 272.

[74] Eden Injunction, 119; 2 Story Eq. Jur., § 915; Goodman v. Kine, 8 Beav. 379; Usborne v. Usborne, 1 Dick. 75; Hippesley v. Spencer, 5 Madd. 422; Humphreys v. Harrison, 1 J. & W. 581; Bagnall v. Villar, L. R. 12 Ch. D. 812; Coker v. Whitlock, 54 Ala. 180; Robinson v. Russell, 24 Cal. 467; Ennis v. Smith (Del. Ch.), 80 Atl. 636; Dorr v. Dudderar, 88 Ill. 107; Harris v. Bannon, 78 Ky. 568, 1 Ky. L. (abstract) 259; Collins v. Rea, 127 Mich. 273, 86 N. W. 811; Wilkinson v. Dunkley-Williams Co., 139 Mich. 621, 103 N. W. 170, 12 Det. Leg. N. 19; Adams v. Corriston, 7 Minn. 456; Fidelity Trust Co. v. Hoboken & M. R. Co., 71 N. J. Eq. 14, 63 Atl. 273; Betz v. Verner, 46 N. J. Eq. 256, 19 Atl. 206, 7 L. R. A. 630, 19 Am. St. 387; Scott v. Webster, 50 Wis. 53, 6 N. W. 363; Taylor v. Collins, 51 Wis.

legal estate, or as giving merely a lien for the debt, seems not to be regarded by the courts in giving this remedy against impairing these securities. That a mortgagee has the legal estate may be one ground for the interference of a court of equity in this way; but the right of the mortgagee to be protected in his security is a ground for such interference, whether he has the legal title or not.[75] As a general rule, however, equity will not interfere to enjoin the mortgagor, unless the acts complained of are such that may render the security insufficient for the satisfaction of the debt or of doubtful sufficiency. But it is the mortgagee's right that the property shall be kept ample to secure the mortgage debt.[76] "In order to obtain an injunction it is not generally necessary to show that the threatened injury is literally irreparable. It is sufficient if there be no adequate remedy by action for damages."[77] Trespass for waste may be maintained by a mortgagee having the legal estate, though not in actual possession, but entitled to it after condition broken. The right to sue in trespass for an injury to the freehold by strip and waste follows as an incident to the right of possession.[78] But in states where mortgages are a lien only, a mortgagee not in possession, and not entitled to possession, cannot maintain such an action of trespass for damages.[79] In like manner replevin may be maintained by

123, 8 N. W. 22; Bunker v. Locke, 15 Wis. 635; Fairbank v. Cudworth, 33 Wis. 358; Anderson v. Englehart, 18 Wyo. 409, 108 Pac. 977.

[75] Nelson v. Pinegar, 30 Ill. 473; Salmon v. Clagett, 3 Bland (Md.) 125; Brady v. Waldron, 2 Johns. Ch. (N. Y.) 148; Emmons v. Hinderer, 24 N. J. Eq. 39; Betz v. Verner, 46 N. J. Eq. 256, 19 Atl. 206, 7 L. R. A. 630, 19 Am. St. 387.

[76] King v. Smith, 2 Hare 239; Humphreys v. Harrison, 1 J. & W. 561; Hippesley v. Spencer, 5 Madd. 422; Coker v. Whitlock, 54 Ala. 180; Buckout v. Swift, 27 Cal. 433, 87 Am. Dec. 90; Vanderslice v. Knapp, 20 Kans. 647; Harris v. Bannon, 78 Ky. 568, 1 Ky. L. (abstract) 259; Moriarty v. Ashworth, 43 Minn. 1, 44 N. W. 531, 19 Am. St. 203; Van Wyck v. Alliger, 6 Barb. (N. Y.) 507.

[77] 1 Jones Mtg. (6th ed.), § 684.

[78] Pollard v. American Freehold Land Mtg. Co., 139 Ala. 183, 35 So. 767; Stowell v. Pike, 2 Greenl. (Maine) 387; Smith v. Goodwin, 2 Greenl. (Maine) 173; Linscott v. Weeks, 72 Maine 506; Cole v. Stewart, 11 Cush. (Mass.) 181; Butler v. Page, 7 Metc. (Mass.) 40, 39 Am. Rep. 757; Page v. Robinson, 10 Cush. (Mass.) 99; Hapgood v. Blood, 11 Gray (Mass.) 400; Mosher v. Vehue, 77 Maine 169; Sanders v. Reed, 12 N. H. 558; Smith v. Moore, 11 N. H. 55; Pettengill v. Evans, 5 N. H. 54; Waterman v. Matteson, 4 R. I. 539; Mitchell v. Bogan, 11 Rich. L. (S. Car.) 686; Harris v. Haynes, 34 Vt. 220; Atkinson v. Hewett, 63 Wis. 396, 23 N. W. 889.

[79] Pueblo & Ark. Valley R. Co. v. v. Beshoas, 8 Colo. 32, 5 Pac. 639. See also, Moriarty v. Ashworth, 43 Minn. 1, 44 N. W. 531, 19 Am. St. 203; Verner v. Betz, 46 N. J. Eq. 256,

the mortgagee for timber cut or fixtures removed from the premises after condition broken against the mortgagor in possession, when the act results in wrongful waste and in substantial diminution of the mortgage security.[80]

§ 4709. Right to emblements.—The mortgagor, until foreclosure or possession taken by the mortgagee, is entitled to emblements, and when they are severed has an absolute right to them without any liability to account for them. They are covered by the mortgage until severance, but belong to the mortgagor afterward.[81] A mortgagee not in possession cannot, therefore, maintain trespass, quare clausum against one who cuts and removes the grass or other annual crops.[82] But growing crops are personal property when severed from the land, and a sale or mortgage of them by the mortgagor amounts to a severance.[83] If the mortgagee, before the debt is due, goes into possession of the mortgaged land under an agreement with the mortgagor, he does not thereby acquire any title to a crop growing, at the time of the agreement, upon the land which had previously been sold.[84] A mortgage on land upon which there are growing crops has priority as to the crops over a chattel mortgage, subsequently executed, of the crops.[85]

19 Atl. 206, 7 L. R. A. 630n, 19 Am. St. 387.

[80] Waterman v. Matteson, 4 R. I. 539.

[81] Colman v. Duke of St. Albans, 3 Ves. 25; American Freehold Land Mtg. Co. v. Turner, 95 Ala. 272, 11 So. 211; Toby v. Reed, 9 Conn. 216; Anderson v. Strauss, 98 Ill. 485; Rankin v. Kinsey, 7 Ill. App. 215; Beckman v. Sikes, 35 Kans. 120, 10 Pac. 592; Perley v. Chase, 79 Maine 519, 11 Atl. 418; Woodward v. Pickett, 8 Gray (Mass.) 617; Brown v. Thurston, 56 Mo. 126, 96 Am. Dec. 438; Gillett v. Balcom, 6 Barb. (N. Y.) 370; Shepard v. Philbrick, 2 Denio (N. Y.) 174; Jones v. Adams, 37 Ore. 473, 59 Pac. 811, 62 Pac. 16, 50 L. R. A. 388, 82 Am. St. 766; In re Bruce, 9 Ben. (U. S.) 236; Cooper v. Cole, 38 Vt. 185; Crews v. Pendleton, 1 Leigh (Va.) 297, 19 Am. Dec. 750; Welp v. Gunther, 48 Wis. 543, 4 N. W. 647; Allen v. Elderkin, 62 Wis. 627, 22 N. W. 842.

[82] Hewes v. Bickford, 49 Maine 71; Woodward v. Pickett, 8 Gray (Mass.) 617; Page v. Robinson, 10 Cush. (Mass.) 99. See also, Crosby v. Wadsworth, 6 East 602; Evans v. Roberts, 5 B. & C. 829; Jones v. Flint, 10 Ad. & El. 753; Rodwell v. Phillips, 9 M. & W. 501.

[83] Sexton v. Breese, 32 N. Y. St. 262, 10 N. Y. S. 510, affd. 135 N. Y. 387, 32 N. E. 133; Frank v. Harrington, 36 Barb. (N. Y.) 415; Whipple v. Foot, 2 Johns. (N. Y.) 418, 3 Am. Dec. 442; Stewart v. Doughty, 9 Johns. (N. Y.) 112; Stall v. Wilbur, 77 N. Y. 158.

[84] Sexton v. Breese, 57 Hun (N. Y.) 1, 32 N. Y. St. 262, 10 N. Y. S. 510, affd. 135 N. Y. 387, 32 N. E. 133.

[85] Thompson v. Union Warehouse Co., 110 Ala. 499, 18 So. 105.

§ 4710. **Right to redeem.**—Redemption, in its origin was purely a creature of courts of equity. Adopting the principle of the civil law, that a mortgage is merely a security for the payment of a debt, equity interposed to prevent the hardships and injustice which resulted at common law from the failure of the mortgagor to strictly comply with the condition of the mortgage. Although the mortgagor had forfeited his estate at law, courts of equity allowed him to redeem his estate within a reasonable time, upon payment of the debt and all proper charges, and this right was called an equity of redemption.[86] The right of redemption is the creature of the law. It is not in terms expressed by the parties to the mortgage. But whatever be the form of the transaction, if intended as a security for money, it is a mortgage, and the right of redemption attaches to it. Although a deed contain a condition that it shall be absolute and without redemption if a certain sum be not paid by the grantor at a fixed time, and the condition is not punctually performed, there is a right of redemption.[87] In other words, the right of the grantor to redeem is a necessary incident to every mortgage and the right applies to mortgages made in the form of absolute conveyances as well as those made in the ordinary form.[88] Courts of equity have so fully recognized and protected the mortgagor in this right that an agreement, made at the time of executing the mortgage, to forfeit the estate upon default of payment, will be held absolutely void.[89] It matters not how strongly the parties may express their agreement that there shall be no redemption; the intent being contrary to the rules of equity, it cannot be car-

[86] Posten v. Miller, 60 Wis. 494, 19 N. W. 540.

[87] Jackson v. Lynch, 129 Ill. 72, 21 N. E. 580, 22 N. E. 246; Mooney v. Byrne, 163 N. Y. 86, 57 N. E. 163; Clark v. Henry, 2 Cow. (N. Y.) 324; Hart v. Ten Eyck, 2 Johns. Ch. (N. Y.) 62, revd. 1 Cow. (N. Y.) 744n, 13 Am. Dec. 568; Rogan v. Walker, 1 Wis. 527; Knowlton v. Walker, 13 Wis. 264; Orton v. Knab, 3 Wis. 576; Plato v. Roe, 14 Wis. 453.

[88] Jones v. Matkin, 118 Ala. 341, 24 So. 242; Cline v. Robbins, 122 Cal. 18, 55 Pac. 150.

[89] 2 Story Eq. Juris., § 1019; East India Co. v. Atkyns, 1 Comyns 347; Fields v. Helms, 82 Ala. 449, 3 So. 106; Parmer v. Parmer, 74 Ala. 285; Willets v. Burgess, 34 Ill. 494; Bearss v. Ford, 108 Ill. 16; Preschbaker v. Feaman's Heirs, 32 Ill. 475; Wynkoop v. Cowing, 21 Ill. 570; Linnell v. Lyford, 72 Maine 280; Baxter v. Child, 39 Maine 110; Henry v. Davis, 7 Johns. Ch. (N. Y.) 40, affd. 2 Cow. (N. Y.) 324; Clark v. Henry, 2 Cow. (N. Y.) 324; Holridge v. Gillespie, 2 Johns. Ch. (N. Y.) 30; Cherry v. Bowen, 4 Sneed (Tenn.) 415; Peugh v. Davis, 96 U. S. 322, 24 L. ed. 775.

ried into effect.[90] It is not even permitted to restrict the right to the mortgagor or to any specified person or class of persons.[91] And any arrangement which is merely an evasion of the equitable rule that a mortgage is redeemable, or which is designed to enable the mortgagee to wrest the property from the mortgagor, is void for the same reason.[92] However, the equity of redemption may be released after the execution of the mortgage if the release is made in good faith without undue influence and for a new and adequate consideration.[93] There can be no redemption till the mortgage is due,[94] but the right continues until lost by laches,[95] barred by lapse of statutory time, by strict foreclosure, or by deed given in completion of foreclosure sale.[96] The right is effectually barred by a foreclosure properly made except when a further right is given by statute.[97]

B. Mortgagee's Rights and Liabilities.

§ 4711. In general.—At the common law a mortgage transferred to the mortgagee the legal title to the property. His rights to the same were that of an absolute owner subject to the

[90] Bayley v. Bailey, 5 Gray (Mass.) 505.

[91] Howard v. Harris, 1 Vern. 33; Newcomb v. Bonham, 1 Vern. 7, 214, 232, Freem. Ch. 67; Spurgeon v. Collier, 1 Eden 54. See also, Bearss v. Ford, 108 Ill. 16; Hughes v. Harlam, 166 N. Y. 427, 60 N. E. 22.

[92] Vernon v. Bethell, 2 Eden 110; East India Co. v. Atkyns, 1 Comyns 347; Toomes v. Conset, 3 Atk. 261; Jennings v. Ward, 2 Vern. 520; Willett v. Winnell, 1 Vern. 488; Mooney v. Byrne, 163 N. Y. 86, 57 N. E. 163. See also, 2 Eq. Cas. Abr. 599, and note in Ann. Cas. 1912D 959.

[93] Stoutz v. Rouse, 84 Ala. 309, 4 So. 170; Green v. Butler, 26 Cal. 595; Pritchard v. Elton, 38 Conn. 434; Wynkoop v. Cowing, 21 Ill. 570; Vennum v. Babcock, 13 Iowa 194; Linnell v. Lyford, 72 Maine 280; Falis v. Conway Mut. Fire Ins. Co., 7 Allen (Mass.) 46; Trull v. Skinner, 17 Pick. (Mass.) 213; Holdridge v. Gillespie, 2 Johns. Ch. (N. Y.) 30; Remsen v. Hay, 2 Edw. Ch. (N. Y.) 535; Odell v. Montross, 6 Hun (N. Y.) 155, revd. 68 N. Y. 499; Marshall v. Stewart, 17 Ohio 356; Shaw v. Walbridge, 33 Ohio St. 1.

[94] Brown v. Cole, 14 Sim. 427, 14 L. J. Ch. 167; Burrowes v. Molloy, 2 Jo. & LaT. 521; Abbe v. Goodwin, 7 Conn. 377; Moore v. Cord, 14 Wis. 213.

[95] Walker v. Warner, 179 Ill. 16, 53 N. E. 594, 70 Am. St. 85; Eastman v. Littlefield, 164 Ill. 124, 45 N. E. 137; Henderson v. Craig, 179 Ill. 395, 53 N. E. 736; Cockrill v. Hutchinson, 135 Mo. 67, 36 S. W. 375, 58 Am. St. 564. See for recent case of laches, Sinclair v. Gunzhenhauser (Ind.), 98 N. E. 37.

[96] Weiner v. Heintz, 17 Ill. 259; Heimberger v. Boyd, 18 Ind. 420; Hull v. McCall, 13 Iowa 467.

[97] Martin v. Ward, 60 Ark. 510, 30 S. W. 1041; Willis v. McIntosh, Ga. Dec. 162, pt. 1; Weiner v. Heintz, 17 Ill. 259; Ballinger v. Bourland, 87 Ill. 513, 29 Am. Rep. 69; Stoddard v. Forbes, 13 Iowa 296; Evans v. Kahr, 60 Kans. 719, 57 Pac. 950, 58 Pac. 467.

right of the mortgagor to redeem in strict accordance with the terms of the mortgage. He was entitled to possession and use of the property until the debt was paid and was liable to no one so long as he did not impair the value of the estate. In equity however his rights were entirely different. He was regarded merely as holding the property to secure the payment of his debt and in the absence of an agreement in the mortgage had no control over the property until breach of condition by the mortgagor. The equitable rule with various modifications has been generally adopted in the several states.[98]

§ 4712. **Nature of mortgagee's interest.**—The mortgagee is not in a general sense the owner of the mortgaged estate although as already noticed under the common-law doctrine he holds the legal title to the estate. Before foreclosure he can be regarded as the owner only in a very limited sense. For some purposes, however, he may be regarded as an owner after he has taken possession;[99] but before he has taken possession it seems that there is no sense in which he can be so regarded, unless it be with reference to a proceeding to enforce his rights as mortgagee.[1] A mortgage before foreclosure is completed is personal assets, and upon the death of the mortgagee vests in his executor or administrator. The mortgage can be transferred, released or foreclosed, only by the executor or administrator.[2] The mortgage

[98] Ortengren v. Rice, 104 Ill. App. 428; Baron v. San Angelo Nat. Bank (Tex. Civ. App.), 138 S. W. 142; Fletcher v. Holmes, 32 Ind. 497. As to the nature of the mortgagee's interest in the various states, see the following cases: Connor v. Connor, 59 Fla. 467, 52 So. 727; Phillips v. Bond, 132 Ga. 413, 64 S. E. 456; Whitley v. Barnett, 151 Iowa 487, 131 N. W. 704; W. A. Allen Co. v. Emerton, 108 Maine 221, 79 Atl. 905; Kinney v. Treasurer & Receiver General, 207 Mass. 368, 93 N. E. 586, 35 L. R. A. (N. S.) 784n; Standard Leather Co. v. Mercantile Town Mut. Ins. Co., 131 Mo. App. 701, 111 S. W. 631; In re Kaupper, 141 App. Div. (N. Y.) 54, 125 N. Y. S. 878; Becker v. McCrea, 193 N. Y. 423, 86 N. E. 463; In re Kaupper, 141 App. Div. (N. Y.) 54, 125 N. Y. S. 878; Modlin v. Atlantic Fire Ins. Co., 151 N. Car. 35, 65 S. E. 605; Gillett v. Romig, 17 Okla. 324, 87 Pac. 325; Kaston v. Storey, 47 Ore. 150, 80 Pac. 217, 114 Am. St. 912; Farr v. Semmler, 24 S. Dak. 290, 123 N. W. 835; Ferguson v. Dickinson (Tex. Civ. App.), 138 S. W. 221; Jump v. North British & Mercantile Ins. Co. of London, 44 Wash. 596, 87 Pac. 928; Gerhardt v. Ellis, 134 Wis. 191, 114 N. W. 495; Tobin v. Tobin, 139 Wis. 494, 121 N. W. 144.

[99] Lowell v. Shaw, 15 Maine 242.

[1] Norwich v. Hubbard, 22 Conn. 587; Great Falls Co. v. Worster, 15 N. H. 412.

[2] Baldwin v. Hatchett, 56 Ala. 461; Pettus v. Gault, 81 Conn. 415, 71 Atl. 509.

title vests in the personal representative, who may, it is held, without any order of court assign or discharge it, or take possession of the property, or proceed to foreclose it by suit.[3] The heirs of a mortgagee have no right as such to enter for condition broken, or to take any action to enforce payment of the mortgage. The debt belongs to the executor or administrator, and the mortgage, which is security for the debt, equally belongs to him.[4] The interest of a mortgagee cannot be levied upon or attached for his debt before foreclosure. While the right of redemption remains, the mortgagor might be much embarrassed by the levy of execution. Until this happens, the mortgaged premises continue to be real estate in the hands of the mortgagor, and liable to be sold on execution against him.[5] Neither is the interest of the beneficiary in a deed of trust, executed to secure a debt, subject to a judgment lien or to sale upon execution.[6] Even when the mortgage is made by an absolute deed with a separate agreement executed at the same time to reconvey, the mortgagees' interest is not subject to a judgment lien or execution until the mortgagor's interest has been divested by foreclosure or otherwise.[7]

§ 4713. Right to possession.—Where the right has not been taken away by statute the mortgagee is entitled to immediate possession, in the absence of an agreement to the contrary. He may enter upon the estate under his deed even before condi-

[3] Webster v. Calden, 56 Maine 204; Collamer v. Langdon, 29 Vt. 32; Rev. Stat. of Wis. 1898, § 3829.

[4] Smith v. Dyer, 16 Mass. 18.

[5] Morris v. Barker, 82 Ala. 272, 2 So. 335; Trapnall's Admx. v. State Bank, 18 Ark. 53; Strauss v. White, 66 Ark. 167, 51 S. W. 64; Hardy v. Heard, 15 Ark. 184; Meadow v. Wise, 41 Ark. 285; Harman v. May, 40 Ark. 146; Huntington v. Smith, 4 Conn. 235; Fish v. Fish, 1 Conn. 559; Cooch's Lessee v. Gerry, 3 Har. (Del.) 280; Nicholson v. Walker, 4 Ill. App. 404; Scott v. Mewhirter, 49 Iowa 487; Buck v. Sanders, 1 Dana (Ky.) 187; Brown v. Bates, 55 Maine 520, 92 Am. Dec. 613; Marsh v. Austin, 1 Allen (Mass.) 235; Portland Bank v. Hall, 13 Mass. 207; Blanchard v. Colburn, 16 Mass. 345; Eaton v. Whiting, 3 Pick. (Mass.) 484; Taylor v. Lowenstein, 50 Miss. 278; Chisholm v. Andrews, 57 Miss. 636; Brooks v. Kelly, 63 Miss. 616; Jackson v. Willard, 4 Johns. (N. Y.) 40; Runyan v. Mersereau, 11 Johns. (N. Y.) 534, 6 Am. Dec. 393; Jackson v. Dubois, 4 Johns. (N. Y.) 216; Hitchcock v. Harrington, 6 Johns. (N. Y.) 290, 5 Am. Dec. 229; Collins v. Torry, 7 Johns. (N. Y.) 278, 5 Am. Dec. 273; Johnson v. Hart, 3 Johns. Cas. (N. Y.) 322; Rickert v. Maderia, 1 Rawle (Pa.) 325.

[6] Beckett v. Dean, 57 Miss. 232.

[7] Scott v. Mewhirter, 49 Iowa 487, 8 Cent. L. J. 39. A mortgage interest in real estate in New York is held to be personal property under the laws of Connecticut and New York. Weed v. Hoge, 85 Conn. 490, 83 Atl. 636.

tion broken, and may maintain an action against the mortgagor as a trespasser, or, in a writ of entry, recover against him as a disseizor if he refuse to yield possession. The mortgagee has the remedies of an owner for the purpose of enforcing his lien against the mortgagor or any one claiming under him, but he has them for this purpose only.[8] Though restrained from entering upon the mortgaged premises and taking possession before breach of the condition, he may enter and take possession after condition broken if he can do so peaceably and unresisted.[9] But the right to possession is now generally provided for by statute and is usually in the mortgagor unless there is an agreement to the contrary. Consequently, the mortgagee's right before foreclosure, to maintain ejectment against the mortgagor, or to recover possession in any way, has been taken away. But this right of possession being implied by law in all mortgages, executed prior to the passage of such a statute, is therefore inoperative as to mortgages of prior execution.[10] But even under such statutes it is generally held that a mortgagee, who has gone into peaceable possession of the premises after a default, cannot be

[8] McMillan v. Otis, 74 Ala. 560; Watford v. Oates, 57 Ala. 290; Coffey v. Hunt, 75 Ala. 236; Woodward v. Parsons, 59 Ala. 625; Shute v. Grimes, 7 Blackf. (Ind.) 1; Clark v. Reyburn, 1 Kans. 281; Blaney v. Bearce, 2 Greenl. (Maine) 132; Gilman v. Wills, 66 Maine 273; Allen v. Parker, 27 Maine 531; Howard v. Houghton, 64 Maine 445; Moore v. O'Dell, 27 Okla. 194, 111 Pac. 308; Wilson v. Rogers, 97 Ark. 369, 134 S. W. 318; Treat v. Pierce, 53 Maine 71; Hadley v. Hadley, 80 Maine 459, 15 Atl. 47; Bangor Sav. Bank v. Wallace, 87 Maine 28, 32 Atl. 716; Hagerstown v. Groh, 101 Md. 560, 61 Atl. 467; Brown v. Stewart, 1 Md. Ch. 87; Erskine v. Townsend, 2 Mass. 493, 3 Am Dec. 71; Goodwin v. Richardson, 11 Mass. 469; Newall v. Wright, 3 Mass. 138, 3 Am. Dec. 98; Green v. Kemp, 13 Mass. 515, 7 Am. Dec. 169; Bradley v. Fuller, 23 Pick. (Mass.) 1; Smith v. Johns, 3 Gray (Mass.) 517; Fay v. Brewer, 3 Pick. (Mass.) 203; Flagg v. Flagg, 11 Pick. (Mass.) 475; Blanchard v. Brooks, 12 Pick. (Mass.) 47; Fay v. Cheney, 14 Pick. (Mass.) 399; Walcop v. McKinney's Heirs, 10 Mo. 229; Morse v. Whitcher, 64 N. H. 591, 15 Atl. 207; Smith v. Moore, 11 N. H. 55; Fletcher v. Chamberlain, 61 N. H. 438; Furbush v. Goodwin, 29 N. H. 321; Den v. Stockton, 12 N. J. L. 322; Jackson v. Dubois, 4 Johns. (N. Y.) 216; Jackson v. Hull, 10 Johns. (N. Y.) 481; Ely's Lessee v. McGuire, 2 Ohio 223. In Brown v. Loeb (Ala.), 58 So. 330, it is held that a mortgagee under a mortgage conveying land may maintain ejectment at once, unless possession is reserved to the mortgagor until default on the law day.

[9] Fuller v. Eddy, 49 Vt. 11.

[10] Phillips v. Bond, 132 Ga. 413, 64 S. E. 456; Shaw v. Hoadley, 8 Blackf. (Ind.) 165; Grimes v. Doe, 8 Blackf. (Ind.) 371; Morgan v. Woodward, 1 Ind. 446, Smith (Ind.) 321; Blackwood v. Van Vleet, 11 Mich. 252; Becker v. McCrea, 48 Misc. (N. Y.) 341, 94 N. Y. S. 20, 16 N. Y. Ann. Cas. 430, affd. 119 App. Div. (N. Y.) 56, 103 N. Y. S. 963.

ejected by the mortgagor while the mortgage remains unsatisfied.[11]

§ 4714. **Accounting.**—A mortgagee in possession, whether in person, by trustee, receiver, or by a tenant, is in equity accountable for the rents and profits of the estate, and is bound to apply them in reduction of the mortgage debt.[12] After paying the interest on the debt, any balance of receipts is applicable to reduce the principal. He is not allowed to make a profit out of his possession of the estate. Therefore, upon a redemption of the mortgaged premises, he is obliged to state an account of his receipts from the mortgaged property, and he is entitled to allowances for all proper disbursements made by him in respect of the premises.[13] But he is not chargeable so long as the premises are not redeemed and the only remedy of the mortgagor is by bill in equity for an account and redemption.[14] The mortgagee must account for waste committed while he is personally in posses-

[11] Oliver v. Alabama Gold Life Ins. Co., 82 Ala. 417, 2 So. 445; Henderson v. Murphree, 124 Ala. 223, 27 So. 405; Heflin v. Slay, 78 Ala. 180; Marks v. Robinson, 82 Ala. 69, 2 So. 292; Jewett v. Tomlinson, 137 Ind. 326, 36 N. E. 1106; Fee v. Swingly, 6 Mont. 596, 13 Pac. 375; Holbrook v. Greene, 98 Maine 171, 56 Atl. 659; Barson v. Mulligan, 191 N. Y. 306, 84 N. E. 75; Becker v. McCrea, 48 Misc. (N. Y.) 341, 94 N. Y. S. 20, 16 N. Y. Ann. Cas. 430, affd. 119 App. Div. (N. Y.) 56, 103 N. Y. S. 963; Cooke v. Cooper, 18 Ore. 142, 22 Pac. 945, 7 L. R. A. 273, 17 Am. St. 709; Hennesy v. Farrell, 20 Wis. 42.

[12] Downs v. Hopkins, 65 Ala. 508; Davis v. Lassiter, 20 Ala. 561; Toomer v. Randolph, 60 Ala. 356; Bickerton v. Guttery, 124 Ala. 382, 27 So. 502; Daniel v. Coker, 70 Ala. 260; Keith v. McLaughlin, 114 Ala. 60, 21 So. 483; American Freehold Land Mortgage Co. v. Pollard, 120 Ala. 1, 24 So. 736; Greer v. Turner, 36 Ark. 17; Banks v. Walters, 95 Ark. 501, 130 S. W. 519; Moss v. Odell, 134 Cal. 464, 66 Pac. 581; Harrison v. Wyse, 24 Conn. 1, 63 Am. Dec. 151; Kellog v. Rockwell, 19 Conn. 446; Rooney v. Crary, 11 Ill. App. 213; Wood v. Whelan, 93 Ill. 153; Breckenridge v. Brooks, 2 A. K. Marsh. (Ky.) 335, 12 Am. Dec. 401; Tharp v. Feltz's Admr., 6 B. Mon. (Ky.) 6; Byers v. Byers, 65 Mich. 598, 32 N. W. 831; Shouler v. Bonander, 80 Mich. 531, 45 N. W. 487; Hannah v. Davis, 112 Mo. 599, 20 S. W. 686; Anthony v. Rogers, 20 Mo. 281; Hatch v. Falconer, 67 Nebr. 249, 93 N. W. 172; Dawson v. Drake, 30 N. J. Eq. 601; Lockard v. Hendrickson (N. J. Eq.), 25 Atl. 512; Hoye v. Bridgewater, 134 App. Div. (N. Y.) 255, 118 N. Y. S. 951; Richardson v. Beaber, 62 Misc. (N. Y.) 542, 115 N. Y. S. 821; Chapman v. Porter, 69 N. Y. 276; Swegle v. Belle, 20 Ore. 323, 25 Pac. 633; Reitenbaugh v. Ludwick, 31 Pa. St. 131; Clark v. Paquette, 67 Vt. 681, 32 Atl. 812; Liskey v. Snyder, 66 W. Va. 149, 66 S. E. 702.

[13] Thomas v. Livingston, 147 Ala. 200, 40 So. 504; McConnel v. Holobush, 11 Ill. 61; Whitley v. Barnett, 151 Iowa 487, 131 N. W. 704; Mills v. Day, 206 Mass. 530, 92 N. E. 803; Watson v. Perkins, 88 Miss. 64, 40 So. 643; Walton v. Withington's Admr., 9 Mo. 549.

[14] Farrant v. Lovel, 3 Atk. 723;

sion.[15] When, however, the security is insufficient, it seems that he will not be enjoined from cutting timber or opening a mine. So long as he does not commit wanton destruction he may also clear and cultivate the land.[16] He is entitled to make the most of the property for the purpose of realizing what is due him. He has only to account for the proceeds of the property.[17]

§ 4715. **Foreclosure.**—In general the right to foreclose a mortgage accrues upon the nonpayment of the principal or interest at the time fixed for payment.[18] If no time of payment is fixed, the debt is payable on demand, and the right to enforce it accrues immediately.[19] And if, by express terms, the mortgage is payable on demand, the mortgagee may foreclose by suit at any time without a previous demand other than by the commencement of the suit.[20] But no effectual sale under a power or by decree of court in a foreclosure suit can be made until the occurrence of the event upon the happening of which a sale or foreclosure is authorized.[21] A failure to pay an instalment of interest or principal when due is a default within the meaning of a mortgage or trust deed which authorized a sale to be made upon the happening of any default.[22] And a demand after default is not necessary to support an action for the entire sum under a mortgage which provides that the whole principal debt shall become

Daniel v. Coker, 70 Ala. 260; Farris v. Houston, 78 Ala. 250; Garland v. Watson, 74 Ala. 323; Anglo-Californian Bank v. Field, 154 Cal. 513, 98 Pac. 267; Wilcox v. Cheviott, 92 Maine 239, 42 Atl. 403; Bell v. New York, 10 Paige (N. Y.) 49; Givens v. McCalmot, 4 Watts (Pa.) 460; Dexter v. Arnold, 2 Sumn. (U. S.) 108, Fed. Cas. No. 3858; Gordon v. Hobart, 2 Story (U. S.) 243, Fed. Cas. No. 5608; Seaver v. Durant, 39 Vt. 103; Chapman v. Smith, 9 Vt. 153.

[15] Sandon v. Hooper, 6 Beav. 246; Hornby v. Matcham, 16 Sim. 325; Midleton v. Eliot, 15 Sim. 531; Daniel v. Coker, 70 Ala. 260; Onderdonk v. Gray, 19 N. J. Eq. 65.

[16] Morrison v. McLeod, 37 N. Car. 108.

[17] Millett v. Davey, 31 Beav. 470; Whiting v. Adams, 66 Vt. 679, 30 Atl. 32, 25 L. R. A. 598, 44 Am. St. 875.

[18] Gladwyn v. Hitchman, 2 Vern. 135.

[19] Eaton v. Truesdail, 40 Mich. 1; Rhoads v. Reed, 89 Pa. St. 436.

[20] Gillett v. Balcom, 6 Barb. (N. Y.) 370; Hill v. Henry, 17 Ohio 9; Darling v. Wooster, 9 Ohio St. 517.

[21] Sullivan v. McLaughlin, 99 Ala. 60, 11 So. 447; Kirk v. Van Petten, 38 Fla. 335, 21 So. 286; Cumberland Island Co. v. Bunkley, 108 Ga. 756, 33 S. E. 183; Felton v. Bissel, 25 Minn. 15; Eitelgeorge v. Mutual House Bldg. Assn., 69 Mo. 52.

[22] Stanhope v. Manners, 2 Eden 197; Fulgham v. Morris, 75 Ala. 245; Fields v. Drennen, 115 Ala. 558, 22 So. 114; McLean v. Presley's Admr., 56 Ala. 211; Keith v. McLaughlin, 105 Ala. 339, 16 So. 886; Burt v. Saxton, 1 Hun (N. Y.) 551, 4 Thomp. & C. 109; Goodman v. Cincinnati & C. R. Co., 2 Disn. (Ohio) 176, 13 Ohio Dec. 108; West Branch Bank v.

due in case default be made in the payment of interest.[23] The right to foreclose continues until barred by the statute of limitations which is usually after the lapse of such period as is prescribed for enforcing a right of entry upon lands unless a different period especially prescribed by statute.[24]

C. Rights and Liabilities of Purchaser.

§ 4716. Purchase subject to mortgage.—When one purchases land expressly subject to a mortgage, the land conveyed is as effectively charged with the encumbrance debt as if the purchaser had expressly assumed the payment of the debt, or had himself made a mortgage of the land to secure it.[25] The conveyance of land subject to a mortgage operates to give priority to the mortgage, both as against the purchaser and those claiming liens under judgments subsequently rendered.[26] The amount of an existing mortgage having been deducted from the purchase-money of the encumbered property, the grantee in effect undertakes to pay the amount of the purchase-money represented by the mortgage to the holder of it, and he is as effectually estopped to deny its validity as he would be had he in terms agreed to pay such mortgage.[27] The difference between a purchaser's assuming the payment of the mortgage and buying subject to the mortgage

Chester, 11 Pa. St. 282, 51 Am. Dec. 547; Kelly v. Kershaw, 5 Utah 295, 14 Pac. 804, 5 Utah 417, 16 Pac. 488.

[23] Hewitt v. Dean, 91 Cal. 5, 25 Pac. 423; Whitcher v. Webb, 44 Cal. 127; Dean v. Applegarth, 65 Cal. 391, 4 Pac. 375; Pacific Mutual Life Ins. Co. v. Shepardson, 77 Cal. 345, 19 Pac. 583; Ziel, Bertheau & Co. v. Dukes, 12 Cal. 479; Halleck v. Moss, 22 Cal. 266; Luckhart v. Ogden, 30 Cal. 547; Cummings v. Howard, 63 Cal. 503.

[24] 2 Jones Mortgages (6th ed.) 1042.

[25] Foster v. Bowles, 138 Cal. 346, 71 Pac. 494; Western Loan & Savings Co. v. Kendrick State Bank, 13 Idaho 331, 90 Pac. 112; Townsend v. Wilson, 155 Ill. App. 303; Fuller v. Hunt, 48 Iowa 163; Cobb v. Dyer, 69 Maine 494; Manwaring v. Powell, 40 Mich. 371; Berry v. Whitney, 40 Mich. 65; Fuller v. Devolld, 144 Mo. App. 93, 128 S. W. 1011; Chadwick v. Island Beach Co., 43 N. J. Eq. 616, 12 Atl. 380; Wiener v. Boehm, 126 App. Div. (N. Y.) 703, 111 N. Y. S. 126; Wiener v. Mayer, 126 App. Div. (N. Y.) 708, 111 N. Y. 132; Appeal of May's Estate, 218 Pa. 64, 67 Atl. 120; Sweetzer v. Jones, 35 Vt. 317, 82 Am. Dec. 639; Guernsey v. Kendall, 55 Vt. 201; Erickson v. Hammond, 135 Wis. 573, 116 N. W. 244.

[26] Bundy v. Iron Co., 38 Ohio St. 300.

[27] Hancock v. Fleming, 103 Ind. 533, 3 N. E. 254; Selby v. Sanford, 7 Kans. App. 781, 54 Pac. 17; Johnson v. Thompson, 129 Mass. 398; Tuite v. Stevens, 98 Mass. 305; Dargan v. McSween, 33 S. Car. 324, 11 S. E. 1077; Washington, O. & W. R. Co. v. Cazenove, 83 Va. 744, 3 S. E. 433.

is simply that in the one case he makes himself personally liable for the payment of the debt and in the other he does not assume such liabilities.[28] In both cases he takes the land charged with the payment of the debt and is not allowed to set up any defense to its validity, as, for instance, that the mortgage is void wholly or in part on account of usury.[29] A statement, however, in a deed of a portion of the premises covered by a mortgage, made by a purchaser from the original mortgagor, that the grant is subject to such mortgage, does not alone make the mortgage a specific charge upon the portion or interest granted by such deed.[30] If the equity of redemption be sold on execution, the purchaser cannot either legally or equitably claim that the mortgagor shall pay off the mortgage. The purchase is made subject to the mortgage, and the premises as between the purchaser and the mortgagor become primarily liable for the debt.[31] A purchaser at an execution sale is in the same position, in respect to previous encumbrances, as one who takes title by quitclaim deed, or by a deed made expressly subject to encumbrances.[32] If a purchaser buys a mere equity of redemption he is not personally liable for the mortgage debt;[33] nor liable either legally or equitably to indem-

[28] J. H. Magill Lumber Co. v. Lane-White Lumber Co., 90 Ark. 426, 119 S. W. 822; Stephens v. Clay, 17 Colo. 489, 30 Pac. 43, 31 Am. St. 328; Capitol Nat. Bank v. Holmes, 43 Colo. 154, 95 Pac. 314, 16 L. R. A. (N. S.) 733n, 127 Am. St. 108; Lane v. Davis, 158 Ill. App. 653; Elser v. Williams, 104 Ill. App. 238; Wyatt v. Dufrene, 106 Ill. App. 214; Strohauer v. Voltz, 42 Mich. 444, 4 N. W. 161; Winans v. Wilkie, 41 Mich. 264, 1 N. W. 1049; Woodbury v. Swan, 58 N. H. 380; Enos v. Sanger, 96 Wis. 150, 70 N. W. 1069; Desmond v. McNamara, 107 Wis. 126, 82 N. W. 701.

[29] Fuller v. Hunt, 48 Iowa 163; Green v. Turner, 38 Iowa 112; Greither v. Alexander, 15 Iowa 470; Perry v. Kearns, 13 Iowa 174; Holtzclaw v. Craynor Smith Lumber Co. (Ky.), 114 S. W. 271; Pinnell v. Boyd, 33 N. J. Eq. 190, revd. 33 N. J. Eq. 600; Dolman v. Cook, 14 N. J. Eq. 56; Conover v. Hobart, 24 N. J. Eq. 120; Lee v. Stiger, 30 N. J. Eq. 610.

[30] Stephens v. Clay, 17 Colo. 489, 30 Pac. 43, 31 Am. St. 328; Slater v. Breese, 36 Mich. 77.

[31] Lovelace v. Webb, 62 Ala. 271; Russell v. Allen, 10 Paige (N. Y.) 249; Vanderkemp v. Shelton, 11 Paige (N. Y.) 28, revg. Clarke Ch. (N. Y.) 321.

[32] Bunch v. Grave, 111 Ind. 351, 12 N. E. 514; Norman v. Norman, 26 S. Car. 41, 11 S. E. 1096.

[33] Hall v. Mobile & Montgomery R. Co., 58 Ala. 10; Crawford v. Nimmons, 180 Ill. 143, 54 N. E. 209; Rourke v. Coulton, 4 Ill. App. 257; Worley v. Hineman, 6 Ind. App. 240, 33 N. E. 260; Moore v. Olive, 114 Iowa 650, 87 N. W. 720; Holcomb v. Thompson, 50 Kans. 598, 32 Pac. 1091; Hopper v. Calhoun, 52 Kans. 703, 35 Pac. 816, 39 Am. St. 363; Fiske v. Tolman, 124 Mass. 254, 26 Am. Rep. 659; Strong v. Converse, 8 Allen (Mass.) 557, 85 Am. Dec. 732; Jager v. Vollinger, 174 Mass. 521, 55 N. E. 458; Locke v. Homer, 131 Mass. 93, 41 Am. Rep. 199; Carley v. Fox, 38 Mich. 387; Clifford v.

nify his grantor against the mortgage.[34] He may give up the property at any time in satisfaction of the lien.[35] The mortgage debt remains an encumbrance upon the estate, and a debt of the mortgagor, but not a debt of the person buying it. In the absence of a special agreement to assume the mortgage, or words in the grant importing in some form that he assumes the payment of it, the purchaser is not personally liable for it.[36]

§ 4717. Assumption of mortgage by purchaser.—Frequently, one purchasing land subject to an existing mortgage does not merely purchase the equity of redemption, but purchases the whole estate, and assumes the payment of the mortgage as a part of the purchase-money of it.[37] The vendor, especially if he be also the mortgagor, usually requires such an undertaking on the part of the purchaser so that the debt may be a charge upon him, and not merely a charge upon the land. As between the parties the purchaser thus becomes primarily liable, and the mortgagor only a surety for the payment of the debt. The mortgaged property moreover, becomes, as between them, the primary fund for the payment of the debt. The purchaser, having made the mortgage debt his own debt, cannot take an assignment of the mortage, and hold it as an independent title, but it is thereupon merged and discharged.[38] A purchaser who assumes the mortgage becomes as to the mortgagor the principal debtor and the mortgagor a surety;[39] but the mortgagee, unless he has assented to

Minor, 76 Minn. 12, 78 N. W. 861; Lawrence v. Towle, 59 N. H. 28; Hoy v. Bramhall, 19 N. J. Eq. 74, revd. 19 N. J. Eq. 563, 97 Am. Dec. 687; Russell v. Allen, 10 Paige (N. Y.) 249; Belmont v. Coman, 22 N. Y. 438, 78 Am. Dec. 213; Merriman v. Moore, 90 Pa. St. 78; In re Moore's Appeal, 88 Pa. St. 450, 32 Am. Rep. 469; Shepherd v. May, 115 U. S. 505, 29 L. ed. 456, 6 Sup. Ct. 119; Elliott v. Sackett, 108 U. S. 132, 27 L. ed. 678, 2 Sup. Ct. 375; Guernsey v. Kendall, 55 Vt. 201; Desmond v. McNamara, 107 Wis. 126, 82 N. W. 701.

[34] Smith v. Truslow, 84 N. Y. 660.

[35] Tichenor v. Dodd, 18 N. J. Eq. 454.

[36] Johnson v. Monell, 13 Iowa 300; Chilton v. Brooks, 72 Md. 554, 20 Atl. 125; Shepherd v. May, 115 U. S. 505, 29 L. ed. 456, 6 Sup. Ct. 119.

[37] George v. Andrews, 60 Md. 26, 45 Am. Rep. 706.

[38] Lilly v. Palmer, 51 Ill. 331; Comstock v. Hitt, 37 Ill. 542; Fowler v. Fay, 62 Ill. 375; Drury v. Holden, 121 Ill. 130, 13 N. E. 547; Holden v. Dunn, 144 Ill. 413, 33 N. E. 413, 19 L. R. A. 481; Winans v. Wilkie, 41 Mich. 264; Converse v. Cook, 8 Vt. 164.

[39] Daniels v. Johnson, 129 Cal. 415, 61 Pac. 1107, 79 Am. St. 123; Roberts v. Fitzallen, 120 Cal. 482, 52 Pac. 818; Scholten v. Barber, 217 Ill. 148, 75 N. E. 460, affg. 119 Ill. App. 241; Gregory v. Arms (Ind. App.), 96 N. E. 196; Boice v. Coffeen (Iowa), 138 N. W. 857; North End Sav. Bank v. Snow,

such an arrangement, may treat both as principal debtors and may have a personal decree against both.[40] The mere assignment by the mortgagor of his interest in the mortgaged premises to a third person, who agrees to pay off the mortgage, does not release the mortgagor. There is no novation unless there be something to show that the mortgagee has released the mortgagor and has agreed to look solely to the purchaser for payment of the mortgage debt.[41] It is held that the mortgagee may release the mortgagor from his personal liability in such case without discharging the land, or the grantee, who assumed the debt,[42] but cannot release the grantee, who has thus become the principal debtor without releasing the mortgagor who has become the surety.[43] A grantee who has assumed the payment of a mortgage is not discharged from liability to the mortgagee merely because the latter has foreclosed his mortgage, if there is a deficiency of proceeds to pay the whole debt.[44] When a purchaser who has assumed a mortgage conveys the land to another who assumes the mortgage, the former purchaser stands as surety for the subsequent purchaser. And if the former is compelled to pay the debt he may recover from the latter unless there is a clause in the con-

197 Mass. 339, 83 N. E. 1099, 125 Am. St. 368; Briddy v. Miners' & Merchants' Bank, 132 Mo. App. 279, 111 S. W. 865; Jackson v. Meister & Bache Realty Co., 139 App. Div. (N. Y.) 937, 124 N. Y. S. 1118; Jackson v. Pescia, 124 N. Y. S. 735; Cohen v. Hecht, 128 App. Div. (N. Y.) 511, 112 N. Y. S. 809; Perry v. Ward, 82 Vt. 1, 71 Atl. 721.

[40] Waters v. Hubbard, 44 Conn. 340; Webster v. Fleming, 178 Ill. 140, 52 N. E. 975, affg. 73 Ill. App. 234; Jones v. Foster, 175 Ill. 459, 51 N. E. 862; Daub v. Englebach, 109 Ill. 267; Hazle v. Bondy, 173 Ill. 302, 50 N. E. 671; Corbett v. Waterman, 11 Iowa 86; Thompson v. Bertram, 14 Iowa 476; James v. Day, 37 Iowa 164; Mulvane v. Sedgley, 63 Kans. 105, 64 Pac. 1038, 55 L. R. A. 552; Herbert v. Doussan, 8 La. Ann. 267; Martin v. Humphrey, 58 Nebr. 414, 78 N. W. 715; Hare v. Murphy, 45 Nebr. 809, 64 N. W. 211, 29 L. R. A. 851; Keedle v. Flack, 27 Nebr. 836, 44 N. W. 34; Shepherd v. May, 115 U. S. 505, 29 L. ed. 456, 6 Sup. Ct. 119; Union Mut. Life Ins. Co. v. Hanford, 143 U. S. 187, 36 L. ed. 118, 12 Sup. Ct. 437; Cucullu v. Hernandez, 103 U. S. 105, 26 L. ed. 322.

[41] Boardman v. Larrabee, 51 Conn. 39; James v. Day, 37 Iowa 164; Teeters v. Lamborn, 43 Ohio St. 144, 1 N. E. 513; Hull v. Hayward, 13 S. Dak. 291, 83 N. W. 270, 79 Am. St. 890; Denison University v. Manning, 65 Ohio St. 138, 61 N. E. 706; Spycher v. Werner, 74 Wis. 456, 43 N. W. 161, 5 L. R. A. 414.

[42] Tripp v. Vincent, 3 Barb. Ch. (N. Y.) 613.

[43] Paine v. Jones, 76 N. Y. 274; Mutual Life Ins. Co. v. Davies, 12 Jones & S. (N. Y.) 172.

[44] Rouse v. Bartholomew, 51 Kans. 425, 32 Pac. 1088.

veyance that the latter purchaser shall hold him harmless from his covenants to assume the mortgage.[45]

§ 4718. Personal liability of purchaser.—A deed which is merely made subject to a mortgage specified does not alone render the grantee personally liable for the mortgage debt.[46] To create such liability there must be language which clearly imports that the grantee assumes the obligation of paying the debt.[47] It is not necessary that any particular formal words should be used,[48] but the intention to impose upon the grantee this obligation should clearly appear. The intention will be

[45] Stover v. Tompkins, 34 Nebr. 465, 51 N. W. 1040. See also, Boice v. Coffeen (Iowa), 138 N. W. 857.

[46] Swisher v. Palmer, 106 Ill. App. 432; Scholten v. Barber, 217 Ill. 148, 75 N. E. 460, affg. 119 Ill. App. 241; Snell's Estate v. Home Mut. Bldg. & Loan Assn., 148 Ill. App. 514; Gregory v. Arms (Ind. App.), 96 N. E. 196; Fitzgerald v. Flannagan (Iowa) 125 N. W. 995; Clifford v. Minor, 76 Minn. 12, 78 N. W. 861; Smith v. Davis, 90 Mo. App. 533; First Methodist Episcopal Church v. Fadden, 8 N. Dak. 162, 77 N. W. 615; Belmont v. Coman, 22 N. Y. 438, 78 Am. Dec. 213; Sloan v. Klein, 230 Pa. 132, 79 Atl. 403. A purchaser is personally liable for only such portion of the mortgage debt as he assumes. Logan v. Smith, 70 Ind. 597.

[47] Patton v. Adkins, 42 Ark. 197; Starbird v. Cranston, 24 Colo. 20, 48 Pac. 652; Burbank v. Roots, 4 Colo. App. 197, 35 Pac. 275; Foster v. Atwater, 42 Conn. 244; McCrery v. Nivin (Del. Ch.), 67 Atl. 452; Middaugh v. Bachelder, 33 Fed. 706; Fowler v. Fay, 62 Ill. 375; Comstock v. Hitt, 37 Ill. 542; Dunn v. Rodgers, 43 Ill. 260; Dean v. Walker, 107 Ill. 540, 47 Am. Rep. 467; Rapp v. Stoner, 104 Ill. 618; Ingram v. Ingram, 172 Ill. 287, 50 N. E. 198; Drury v. Holden, 121 Ill. 130, 13 N. E. 547; Crawford v. Nimmons, 180 Ill. 143, 54 N. E. 209; Consolidated Coal Co. v. Peers, 166 Ill. 361, 46 N. E. 1105, 38 L. R. A. 624; Seigel v. Borland, 191 Ill. 107, 60 N. E. 863; Campbell v. Patterson, 58 Ind. 66; Ayres v. Randall, 108 Ind. 595, 9 N. E. 464; Johnson v. Monell, 13 Iowa 300; Ritchie v. McDuffie, 62 Iowa 46, 17 N. W. 167; Duncan v. Finn, 79 Iowa 658, 44 N. W. 888; Hull & Co. v. Alexander, 26 Iowa 569; Lewis v. Day, 53 Iowa 575, 5 N. W. 753; Crane v. Hughes, 5 Kans. App. 100, 48 Pac. 865; Stephenson v. Elliott, 53 Kans. 550, 36 Pac. 980; Flint v. Winter Harbor Land Co., 89 Maine 420, 36 Atl. 634; Weed Sewing Machine Co. v. Emerson, 115 Mass. 554; Strong v. Converse, 8 Allen (Mass.) 557, 85 Am. Dec. 732; Drury v. Tremont Improvement Co., 13 Allen (Mass.) 168; Jehle v. Brooks, 112 Mich. 131, 70 N. W. 440; Winans v. Wilkie, 41 Mich. 264, 1 N. W. 1049; Gage v. Jenkinson, 58 Mich. 169, 24 N. W. 815; Graves v. Macfarland, 58 Nebr. 802, 79 N. W. 707; Hare v. Murphy, 45 Nebr. 809, 64 N. W. 211, 29 L. R. A. 851; Stover v. Tomplins, 34 Nebr. 465, 51 N. W. 1040; Green v. Hall, 45 Nebr. 89, 63 N. W. 119; Woodbury v. Swan, 58 N. H. 380; Schley v. Fryer, 100 N. Y. 71; Collins v. Rowe, 1 Abb. N. Cas. (N. Y.) 97; Trotter v. Hughes, 12 N. Y. 74, 62 Am. Dec. 137; Belmont v. Coman, 22 N. Y. 438, 78 Am. Dec. 213; Binsse v. Paige, 1 Keyes (N. Y.) 87, 1 Abb. Dec. (N. Y.) 138; Stebbins v. Hall, 29 Barb. (N. Y.) 524; Tillotson v. Boyd, 6 N. Y. Super. Ct. 516; Murray v. Smith, 8 N. Y. Super. Ct. 412; Walker v. Goldsmith, 7 Ore. 161; In re Moore's Appeal, 88 Pa. St. 450, 19 Alb. L. J. 257, 32 Am. Rep. 469; Granger v. Roll, 6 S. Dak. 611, 62 N. W. 970; Bumgardner v. Allen, 6 Munf. (Va.) 439; Tanguay v. Felthousen, 45 Wis. 30.

[48] Johns v. Wilson, 6 Ariz. 125, 53

sought from the whole instrument and any inconsistent part will be rejected or modified according to the intent of the whole.[49] A clause in a deed which recites that the premises are subject to a certain mortgage which the grantee "assumes" means the same as if it were "assumes to pay" and amounts to a personal covenant by the grantee to pay the mortgage.[50] A purchaser of land accepting a deed expressly conveying it subject to a mortgage, and excepting it from the covenants, is not himself personally liable to pay it, unless he covenants to do so. The land in such case is primarily liable as between the vendor and purchaser; and the vendor is liable for any deficiency after a foreclosure sale fairly made.[51] When the mortgage has been thus assumed by a purchaser, he may be made a party to a proceeding to foreclose, and a personal judgment had against him; or he may be sued on his personal liability without any proceeding to foreclose.[52] An agreement that the amount of a mortgage upon the granted premises shall be paid as a part of the purchase-money is in effect an assumption to pay the mortgage, and not merely a taking of the property subject to the mortgage. The mortgage in such case is charged upon the purchase-money, and not upon the land merely.[53] Whenever the mortgage debt forms a part of the consideration of the purchase, although the purchaser has not entered into any covenant or agreement to pay it, he is

Pac. 583, affd. 180 U. S. 440, 45 L. ed. 613, 21 Sup. Ct. 445; Wright v. Briggs, 99 Ind. 563; Strong v. Converse, 8 Allen (Mass.) 557; Thayer v. Torrey, 37 N. J. L. 339; Martin v. Humphrey, 58 Nebr. 414, 78 N. W. 715; Belmont v. Coman, 22 N. Y. 438, 78 Am. Dec. 213.

[49] Hopper v. Calhoun, 52 Kans. 703, 35 Pac. 816, 39 Am. St. 363; Stebbins v. Hall, 29 Barb. (N. Y.) 524.

[50] Skinner v. Harker, 23 Colo. 333, 48 Pac. 648; Thomas v. Home Mut. Bldg. Loan Assn., 243 Ill. 550, 90 N. E. 1081; Jehle v. Brooks, 112 Mich. 131, 70 N. H. 440; Field v. Thistle, 58 N. J. Eq. 339, 43 Atl. 1072, affd. 60 N. J. Eq. 444, 46 Atl. 1099; Vreeland v. Van Blarcom, 35 N. J. Eq. 530; Schley v. Fryer, 100 N. Y. 71, 2 N. E. 280.

[51] Comstock v. Hitt, 37 Ill. 542; Johnson v. Zink, 51 N. Y. 333; Hampshire v. Greeves (Tex. Civ. App.), 130 S. W. 665; Gayle v. Wilson, 30 Grat. (Va.) 166.

[52] Blakeslee v. Holt, 116 Ill. App. 83; Wright v. Briggs, 99 Ind. 563; Thompson v. Bertram, 14 Iowa 476; Corbett v. Waterman, 11 Iowa 86; Moses v. Dallas Dist. Court, 12 Iowa 139; Gerardi v. Christie, 148 Mo. App. 75, 127 S. W. 635; Curry v. Lafon, 133 Mo. App. 163, 113 S. W. 246; Burr v. Beers, 24 N. Y. 178, 80 Am. Dec. 327. But see in Minnesota, Wood v. Johnson (Minn.), 135 N. W. 746.

[53] Kennedy v. Brown, 61 Ala. 296; Heid v. Vreeland, 30 N. J. Eq. 591; Tichenor v. Dodd, 4 N. J. Eq. 454; Belmont v. Coman, 22 N. Y. 438, 78 Am. Dec. 213; Dargan v. McSween, 33 S. Car. 324, 11 S. E. 1077; Urquhart v. Brayton, 12 R. I. 169.

bound to the extent of the property to indemnify the grantor The law implies a promise to that effect from the nature of the transaction.[54] But the purchaser is under no personal liability to any one on such mortgage debt.[55] He does not assume any liability beyond the value of the land conveyed to him. If the mortgage debt be afterward paid by the mortgagor, equity may compel the purchaser by way of subrogation to refund the money so paid or give up the property. He may discharge his obligation to indemnify the mortgagor by releasing the land to him.[56]

[54] Twichell v. Mears, 8 Biss. (U. S.) 211. See also, Comstock v. Hitt, 37 Ill. 542; Shepperd v. Berkshire L. Ins. Co., 161 Ill. App. 467, (But this obligation does not extend to attorney's fees and the like, in the absence of contract.); Wood v. Smith, 51 Iowa 156, 50 N. W. 581; Iowa Loan & Trust Co. v. Mowery, 67 Iowa 113, 24 N. W. 747; Bristol Sav. Bank v. Stiger, 86 Iowa 344, 53 N. W. 265; Fuller v. Hunt, 48 Iowa 163; Northwestern Nat. Bank v. Stone, 97 Iowa 183, 66 N. W. 91; Foy v. Armstrong, 113 Iowa 629, 85 N. W. 753; Scott v. Featherston, 5 La. Ann. 306; Schlatre v. Greaud, 19 La. Ann. 125; Stevenson v. Black, 1 N. J. Eq. 338; Klapworth v. Dressler, 13 N. J. Eq. 62, 78 Am. Dec. 69; Hartshorne v. Hartshorne, 2 N. J. Eq. 349; Crowell v. Hospital of St. Barnabas, 27 N. J. Eq. 650; Cummings v. Jackson, 55 N. J. Eq. 805, 38 Atl. 763; Garnsey v. Rogers, 47 N. Y. 233, 7 Am. Rep. 440; Dorr v. Peters, 3 Edw. Ch. (N. Y.) 132; Marsh v. Pike, 1 Sandf. Ch. (N. Y.) 210, affd. 10 Paige (N. Y.) 595; Blyer v. Monholland, 2 Sandf. Ch. (N. Y.) 478; Ferris v. Crawford, 2 Denio (N. Y.) 595, affd. 11 Paige (N. Y.) 470; Flagg v. Thurber, 14 Barb. (N. Y.) 196; Cornell v. Prescott, 2 Barb. (N. Y.) 16; Thompson v. Thompson, 4 Ohio St. 333; In re Moore's Appeal, 88 Pa. St. 450, 19 Alb. L. J. (Pa.) 257, 32 Am. Rep. 469; Burke v. Gummey, 49 Pa. St. 518; Desmond v. McNamara, 107 Wis. 126, 82 N. W. 701.

[55] Hubbard v. Ensign, 46 Conn. 576; Bristol Sav. Bank v. Stiger, 86 Iowa 344, 53 N. W. 265; Lawrence v. Towle, 59 N. H. 28; Equitable Life Assur. Soc. v. Bostwick, 100 N. Y. 628, 3 N. E. 296; Belmont v. Coman, 22 N. Y. 438, 78 Am. Dec. 213.

[56] Tichenor v. Dodd, 4 N. J. Eq. 454; Crowell v. Hospital of St. Barnabas, 27 N. J. Eq. 650; Mount v. Van Ness, 33 N. J. Eq. 262.

CHAPTER CXLII.

ASSIGNMENT OF MORTGAGES.

§ 4725. Form, requisites, and method of assignment.
4726. What constitutes an assignment.
4727. Delivery.
4728. Consideration.
4729. Effect of assignment.
§ 4730. Who may make an assignment.
4731. Right to compel assignment by a mortgagee.
4732. Notice of assignment.
4733. Mortgage of indemnity.
4734. Disseizin of mortgagee.
4735. Equitable assignments.

§ 4725. Form, requisites, and method of assignment.—An assignment of a mortgage is usually effected by a brief form in which the mortgage is identified by a recital of the names of the parties to it, of its date, and of the book and page, in the registry where it was recorded, without any other description of the property. It is usual to deliver with the assignment the original mortgage; but this is not essential.[1] It is, however, essential to a formal and complete assignment that the note or bond secured by the mortgage should be indorsed or otherwise assigned, and delivered with the assignment;[2] or, at any rate, that an intention should be manifest to assign the mortgage debt, to which the mortgage is only an incident; otherwise the assignment will only pass a naked legal title to the land.[3] The legal title to a mortgage can only be transferred by deed, executed with due formality with words of conveyance, except in those states where the common-law character of the mortgage as an estate in land has given place to the doctrine that the mortgage is a mere chattel interest.[4] An assignment, though indorsed upon the mort-

[1] Warden v. Adams, 15 Mass. 233. See also, Goettlicher v. Wille, 76 Misc. (N. Y.) 361, 134 N. Y. S. 977.

[2] Bailey v. Gilliland, 2 Kans. App. 558, 44 Pac. 747.

[3] Hill v. Alexander, 2 Kans. App. 251, 41 Pac. 1066.

[4] Barron v. Barron, 122 Ala. 194, 25 So. 55; Sanders v. Cassady, 86 Ala. 246, 5 So. 503; New England Mortgage Security Co. v. Clayton, 119 Ala. 361, 24 So. 362; Givan v. Doe, 7 Blackf. (Ind.) 210; Burton v. Baxter, 7 Blackf. (Ind.) 297; Douglass v. Durin, 51 Maine 121; Smith v. Kelley, 27 Maine 237, 46 Am. Dec.

gage, and delivered with it, if not under seal, has been held to convey only an equitable interest.[5] It does not pass the legal estate though it will authorize the assignee to enforce the mortgage in equity.[6] It must, also, contain the words necessary in an ordinary deed of land to pass the legal estate, as, for instance, words of grant;[7] but an assignment which purports to pass all the mortgagee's interest in the mortgaged premises and the debt vests in the assignee all the mortgagee's rights, and not merely a life estate, though no words of inheritance are used in the assignment.[8]

§ 4726. What constitutes an assignment.—In general, if an assignment of a mortgage be made without any transfer of the note, bond or debt secured by the mortgage, the assignee takes only a naked legal estate, which he will hold in trust for the owner of the note or other mortgage debt. The transfer of the debt is essential to an effective assignment of the mortgage.[9] A purchaser of the mortgage title, not finding the note in the possession of a mortgagee, is held to take it subject to the rights of any person to whom the mortgage debt has been previously assigned.[10] Yet it is held that an assignment of the mortgage generally carries the debt. The assignment of itself conveys the right to receive payment of the notes, if these be actually sold

595; Dorkray v. Noble, 8 Greenl. (Maine) 278; Dwinel v. Perley, 32 Maine 197; Lyford v. Ross, 33 Maine 197; Warren v. Homestead, 33 Maine 256; Vose v. Handy, 2 Greenl. (Maine) 322, 11 Am. Dec. 101; Warden v. Adams, 15 Mass. 233; Adams v. Parker, 12 Gray (Mass.) 53; Phelps v. Townsley, 10 Allen (Mass.) 554; Williams v. Teachey, 85 N. Car. 402; Henderson v. Pilgrim, 22 Tex. 464; Torrey v. Deavitt, 53 Vt. 331.

[5] Adams v. Parker, 12 Gray (Mass.) 53.

[6] Kinna v. Smith, 3 N. J. Eq. 14.

[7] Lanigan v. Sweany, 53 Ark. 185, 13 S. W. 740; Williams v. Teachey, 85 N. Car. 402; Cottrell v. Adams, 2 Biss. (U. S.) 351, Fed. Cas. No. 3272, 2 Leg. Gaz. 275.

[8] Barnes v. Boardman, 149 Mass. 106, 21 N. E. 308, 3 L. R. A. 785.

[9] Duval's Heirs v. McLoskey, 1 Ala. 708; Peters v. Jamestown Bridge Co., 5 Cal. 334, 63 Am. Dec. 134; Farrell v. Lewis, 56 Conn. 280, 14 Atl. 931; Carter v. Bennett, 4 Fla. 283; Johnson v. Cornett, 29 Ind. 59; Hamilton v. Browning, 94 Ind. 242; Swan v. Yaple, 35 Iowa 248; Pope v. Jacobus, 10 Iowa 262; Sangster v. Love, 11 Iowa 580; Lunt v. Lunt, 71 Maine 377; Bailey v. Gould, Walk. Ch. (Mich.) 478; O'Mulcahy v. Holley, 28 Minn. 31, 8 N. W. 906; Thayer v. Campbell, 9 Mo. 280; Bell v. Morse, 6 N. H. 205; Hutchins v. Carleton, 19 N. H. 487; Merritt v. Bartholick, 36 N. Y. 44, affg. 47 Barb. (N. Y.) 253; Aymar v. Bill, 5 Johns. Ch. (N. Y.) 570; Jackson v. Willard, 4 Johns. (N. Y.) 41; Cooper v. Newland, 17 Abb. Pr. (N. Y.) 342; Cleveland v. Cohrs, 10 S. Car. 224.

[10] Haescig v. Brown, 34 Mich. 503; Fletcher v. Carpenter, 37 Mich. 412; Kellogg v. Smith, 26 N. Y. 18.

and delivered to the assignee of the mortgage, or if they be in terms included in the assignment, though they be not actually delivered to the assignee.[11] In a proceeding to foreclose, it is necessary to produce the notes in order to rebut the presumption of payment which would result from their absence. The note is the most direct and proper evidence of the debt. If the note be not produced, its absence must be accounted for.[12] But the beneficial interest in the debt may be included in an assignment of the mortgage, although the terms of the assignment embrace the mortgage alone. This, it is held, would be the presumed intention of the parties in all cases when the debt has not been already transferred to another,[13] and an adequate consideration is paid.[14]

On the other hand, the mortgage being merely an incident of the debt it cannot be assigned separately from it, so as to give any benefical interest. The incident may pass by a grant of the principal, but not the principal by the grant of the incident.[15] And it is held that the mere delivery of the mortgage deed without the bond or note does not constitute a transfer of it either by way of sale or pledge, though the full consideration was paid or money was advanced upon it.[16] There is said to be in such case a presumption against any transfer. In England such a deposit of the papers would constitute a valid lien, and is a very common mode of securing a loan. But in this country, under the recording acts, no lien upon the real estate can be created by a deposit of title deeds.[17] When a mortgage has been

[11] Hilton v. Woodman's Estate, 124 Mich. 326, 82 N. W. 1056; Williams v. Teachey, 85 N. Car. 402; Baldwin v. Raplee, 4 Ben. 433, Fed. Cas. No. 801.

[12] King v. Harrington, 2 Aikens (Vt.) 33, 16 Am. Dec. 675; Edgell v. Stanford, 3 Vt. 202.

[13] Merritt v. Bartholick, 36 N. Y. 44, affg. 47 Barb. (N. Y.) 253; Cooper v. Newland, 17 Ab. Pr. (N. Y.) 342; Northampton Bank v. Balliet, 8 Watts & S. (Pa.) 311, 42 Am. Dec. 297; Philips v. Bank of Lewistown, 18 Pa. St. 394.

[14] Hewell v. Coulbourn, 54 Md. 59; Fletcher v. Carpenter, 37 Mich. 412.

[15] Morrison v. Roehl, 215 Mo. 545, 114 S. W. 981; Luetchford v. Lord, 132 N. Y. 465, 30 N. E. 859; Bloomingdale v. Bowman, 51 Hun (N. Y.) 639, 21 N. Y. St. 247, 4 N. Y. S. 60; Cleveland v. Cohrs, 10 S. Car. 224; Downing v. State, 61 Tex. Crim. App. 519, 136 S. W. 471; Hitchcock v. Merrick, 18 Wis. 357; Roach v. Sanborn Land Co., 135 Wis. 354, 115 N. W. 1102.

[16] Warden v. Adams, 15 Mass. 233; Bowers v. Johnson, 49 N. Y. 432; Merritt v. Bartholick, 36 N. Y. 44, affg. 47 Barb. (N. Y.) 253.

[17] 1 Jones on Mortgages (6th ed.), §§ 179, 185. Compare, however, Sturdivant Bank v. Schade, 195 Fed. 188, as to pledge of collateral notes and delivery of trust deed.

formally assigned and the mortgage note delivered to the assignee without any indorsement of it, the mortgagor is not justified in refusing payment to the assignee on the ground that the note has not been indorsed by the payee.[18] The formal assignment, duly acknowledged and recorded, and the possession of the note, are the best possible evidence of ownership, and the assignee is entitled to demand and enforce payment whether the note is indorsed or not, or whether it be negotiable or not.[19] Such an assignment is a good equitable transfer of the mortgage and note. It is sufficient evidence of an intention to pass the beneficial interest in them.[20] When, however, there is no separate obligation for the mortgage debt, and no express covenant in the mortgage for the payment of it, then the remedy upon the mortgage is confined to the lands, and an assignment of the mortgage necessarily transfers all the mortgagee's rights under it. The mortgage is then the principal and only thing, and is not an incident to anything else.[21] The assignee of a mortgage without the debt can maintain no action upon it except at the request of the holder of the bond or note secured by it. Judgment could only be entered upon producing the separate obligation for the debt. According to the principles of equity courts, the assignee of the legal title, holding it as trustee for the benefit of the holder of the mortgage debt, would be compelled either to foreclose the mortgage for the benefit of the holder of the debt, or to assign it to him.[22] A deed of release or quitclaim or other conveyance is sufficient to pass the interest of the mortgagee, when there is no separate obligation for the payment of the debt;[23]

[18] Pease v. Warren, 29 Mich. 9, 18 Am. Rep. 58; Moreland v. Houghton, 94 Mich. 548, 54 N. W. 285; Kelly v. Burnham, 9 N. H. 20; Thorndike v. Norris, 24 N. H. 454; King v. Harrington, 2 Aikens (Vt.) 33, 16 Am. Dec. 675.

[19] Morris v. Peck, 73 Wis. 482, 41 N. W. 623.

[20] Pratt v. Skolfield, 45 Maine 386; Strong v. Jackson, 123 Mass. 60, 25 Am. Rep. 19.

[21] Caryl v. Williams, 7 Lans. (N. Y.) 416; Severance v. Griffith, 2 Lans. (N. Y.) 38; Hone v. Fisher, 2 Barb. Ch. (N. Y.) 559; Coleman v. Van Rensselaer, 44 How. Pr. (N. Y.) 368.

[22] Pettus v. Gault, 81 Conn. 415, 71 Atl. 509; Webb v. Flanders, 32 Maine 175; Garroch v. Sherman, 6 N. J. Eq. 219.

[23] Sadler v. Jefferson, 143 Ala. 669, 39 So. 380; Dorkray v. Noble, 8 Greenl. (Maine) 278; Hill v. More, 40 Maine 515; Hunt v. Hunt, 14 Pick. (Mass.) 374, 25 Am. Dec. 400; Freeman v. McGaw, 15 Pick. (Mass.) 82; Thompson v. Kenyon, 100 Mass. 108; Stark v. Boynton, 167 Mass. 443, 45 N. E. 764; Blunt v. Norris, 123 Mass. 55, 25 Am. Rep. 14; Morse v. Curtis,

and is sufficient also when there is a separate obligation, and this is delivered with the deed.[24] A warranty deed is equally effectual, and will also pass any title subsequently perfected by the mortgagee.[25] But a mere conveyance by the mortgagee of the mortgaged premises will not per se operate as an assignment of the debt secured by the mortgage.[26] Such also, is the effect of the conveyance by one having an absolute title to property which he really holds by mortgage title, if the purchaser from him has notice of the separate defeasance, or of circumstances which make the transaction a mortgage.[27] And a deed of the land by the mortgagee will pass no interest at all, unless it be a mere naked legal estate, when the mortgagee has already transferred the mortgage debt.[28] A mortgage cannot convey the mortgaged property to a stranger and at the same time retain the debt which it was given to secure. The mortgagee has no estate in the land, except such as is necessary for securing the debt due him; he has no estate which he can convey in disconnection with the debt.[29] The deed alone will not pass the mortgage debt, unless the intention to transfer this as well is expressed in it.[30] Where the legal title is regarded as remaining in the

140 Mass. 112, 2 N. E. 929, 54 Am. Rep. 456; Welch v. Priest, 8 Allen (Mass.) 165; Weeks v. Eaton, 15 N. H. 145; Felker v. Mowry, 69 N. H. 164, 38 Atl. 726; Bacon v. Goodnow, 59 N. H. 415; Fletcher v. Chamberlin, 61 N. H. 438; Severance v. Griffith, 2 Lans. (N. Y.) 38; Hawley v. Levee, 66 Misc. (N. Y.) 280, 123 N. Y. S. 4; Gottlieb v. New York, 128 App. Div. (N. Y.) 148, 112 N. Y. S. 545; Blessett v. Turcotte, 20 N. Dak. 151, 127 N. W. 505; Rodriguez v. Haynes, 76 Tex. 225, 13 S. W. 296; Smithson Land Co. v. Brautigam, 16 Wash. 174, 47 Pac. 434.

[24] Dixfield v. Newton, 41 Maine 221; Dearborn v. Taylor, 18 N. H. 153; Hobson v. Roles, 20 N. H. 41; Furbush v. Goodwin, 25 N. H. 425; Mott v. German Hospital, 55 N. J. Eq. 722, 37 Atl. 757.

[25] Ruggles v. Barton, 13 Gray (Mass.) 506; Lawrence v. Stratton, 6 Cush. (Mass.) 163.

[26] Jordan v. Sayre, 29 Fla. 100, 10 So. 823; Hill v. Edwards, 11 Gil. (Minn.) 5; Everest v. Ferris, 16 Gil. (Minn.) 14; Smith v. Smith, 15 N. H. 55; Purdy v. Huntington, 42 N. Y. 334, 1 Am. Rep. 532.

[27] Union Mut. L. Ins. Co. v. Slee, 123 Ill. 57, 13 N. E. 222; Leahigh v. White, 8 Nev. 147; Decker v. Leonard, 6 Lans. (N. Y.) 264. If the purchaser has not such notice, but in good faith purchases an indefeasible title, the mortgagee will in equity be treated as a constructive trustee for the price for which he sold the land after deducting therefrom the amount of the mortgage debt. Linnell v. Lyford, 72 Maine 280.

[28] Wyman v. Porter, 108 Maine 110, 79 Atl. 371; Bell v. Morse, 6 N. H. 205; Whittemore v. Gibbs, 24 N. H. 484; Weeks v. Eaton, 15 N. H. 145; Furbush v. Goodwin, 25 N. H. 425; Hobson v. Roles, 20 N. H. 41.

[29] Jordan v. Sayre, 29 Fla. 100, 10 So. 823; Devlin v. Collier, 53 N. J. L. 422, 22 Atl. 201; Jackson v. Bronson, 19 Johns. (N. Y.) 325.

[30] Ellison v. Daniels, 11 N. H. 274; Parish v. Gilmanton, 11 N. H. 293.

mortgagor, and the mortgagee only acquires a right to enforce payment of his claim, a deed made by a holder of the mortgage conveying all his "estate, title, and interest" in the real estate mortgage will not operate as an assignment of the mortgage, for this is a conveyance of the land, in which he has no title. His interest is a chattel interest, inseparable from the debt it was given to secure.[31] In like manner, it is held that a conveyance by the mortgagee of all his rights, title and interest in the land passes nothing unless the debt be assigned, as the mortgage is a mere security incident to the debt.[32] But if the mortgagee be in possession, his conveyance of the mortgaged property by warranty deed or quitclaim is regarded as passing his mortgage interest, although no mention in terms be made of the debt.[33] It moreover transfers his right of possession and enables the grantee, and those claiming under him, to maintain an action against any person who does not show a better title.[34] And so if the mortgagee purchases the mortgaged property at a void foreclosure sale and then conveys the premises, his deed operates as an assignment of the mortgage debt as well as the mortgage title.[35]

A deed of the mortgaged premises by the heir of a deceased mortgagee before foreclosure, and before a decree of distribution of the estate, will not operate as an assignment of the mortgage, and will not even convey any title sufficient to enable the grantee to maintain a writ of entry against such heir, inasmuch as a mortgage is assets in the hands of the personal representative.[36] However, such a deed of the mortgaged property by the heir has been held a good assignment in equity against all the world except the personal representative and creditors whose right might be affected, a stranger not being allowed to

[31] Polk v. Simon, 63 Ark. 569, 39 S. W. 1045; Swan v. Yaple, 35 Iowa 248; Aymar v. Bill, 5 Johns. Ch. (N. Y.) 570.

[32] Peters v. Jamestown Bridge Co., 5 Cal. 334, 63 Am. Dec. 134; Nagle v. Macy, 9 Cal. 426; Delano v. Bennett, 90 Ill. 533.

[33] Lamprey v. Nudd, 29 N. H. 299; Smith v. Smith, 15 N. H. 55; Hinds v. Ballou, 44 N. H. 619.

[34] Wallace v. Goodall, 18 N. H. 439; Hutchins v. Carleton, 19 N. H. 487.

[35] Jordan v. Sayre, 29 Fla. 100, 10 So. 823; Hoffman v. Harrington, 33 Mich. 392; Johnson v. Sandhoff, 30 Minn. 197, 14 N. W. 889; Jackson v. Bowen, 7 Cow. (N. Y.) 13; Robinson v. Ryan, 25 N. Y. 320; Winslow v. Clark, 47 N. Y. 261; Cooke v. Cooper, 18 Ore. 142, 22 Pac. 945, 7 L. R. A. 273, 17 Am. St. 709; Brobst v. Brock, 10 Wall. (U. S.) 519, 19 L. ed. 1002; Stark v. Brown, 12 Wis. 572, 78 Am. Dec. 762.

[36] Douglass v. Durin, 51 Maine 121;

question its validity and effect.[37] A mortgage of land by one whose only title to it is in mortgage passes his mortgage interest. It is in legal effect an assignment of his mortgage.[38] A devise of land by one whose only estate therein is that of mortgagee will transfer the mortgaged estate and the debt secured by the mortgage.[39] A conveyance by a mortgagee of a part of the mortgaged estate to a third person is in like manner regarded as an equitable assignment of the mortgage to the extent of the purchase-money of such part, especially when the purchaser has bought in good faith from a mortgagee in possession with the assurance on his part that he had a perfect title.[40] An ineffectual sale under a power in the mortgage,[41] or an irregular sale under a decree of foreclosure, operates as an assignment of the mortgage to the purchaser if he has paid the purchase-money and it has been applied to the payment of the mortgage debt.[42] If the mortgagee purchases at such ineffectual sale and enters into possession, he simply becomes a mortgagee in possession; and if he sells the land to another and there are successive sales, the conveyances operate as assignments of the mortgage to the suc-

Taft v. Stevens, 3 Gray (Mass.) 504; Albright v. Cobb, 30 Mich. 355.

[37] Welsh v. Phillips, 54 Ala. 309, 25 Am. Rep. 679; Cook v. Parham, 63 Ala. 456.

[38] Dudley v. Cadwell, 19 Conn. 218; Central Bank v. Copeland, 18 Md. 305, 81 Am. Dec. 597; Murdock v. Chapman, 9 Gray (Mass.) 156.

[39] Crosgrove v. Crosgrove, 69 Conn. 416, 38 Atl. 219.

[40] Union Mut. Life Ins. Co. v. Slee, 123 Ill. 57, 13 N. E. 222; Johnson v. Leonards, 68 Maine 237; McSorley v. Larissa, 100 Mass. 270; Wyman v. Hooper, 2 Gray (Mass.) 141; Welch v. Priest, 8 Allen (Mass.) 165; Grover v. Thatcher, 4 Gray (Mass.) 526; Raymond v. Raymond, 7 Cush. (Mass.) 605; Smith v. Hitchcock, 130 Mass. 570.

[41] Taylor v. Agricultural & M. Assn., 68 Ala. 229; Atkins v. Tutwiler, 98 Ala. 729, 11 So. 640; Brown v. Smith, 116 Mass. 108; Burns v. Thayer, 115 Mass. 89; Gilbert v. Cooley, Walk. Ch. (Mich.) 494; Johnson v. Sandhoff, 30 Minn. 197, 14 N. W. 889; Long v. Long, 111 Mo. 12, 19 S. W. 537; Salvage v. Haydock, 68 N. H. 484, 44 Atl. 696; Jackson v. Bowen, 7 Cow. (N. Y.) 13; Robinson v. Ryan, 25 N. Y. 320; Lunsford v. Speaks, 112 N. Car. 608, 17 S. E. 430.

[42] Bryan v. Pinney, 3 Ariz. 412, 31 Pac. 548, affd. 162 U. S. 419, 40 L. ed. 1023, 16 Sup. Ct. 804; Bryan v. Brasus, 3 Ariz. 433, 31 Pac. 519, affd. 162 U. S. 415, 40 L. ed. 1022, 16 Sup. Ct. 803; Osborne v. Taylor, 60 Conn. 107, 21 Atl. 380; Muir v. Berkshire, 52 Ind. 149; Hill v. More, 40 Maine 515; Johnson v. Robertson, 34 Md. 165; Kelsey v. Ming, 118 Mich. 438, 76 N. W. 981; Jellison v. Halloran, 44 Minn. 199, 46 N. W. 332; Anderson v. Minn. Loan & Trust Co., 68 Minn. 491, 71 N. W. 665, 819; Stackpole v. Robbins, 47 Barb. (N. Y.) 212, affd. 48 N. Y. 665; Olmsted v. Elder, 4 N. Y. Super. Ct. 325, revd. 5 N. Y. 144; Cooke v. Cooper, 18 Ore. 142, 22 Pac. 945, 7 L. R. A. 273, 17 Am. St. 709; Brobst v. Brock, 10 Wall. (U. S.) 519, 19 L. ed. 1002; Moore v. Cord, 14 Wis. 213.

cessive grantees in the several deeds.[43] The assignment of a judgment rendered on the mortgage note or bond is an equitable assignment of the mortgage,[44] and an assignment of a judgment for a part of the mortgage debt carries an interest pro tanto in the mortgage.[45]

§ 4727. Delivery.—Delivery is as essential to the validity of an assignment of a mortgage as it is to the validity to the mortgage itself; and therefore if it be executed and acknowledged and made complete in every other way, if it be not delivered to the assignee it amounts to nothing.[46] To constitute a delivery of an assignment, an intention to pass the property in the debt must be shown.[47] If a mortgagee executes and acknowledges an assignment in blank, and authorizes an agent to find a purchaser and fill in the purchaser's name, and the agent delivers it to the purchaser, who has no knowledge of the agent's filling out the blank, the assignment is valid.[48]

§ 4728. Consideration.—Whether the assignee of a mortgage had paid value for it does not concern the mortgagor, except in reference to his interposing an equitable defense in the way of payment or set-off.[49] Although the assignee has purchased the mortgage for less than the amount due upon it, it is none the less a valid security for the entire debt.[50] An assign-

[43] Murdock v. Chapman, 9 Gray (Mass.) 156; Hinds v. Ballou, 44 N. H. 619; Smith v. Smith, 15 N. H. 55; Lamprey v. Nudd, 29 N. H. 299; Winslow v. Clark, 47 N. Y. 261; Miner v. Beekman, 50 N. Y. 337, 14 Abb. Pr. (N. S.) (N. Y.) 1; Robinson v. Ryan, 25 N. Y. 320; Cooke v. Cooper, 18 Ore. 142, 22 Pac. 945, 7 L. R. A. 273, 17 Am. St. 709.

[44] Polk v. Simon, 63 Ark. 569, 39 S. W. 1045; Wayman v. Cochrane, 35 Ill. 152; Walker v. Lillibridge, 112 Mich. 384, 70 N. W. 1031; Anderson v. Minn. Loan & Trust Co., 68 Minn. 491, 71 N. W. 665, 819.

[45] Pattison v. Hull, 9 Cow. (N. Y.) 747.

[46] Rankin v. Major, 9 Iowa 297; Rose v. Kimball, 16 N. J. Eq. 185; Ruckman v. Ruckman, 33 N. J. Eq. 354; People's Trust Co. v. Tonkonogy, 144 App. Div. (N. Y.) 333, 128 N. Y. S. 1055; Weed v. Hewlett, 58 Hun (N. Y.) 611, 36 N. Y. St. 201, 12 N. Y. S. 606, affd. 129 N. Y. 673, 30 N. E. 65.

[47] Shurtleff v. Francis, 118 Mass. 154; Kersten v. Kersten, 114 Minn. 24, 129 N. W. 1051.

[48] Phelps v. Sullivan, 140 Mass. 36, 2 N. E. 121, 54 Am. Rep. 442; Koch v. Hinkle, 35 Pa. Super. Ct. 421.

[49] Johnson v. Beard, 93 Ala. 96, 9 So. 535; Adair v. Adair, 5 Mich. 204, 71 Am. Dec. 779; Whitney v. Traynor, 74 Wis. 289, 42 N. W. 267.

[50] Pease v. Benson, 28 Maine 336; Pratt v. Poole, 61 Hun (N. Y.) 620, 39 N. Y. St. 924, 15 N. Y. S. 789; Nelson v. Eaton, 26 N. Y. 410, 16 Abb. Pr. (N. Y.) 113; Warner v. Gouverneur's Exr., 1 Barb. (N. Y.) 36; Knox v. Galligan, 21 Wis. 470.

ment by an attorney, for the purpose of enforcing collection of the mortgage debt, is a valid assignment, and passes the legal title with the right to exercise the power of sale given by the mortgage.[51] But one who buys a note and mortgage which are not delivered to him making only a nominal payment prior to his receiving notice that they belong to another, is not entitled to protection, as a bona fide purchaser.[52]

§ 4729. Effect of assignment.—An assignment by deed puts the assignee in the place of the mortgagee. It is ipso facto a transfer of the premises covered by the mortgage.[53] He takes the mortgage subject to all the legal and equitable defenses available to the mortgagor at the time of the assignment.[54] It passes the legal estate, and enables the assignee to foreclose in his own name. The mortgagee has no longer any right or interest in, or claim to the lands mortgaged, and an action in his name in respect to them can be no longer maintained;[55] but the right of action is in the assignee, who can transfer the right to others.[56] The mortgagee can no longer make any agreement with the mortgagor which can affect the rights of the assignee.[57] The second or third or any subsequent assignee, taking the mortgage and note before maturity, takes the same estate and the same right that the first assignee had.[58] An assignment is effectual between the parties to transfer the title without acknowledgment or record.[59]

[51] Russum v. Wanser, 53 Md. 92.

[52] Campbell v. Roach, 45 Ala. 667; Haescig v. Brown, 34 Mich. 503; Weaver v. Barden, 49 N. Y. 286; Dresser v. Missouri &c. Construction Co., 93 U. S. 92, 23 L. ed. 815.

[53] Wiley v. Williamson, 68 Maine 71; Hills v. Eliot, 12 Mass. 26, 7 Am. Dec. 26.

[54] Bouton v. Cameron, 205 Ill. 50, 68 N. E. 800; Mitchell v. Koch, 175 Ind. 666, 95 N. E. 231; Bartholf v. Bensley, 234 Ill. 336, 84 N. E. 928; Elser v. Williams, 104 Ill. App. 238; Hendricks v. Hess, 112 Minn. 252, 127 N. W. 995; Voorhees v. Nixon, 72 N. J. Eq. 791, 66 Atl. 192; Schlitz v. Koch, 138 App. Div. (N. Y.) 535, 123 N. Y. S. 302; Quackenbush v. Wheaton, 46 Misc. (N. Y.) 357, 94 N. Y. S. 823. See also, Briggs v. Crawford, 162 Cal. 124, 121 Pac. 381.

[55] Gould v. Newman, 6 Mass. 239; Marcus v. Dyer, 174 Mass. 64, 54 N. E. 352. See Reading of Judge Trowbridge, 8 Mass. 551; Pryor v. Wood, 31 Pa. St. 142. And see Woodruff v. Adair, 131 Ala. 530, 32 So. 515.

[56] Woronieki v. Pairskiego, 74 Conn. 224, 50 Atl. 562.

[57] Titus v. Haynes, 9 N. Y. S. 742, 31 N. Y. St. 409, affd. 129 N. Y. 645, 29 N. E. 1032.

[58] Hoitt v. Webb, 36 N. H. 158.

[59] Wellendorf v. Wellendorf (Minn.), 139 N. W. 812; Strever v. Earl, 60 Hun (N. Y.) 528, 39 N. Y. St. 686, 15 N. Y. S. 350.

§ 4730. Who may make an assignment.—A mortgage made to two persons jointly to secure a note payable to them jointly, may be assigned by one of them in the name of both; but if it secures several debts, both must join in the assignment.[60] One of several trustees who holds a mortgage cannot ordinarily make a valid assignment of it; all must join.[61] An executor or administrator can generally assign a mortgage without a license for that purpose, inasmuch that a mortgage is regarded as only a chattel interest, which immediately vests in the personal representative of the mortgagee upon his decease.[62] Where there are two or more executors or administrators one of them may generally make a valid assignment of the mortgage without the others joining in the transfer.[63] But a foreign administrator cannot, by virtue of his appointment in another state, assign a mortgage.[64] Titles to real estate are regulated and established by the lex loci rei sitae; and whenever the official act of an executor or administrator is necessary to make title to real estate, his authority must appear by letters testamentary, or letters of administration granted in the state where the land is situated.[65] But where a mortgage is not regarded as a title to land, but merely a lien, a foreign administrator can make a valid assignment.[66] A corporation may assign a mortgage which it holds. It may assign the debt, and the mortgage follows as an incident. But an officer of the corporation usually has no authority, by virtue of his office merely, to make an assignment of the mortgage. Such power can only be given by a by-law or under special authority given by the company.[67] An assignment made by a corporation should be executed in the name and under the seal of the corporation and

[60] Bruce v. Bonney, 12 Gray (Mass.) 107, 71 Am. Dec. 739.

[61] Austin v. Shaw, 10 Allen (Mass.) 552; Webster v. Vandeventer, 6 Gray (Mass.) 428; Wilbur v. Almy, 12 How. (U. S.) 180, 13 L. ed. 944.

[62] Baldwin v. Hatchett, 56 Ala. 461; Libby v. Mayberry, 80 Maine 137, 13 Atl. 577; Crooker v. Jewell, 31 Maine 306; Ex parte Blair, 13 Metc. (Mass.) 126; Ladd v. Wiggin, 35 N. H. 421, 69 Am. Dec. 551; Williams v. Teachey, 85 N. Car. 402.

[63] Bac. Ab. Exrs. & Admrs. D.; George v. Baker, 3 Allen (Mass.) 326n; Mutual Life Ins. Co. v. Sturges, 33 N. J. Eq. 328; Bogert v. Hertell, 4 Hill (N. Y.) 492.

[64] Cutter v. Davenport, 1 Pick. (Mass.) 81, 11 Am. Dec. 149.

[65] Hutchins v. State Bank, 12 Metc. (Mass.) 421.

[66] Smith v. Tiffany, 16 Hun (N. Y.) 552.

[67] England v. Dearborn, 141 Mass. 590, 6 N. E. 837; Jackson v. Campbell, 5 Wend. (N. Y.) 572.

not in the name of an officer under his hand and seal. If, however, the mortgage note is indorsed by the treasurer so that it is legally transferred, a court of equity would correct the assignment or treat the mortgage as tranferred with the debt.[68] If the mortgage be made or assigned to certain persons as trustees of an association not incorporated, the legal title vests in these persons jointly, and no valid assignment can be made by the association, or by one of the mortgagees, but all must join in the deed in order to make a valid assignment.[69] A mortgage to a partnership should be assigned by a deed executed by all the partners; for although it belongs to the partnership, the legal estate is in the individual members of it, as tenants in common, and it is held that one partner cannot make a legal assignment by executing an assignment in the name of the firm,[70] but he can make an equitable assignment by a transfer of the debt.[71]

§ 4731. **Right to compel assignment by mortgagee.**—A mortgagee may not be compelled in equity to assign his mortgage, on receiving payment, in order that subsequent parties in interest may adjust their respective rights. He is entitled to be paid, or to proceed to foreclosure, without being obliged to investigate titles arising after his own. He may release his interest on receiving payment, and leave after-claimants to the preferences which their respective titles give them when his mortgage is discharged.[72] A mortgagee is not bound to protect other parties who have interests in the property by assigning his mortgage to any one. His whole duty is performed by releasing his interest on receipting payment.[73] Any one having a subsequent encumbrance upon the mortgaged estate can protect his interest by pay-

[68] Commonwealth v. Reading Sav. Bank, 137 Mass. 431.

[69] Austin v. Shaw, 10 Allen (Mass.) 552; Webster v. Vandeventer, 6 Gray (Mass.) 428; Chapin v. First Universalist Soc., 8 Gray (Mass.) 580.

[70] Dillon v. Brown, 11 Gray (Mass.) 179, 71 Am. Dec. 700.

[71] In re Dubois' Appeal, 38 Pa. St. 231, 80 Am. Dec. 478.

[72] Lyon v. Robbins, 45 Conn. 513; Calkins v. Munsel, 2 Root (Conn.) 333; Butler v. Taylor, 5 Gray (Mass.) 455; Taylor v. Porter, 7 Mass, 355; Cole v. Malcolm, 66 N. Y. 363; Frost v. Yonkers Sav. Bank, 70 N. Y. 553, 26 Am. Rep. 627; McCulla v. Beadleston, 17 R. I. 20, 20 Atl. 11; Green v. Walker, 22 R. I. 14, 45 Atl. 742. Otherwise by statute in Rhode Island: G. L. Ch. 258 (1909), § 7; Harvey v. Chapman, 22 R. I. 316, 47 Atl. 888; Atwood v. Charlton, 21 R. I. 568, 45 Atl. 580.

[73] Lamb v. Montague, 112 Mass. 352; Butler v. Taylor, 5 Gray (Mass.) 455; McCabe v. Bellows, 7 Gray (Mass.) 148, 66 Am. Dec. 467.

ing the prior mortgage when it is due, and he may thereupon succeed by subrogation on settled principles of equity, to the rights and interests of such prior mortgagee in the land, as security for the amount so paid, without any assignment or transfer by the prior mortgagee. He is not entitled to an assignment.[74] The mere fact that one has a right to redeem the mortgage does not enable him to compel an assignment of it to himself. There must be some equitable reason for it, as that the redeeming party is in the position of a surety and is entitled to be subrogated to the position of the holder of the mortgage, or that the mortgagee or the mortgagor, or both of them, were about to do something to injure or destroy the security.[75] In some states however an assignment may be compelled in a court of equity for the protection of a surety or a junior encumbrancer, though not occupying the position of a surety.[76]

§ 4732. **Notice of assignment.**—The assignee of a mortgage should always as a practical matter give notice of the assignment to the mortgagor so as to protect himself against payment which may be made in good faith to the assignor. Though an assignment is entitled to record as a conveyance,[77] the recording of the assignment is not of itself notice in most jurisdictions to the mortgagor, his heirs or his personal representatives.[78] If the assignee of a mortgage fails to give notice of the assignment, and so acts as to authorize the mortgagor to believe that the mortgagee is still the owner of it, he is estopped from denying the

[74] Ellsworth v. Lockwood, 42 N. Y. 89; Burnet v. Dennison, 5 Johns. Ch. (N. Y.) 35; Hubbard v. Ascutney Mill Dam Co., 20 Vt. 402, 50 Am. Dec. 41.

[75] Ellsworth v. Lockwood, 42 N. Y. 89; Vandercook v. Cohoes Sav. Inst., 5 Hun (N. Y.) 641; Pardee v. Van Anken, 3 Barb. (N. Y.) 534; Jenkins v. Continental Ins. Co., 12 How. Pr. (N. Y.) 66.

[76] Moore v. Smith, 95 Mich. 71, 54 N. W. 701; Baker v. Terrell, 8 Minn. 195; Mount v. Suydam, 4 Sandf. Ch. (N. Y.) 399; Johnson v. Zink, 52 Barb. (N. Y.) 396, affd. 51 N. Y. 333; Howard v. Robbins, 170 N. Y. 498, 63 N. E. 530, affg. 67 App. Div. (N. Y.) 245, 73 N. Y. S. 172.

[77] Parmenter v. Oakley, 69 Iowa 388, 28 N. W. 653; Kenosha Stove Co. v. Shedd, 82 Iowa 540, 48 N. W. 933.

[78] Towner v. McClelland, 110 Ill. 542; Buehler v. McCormick, 169 Ill. 269, 48 N. E. 287; Schultz v. Sroelowitz, 191 Ill. 249, 61 N. E. 92; Olds v. Cummings, 31 Ill. 188; Reeves v. Hayes, 95 Ind. 521; Perkins v. Matteson, 40 Kans. 165, 19 Pac. 633; Johnson v. Carpenter, 7 Gil. (Minn.) 120; Hostetter v. Alexander, 22 Minn. 559; Redin v. Branhan, 43 Minn. 283, 45 N. W. 445; Olson v. Northwestern Guaranty Loan Co., 65 Minn. 475, 68 N. W. 100; Reed v. Marble, 10 Paige (N. Y.) 409; Van Keuren v. Corkins, 4 Hun (N. Y.)

right of the mortgagor to deal with the mortgagee as owner.[79] It is not, however, the legal duty of the assignee of the mortgage and note to notify the mortgagor of the assignment; but it is the duty of the mortgagor in paying the mortgage debt to the original mortgagee to require the actual production of the notes secured.[80]

§ 4733. **Mortgage of indemnity.**—The condition of a mortgage of indemnity is saved if the debt for which the indemnity is taken is paid by the principal debtor, according to its terms. The mortgage in that case never becomes operative and available, and the mortgagee has then no interest which he can assign. It is immaterial in this respect whether the original debt is paid by the mortgagor in money or by a new note, with other sureties; the mortgagee, not being upon the renewed note, is exonerated and discharged from his liability, and his interest under his mortgage having ceased, he cannot pass any interest by assignment of it, even to the new sureties.[81] A mortgage of indemnity is assignable after the mortgagee has paid the debt against which he is indemnified; but until that time he has nothing that he can assign.[82]

§ 4734. **Disseizin of mortgagee.**—The possession of the mortgagor being the possession of the mortgagee, it follows that the disseizin of the mortgagor is the disseizin of the mortgagee, and so long as the disseizor is in possession, the mortgagee cannot pass his interest in the land by a deed of assignment.[83] He

129, 6 Thomp. & C. (N. Y.) 355, affd. 66 N. Y. 77; James v. Johnson, 6 Johns. Ch. (N. Y.) 417, revd. 2 Cow. (N. Y.) 246, 14 Am. Dec. 475; James v. Morey, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475; New York Life Ins. & Trust Co. v. Smith, 2 Barb. Ch. (N. Y.) 82; Union College v. Wheeler, 61 N. Y. 88; Horstman v. Gerker, 49 Pa. St. 282, 88 Am. Dec. 501; Foster v. Carson, 147 Pa. St. 157, 23 Atl. 342.

[79] McCabe v. Farnsworth, 27 Mich. 52.

[80] Schumacher v. Wolf, 125 Ill. App. 81; Biggerstaff v. Marston, 161 Mass. 101, 36 N. E. 785; Mulcahy v. Fenwick, 161 Mass. 164, 36 N. E. 689; Fitzgerald v. Beckwith, 182 Mass. 177, 65 N. E. 36.

[81] Bonham v. Galloway, 13 Ill. 68; Abbott v. Upton, 19 Pick. (Mass.) 434.

[82] Jones v. Quinnipiack Bank, 29 Conn. 25; Carper v. Munger, 62 Ind. 481; Pierce v. Batten, 3 Kans. App. 396, 42 Pac. 924; Abbott v. Upton, 19 Pick. (Mass.) 434; Murray v. Porter, 26 Nebr. 288, 41 N. W. 1111; Wallace v. Goodall, 18 N. H. 439; Hall v. Cushman, 16 N. H. 462, 43 Am. Dec. 562; Weeks v. Eaton, 15 N. H. 145.

[83] Poignard v. Smith, 6 Pick. (Mass.) 172, 8 Pick. (Mass.) 272;

may be disseized by a stranger, but ordinarily not by the mortgagor, for the possession of the mortgagor is the possession of the mortgagee, and is not adverse; and such possession is therefore no obstacle to an assignment.[84] After a mortgagee has been disseized he cannot make a valid assignment.[85]

§ 4735. **Equitable assignments.**—An equitable assignment of a mortgage may be made by a sale of it, without either a formal transfer of the mortgagee's interest in the property, or an indorsement of the note. In those states where a mortgage is considered a mere chattel interest and not a conveyance, and the doctrines of the courts of equity in regard to mortgages obtain, a parol assignment is sufficient if accompanied by a transfer of the note, bond or other evidence of the mortgage debt, by delivery without indorsement or other formal assignment, and the assignee may maintain an action in his own name.[86] The equitable interest of the purchaser enables him to deal with the mortgage for all beneficial purposes. He may enforce it against the property and the person liable upon it.[87] Under the old practice this would have to be done in the name of the assignor or person in whom the legal title remains;[88] but under the codes adopted in many of the states, by which all actions are prosecuted in the name of the real party in interest, the mortgage would be enforced in the purchaser's own name.[89] But it has been held

Dadnum v. Lamson, 9 Allen (Mass.) 85; Lincoln v. Emerson, 108 Mass. 87.

[84] Sheridan v. Welch, 8 Allen (Mass.) 166; Gould v. Newman, 6 Mass. 239; Reading of Judge Trowbridge, 8 Mass. 550; James v. Morey, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475; Murray v. Blackledge, 71 N. Car. 492; Converse v. Searls, 10 Vt. 578.

[85] Holmes v. Turner's Falls Lumber Co., 150 Mass. 535, 23 N. E. 305, 6 L. R. A. 283.

[86] Younkers v. Martin, 18 Iowa 143; Haescig v. Brown, 34 Mich. 503; Greely State Bank v. Line, 50 Nebr. 434, 69 N. W. 966; Strause v. Josephthal, 77 N. Y. 622; Sprague v. Lovett, 20 S. Dak. 328, 106 N. W. 134; Andrews v. Powers, 35 Wis. 644.

[87] Barron v. Barron, 122 Ala. 194, 211, 25 So. 55; Nelson v. Ferris, 30 Mich. 497.

[88] Vose v. Handy, 2 Greenl. (Maine) 322, 11 Am. Dec. 101; Crane v. March, 4 Pick. (Mass.) 131, 16 Am. Dec. 329; Young v. Miller, 6 Gray (Mass.) 152; Bryant v. Damon, 6 Gray (Mass.) 564; Dimon v. Dimon, 10 N. J. L. 156; Partridge v. Partridge, 38 Pa. St. 78.

[89] Austin v. Burbank, 2 Day (Conn.) 474, 2 Am. Dec. 119; Reeves v. Hayes, 95 Ind. 521; Clearwater v. Rose, 1 Blackf. (Ind.) 137; Gower v. Howe, 20 Ind. 396; Sangster v. Love, 11 Iowa 580; Crow v. Vance, 4 Iowa 434; Rankin v. Major, 9 Iowa 297; Williams v. Morancy, 3 La. Ann. 227; Southerin v. Mendum, 5 N. H. 420; Allen v. Pancoast, 20 N. J. L. 68; Kinna v. Smith, 3 N. J. Eq. 14;

that the mere possession by a third person of a mortgage not assigned and a note not indorsed by the mortgagee is not sufficient evidence of his ownership of them to enable him to sustain an action upon them. He must allege and prove his ownership by other evidence.[90] He must show that there was an intention to transfer a beneficial interest in the securities by the mere manual delivery of them.[91] After an assignment of the mortgage note the mortgagee cannot discharge the mortgage if the note be negotiable and it be assigned to an innocent party, before due and for a good consideration, although the note be without any consideration; and satisfaction so entered will be vacated by a court of equity.[92] Where there is no statute requiring assignments of mortgages to be recorded, the mortgagor or other persons paying the mortgage and taking the discharge is bound to know that, if the mortgagee has indorsed the notes before maturity to a bona fide holder, the mortgagee has no longer authority to satisfy the mortgage; and therefore the person taking the discharge is bound to ascertain whether the mortgagee still held the note at the time he discharged the mortgage.[93] The notes in such case become the evidence of the mortgagee's authority to enter satisfaction of the lien.[94] After discharge by a mortgagee who has transferred the

Kamena v. Huelbig, 23 N. J. Eq. 78; Mulford v. Peterson, 35 N. J. L. 127; Runyan v. Mersereau, 11 Johns. (N. Y.) 534, 6 Am. Dec. 393; Jackson v. Blodget, 5 Cow. (N. Y.) 202; Green v. Hart, 1 Johns. (N. Y.) 580; Paine v. French, 4 Ohio 318; Clark v. Clark, 76 Wis. 306, 45 N. W. 121; Marshall v. Pinkham, 52 Wis. 572, 9 N. W. 615, 38 Am. Rep. 756. See Garland v. Richeson, 4 Rand. (Va.) 266; Clarksons v. Doddridge, 14 Grat. (Va.) 42.

[90] Haescig v. Brown, 34 Mich. 503; Andrews v. Powers, 35 Wis. 644.

[91] Strause v. Josephthal, 77 N. Y. 622.

[92] Brewer v. Atkeison, 121 Ala. 410, 25 So. 992, 7 Am. St. 64; Reeves v. Hayes, 95 Ind. 521; McCormick v. Digby, 8 Blackf. (Ind.) 99; Sample v. Rowe, 24 Ind. 208; Lapping v. Duffy, 47 Ind. 51; Dixon v. Hunter, 57 Ind. 278; Vandercook v. Baker, 48 Iowa 199; Mutual Benefit L. Ins. Co. v. Huntington, 57 Kans. 744, 48 Pac. 19; Dunham v. W. Steele Packing &c. Co., 100 Mich. 75, 58 N. W. 627; State Bank v. Frame, 112 Mo. 502, 20 S. W. 620; Hagerman v. Sutton, 91 Mo. 519, 4 S. W. 73; Gottschalk v. Neal, 6 Mo. App. 596; Craft v. Phillips, 9 Sad. (Pa.) 223, 12 Atl. 331; Gordon v. Mulhare, 13 Wis. 22.

[93] Reeves v. Hayes, 95 Ind. 521; Perry v. Baker, 61 Nebr. 841, 86 N. W. 692; Whitney v. Lowe, 59 Nebr. 87, 80 N. W. 266; Whipple v. Fowler, 41 Nebr. 675, 60 N. W. 15; Donaldson v. Grant, 15 Utah 231, 49 Pac. 779; Passumpsic Sav. Bank v. Buck, 71 Vt. 190, 44 Atl. 93.

[94] Reeves v. Hayes, 95 Ind. 521; Ayers v. Hays, 60 Ind. 452; Livermore v. Maxwell, 87 Iowa 705, 55 N. W. 37; Smith v. Perkins, 8 Biss. (U. S.) 73, Fed. Cas. No. 13091, affd. 102 U. S. 412, 26 L. ed. 193; Swift v. Smith, 102 U. S. 442, 26 L. ed. 193.

mortgage notes before maturity, a subsequent mortgagee or purchaser in good faith and without notice of the unauthorized discharge of the mortgage is entitled to rely on the record.[95] The assignee may take free from existing equities between the mortgagor and mortgagee.[96] He holds the mortgage by the same title that he holds the notes, and subject to no defense that would not be good against them.[97] If the note or other debt secured by a mortgage be transferred without any formal assignment of the mortgage, or even of a delivery of it, the mortgage in equity goes with the debt unless there be an agreement to the contrary.[98] Such an

[95] Porter v. Ourada, 51 Nebr. 510, 71 N. W. 52; Eggert v. Beyer, 43 Nebr. 711, 62 N. W. 57; Whipple v. Fowler, 41 Nebr. 675, 60 N. W. 15; Daniels v. Densmore, 32 Nebr. 40, 48 N. W. 906; Whitney v. Lowe, 59 Nebr. 87, 80 N. W. 266.

[96] Crosby v. Roub, 16 Wis. 616, 84 Am. Dec. 720; Andrews v. Hart, 17 Wis. 297; Cornell v. Hichens, 11 Wis. 353; Fisher v. Otis, 3 Pin. (Wis.) 78, 3 Chand. (Wis.) 83.

[97] Martineau v. McCollum, 4 Chand. (Wis.) 153, 3 Pin. (Wis.) 455; Cornell v. Hichens, 11 Wis. 353.

[98] New England Mortg. Sec. Co. v. Clayton, 119 Ala. 361, 24 So. 362; Center v. Planters' & Merchants' Bank, 22 Ala. 743; Graham v. Newman, 21 Ala. 497; Cullum v. Erwin, 4 Ala. 452; Emanuel v. Hunt, 2 Ala. 190; Prout v. Hoge, 57 Ala. 28; Bennett v. Solomon, 6 Cal. 134; Ord v. McKee, 5 Cal. 515; Fassett v. Mulock, 5 Colo. 466; Kenney v. Jerrerson County Bank, 12 Colo. App. 24, 54 Pac. 404; Lewis v. Farrell, 51 Conn. 216; Farrell v. Lewis, 56 Conn. 280, 14 Atl. 931; Lawrence v. Knap, 1 Root (Conn.) 248, 1 Am. Dec. 42; Converse v. Michigan Dairy Co., 45 Fed. 18; Roberts v. Mansfield, 32 Ga. 228; Planters' Bank v. Prater, 64 Ga. 609; Van Pelt v. Hurt, 97 Ga. 660, 25 S. E. 489; National Bank v. Exchange Bank, 110 Ga. 692, 36 S. E. 265; Union Mut. L. Ins. Co. v. Slee, 123 Ill. 57, 13 N. E. 222; Barrett v. Hinckley, 124 Ill. 32, 14 N. E. 863, 7 Am. St. 331; Towner v. McClelland, 110 Ill. 542; Fountain v. Bookstaver, 141 Ill. 461, 31 N. E. 17; Gaff v. Harding, 48 Ill. 148; Miller v. Larned, 103 Ill. 562; Worchester Nat. Bank v. Cheeney, 87 Ill. 602; Lucas v. Harris, 20 Ill. 165; Vansant v. Allmon, 23 Ill. 30; Mapps v. Sharpe, 32 Ill. 13; Pardee v. Lindley, 31 Ill. 174, 83 Am. Dec. 219; Citizens' State Bank v. Julian, 153 Ind. 655, 55 N. E. 1007; Reeves v. Hayes, 95 Ind. 521; Bayless v. Glenn, 72 Ind. 5; Gabbert v. Schwartz, 69 Ind. 450; French v. Turner, 15 Ind. 59; Blair v. Bass, 4 Blackf. (Ind.) 539; Burton v. Baxter, 7 Blackf. (Ind.) 297; Updegraft v. Edwards, 45 Iowa 513; Walker v. Schreiber, 47 Iowa 529; Crow v. Vance, 4 Iowa 434; Bank of Indiana v. Anderson, 14 Iowa 544, 83 Am. Dec. 390; Mutual Benefit L. Ins. Co. v. Huntington, 57 Kans. 744, 48 Pac. 19; Robinson Female Seminary v. Campbell, 60 Kans. 60, 55 Pac. 276; Perkins v. Matteson, 40 Kans. 165, 19 Pac. 633; Burdett v. Clay, 8 B. Mon. (Ky.) 287; Miles v. Gray, 4 B. Mon. (Ky.) 417; Miller v. Cappel, 36 La. Ann. 264; Succession of Forstall, 39 La. Ann. 1052, 3 So. 277; Scott v. Turner, 15 La. Ann. 346; Perkins v. Gumbel, 49 La. Ann. 653, 21 So. 743; Donnell v. Wylie, 85 Maine 143, 26 Atl. 1092; Vose v. Handy, 2 Greenl. (Maine.) 322, 11 Am. Dec. 101; Brewster v. Seeger, 173 Mass. 281, 53 N. E. 814; Commonwealth v. Globe Investment Co., 168 Mass. 80, 46 N. E. 410; Watson v. Wyman, 161 Mass. 96, 36 N. E. 692; Wolcott v. Winchester, 15 Gray (Mass.) 461; Barnes v. Boardman, 149 Mass. 106, 21 N. E. 308, 3 L. R. A. 785; Belcher v. Costello, 122 Mass. 189; Morris v. Bacon, 123 Mass. 58, 25 Am. Rep. 17; Briggs v. Hannowald, 35 Mich. 474; Martin v. McReynolds, 6 Mich. 70;

assignment has generally, however, no effect upon the legal estate. The mere transfer of the debt does not, at common law, carry with it the mortgage security so far as to vest the legal interest in the purchaser, but only gives him an equitable interest which must be enforced in the name of the person who still holds the

Kinney v. Duluth Ore Co., 58 Minn. 455, 60 N. W. 23, 49 Am. St. 528; First Nat. Bank v. Pope, 85 Minn. 433, 89 N. W. 318; Meeker County Bank v. Young, 51 Minn. 254, 53 N. W. 630; Northern Cattle Co. v. Munro, 83 Minn. 37, 85 N. W. 919; Holmes v. McGinty, 44 Miss. 94; Dick v. Mawry, 9 Sm. & M. (Miss.) 448; Gabbert v. Wallace, 66 Miss. 618, 5 So. 394; De Laureal v. Kemper, 9 Mo. App. 77; Boatmen's Sav. Bank v. Grewe, 84 Mo. 477; Lee v. Clark, 89 Mo. 553, 1 S. W. 142; Hagerman v. Sutton, 91 Mo. 519, 4 S. W. 73; Bell v. Simpson, 75 Mo. 485; Mayes v. Robinson, 93 Mo. 114, 5 S. W. 611; State Bank v. Frame, 112 Mo. 502, 20 S. W. 620; German-American Bank v. Carondelet Real Estate Co., 150 Mo. 570, 51 S. W. 691; George v. Somerville, 153 Mo. 7, 54 S. W. 491; Potter v. Stevens, 40 Mo. 229; Chappell v. Allen, 38 Mo. 213; Laberge v. Chauvin, 2 Mo. 179; Kuhns v. Bankes, 15 Nebr. 92, 17 N. W. 356; Goodwin v. Cunningham, 54 Nebr. 11, 74 N. W. 315; Cram v. Cottrell, 48 Nebr. 646, 67 N. W. 452, 58 Am. St. 714; Daniels v. Densmore, 32 Nebr. 40, 48 N. W. 906; Whitney v. Lowe, 59 Nebr. 87, 80 N. W. 266; New England Loan & Trust Co. v. Robinson, 56 Nebr. 50, 76 N. W. 415, 71 Am. St. 657; Anderson v. Kreidler, 56 Nebr. 171, 76 N. W. 581; Whipple v. Fowler, 41 Nebr. 675, 60 N. W. 15; Southerin v. Mendum, 5 N. H. 420; Downer v. Button, 26 N. H. 338; Blake v. Williams, 36 N. H. 39; Rigney v. Lovejoy, 13 N. H. 247; Smith v. Moore, 11 N. H. 55; Page v. Pierce, 26 N. H. 317; Quimby v. Williams, 67 N. H. 489, 41 Atl. 862, 68 Am. St. 685; Harris v. Cook, 28 N. J. Eq. 345; Galway v. Fullerton, 17 N. J. Eq. 389; Denton v. Cole, 30 N. J. Eq. 244, affd. 30 N. J. Eq. 732; Ferry v. Meckert, 32 N. J. Eq. 38; Neilson v. Blight, 1 Johns Cas. (N. Y.) 205; Green v. Hart, 1 Johns. (N. Y.) 580; Evertson v. Booth, 19 Johns. (N. Y.) 486; Pattison v. Hull, 9 Cow. (N. Y.) 747; Jackson v. Blodget, 5 Cow. (N. Y.) 202; Langdon v. Buel, 9 Wend. (N. Y.) 80; Parmelee v. Dann, 23 Barb. (N. Y.) 461; Gould v. Marsh, 1 Hun (N. Y.) 566, 4 Thomp. & C. (N. Y.) 128; Hyman v. Devereux, 63 N. Car. 624; Jenkins v. Wilkinson, 113 N. Car. 532, 18 S. E. 696; Paine v. French, 4 Ohio 318; Watson v. Dundee Mtg. & T. I. Co., 12 Ore. 747, 8 Pac. 548; Partridge v. Partridge, 38 Pa. St. 78; Donley v. Hays, 17 Serg. & R. (Pa.) 400; Muller v. Wadington, 5 S. Car. 342; Walker v. Kee, 14 S. Car. 142; Cleveland v. Cohrs, 10 S. Car. 224; Clark v. Jones, 93 Tenn. 639, 27 S. W. 1009, 42 Am. St. 931; Perkins v. Sterne, 23 Tex. 561, 76 Am. Dec. 72; Winstead v. Bingham, 4 Woods (U. S.) 510, 14 Fed. 1; Myers v. Hazzard, 4 McCrary (U. S.) 94; Ober v. Gallagher, 93 U. S. 199, 23 L. ed. 829; Kenicott v. Wayne County, 16 Wall. (U. S.) 452, 21 L. ed. 319; Carpenter v. Longan, 16 Wall. (U. S.) 271, 21 L. ed. 313; Batesville Institute v. Kauffman, 18 Wall. (U. S.) 151, 21 L. ed. 775; Keyes v. Wood, 21 Vt. 331; Langdon v. Keith, 9 Vt. 299; Pratt v. Bank Bennington, 10 Vt. 293, 33 Am. Dec. 201; Nash v. Kelley, 50 Vt. 425; Thomas v. Linn, 40 W. Va. 122, 20 S. E. 878; Croft v. Bunster, 9 Wis. 503; Rice v. Cribb, 12 Wis. 179; Fisher v. Otis, 3 Pin. (Wis.) 78, 3 Chand. (Wis.) 83; Blunt v. Walker, 11 Wis. 334, 78 Am. Dec. 709; Andrews v. Hart, 17 Wis. 297; Martineau v. McCollum, 4 Chand. (Wis.) 153, 3 Pin. (Wis.) 455; Woodruff v. King, 47 Wis. 261, 2 N. W. 452; Lane v. Duchac, 73 Wis. 646, 41 N. W. 962; Fred Miller Brewing Co. v. Manasse, 99 Wis. 99, 74 N. W. 535; Franke v. Neisler, 97 Wis. 364, 72 N. W. 887; Boyle v. Lybrand, 113 Wis. 79, 88 N. W. 904.

legal title.[99] Before the assignee of the debt can recover in ejectment, he must show a transfer of the legal estate to himself.[1]

[99] Barnes v. Boardman, 149 Mass. 106, 21 N. E. 308, 3 L. R. A. 785; Olcott v. Crittenden, 68 Mich. 230, 36 N. W. 41; Bailey v. Winn, 101 Mo. 649, 12 S. W. 1045; Johnson v. Clarke (N. J. Eq.), 28 Atl. 558; Boone v. Miller, 86 Tex. 74, 23 S. W. 574; McCammant v. Roberts, 87 Tex. 241, 27 S. W. 86.

[1] Baker v. Seavey, 163 Mass. 522, 40 N. E. 863, 47 Am. St. 475; Burke v. Backus, 51 Minn. 174, 53 N. W. 458; Northern Cattle Co. v. Munro, 83 Minn. 37, 85 N. W. 919; Bailey v. Winn, 101 Mo. 649, 12 S. W. 1045.

TITLE THIRTEEN

CHATTEL MORTGAGES.

CHAPTER CXLIII.

NATURE OF CHATTEL MORTGAGES.

§ 4750. Definition and general nature.
4751. Distinguished from pledge.
4752. Distinguished from conditional sale.
4753. Conditional transfer of title essential..
4754. Statement of condition and defeasance.
§ 4755. Bill of sale with separate defeasance.
4756. Absolute bill of sale at law and in equity.
4757. Verbal mortgages — Necessity for writing.

§ 4750. Definition and general nature.—A formal mortgage of personal property is a conditional sale of it as security for the payment of a debt or the performance of some other obligation. The condition is that the sale shall be void upon the seller's paying to the purchaser a sum of money, or doing some other act named.[1] If the condition be not performed according to its terms, the thing mortgaged is irredeemable at law, though there may be a redemption in equity, or by force of statute. If the condition is performed according to its terms, the mortgage immediately becomes void, and the mortgagee is divested of his title. Tender of performance has the same effect.[2] Such a mortgage is something more than a mere security. It is a conditional sale of chattels, and operates to transfer the legal title to the mortgagee, to be defeated only by a full performance of the condition. Upon breach of the condition the mortgagee may take possession of the property, and, so far as the legal rights of the

[1] Susman v. Whyard, 149 N. Y. 127, 43 N. E. 413; Odom v. Clark, 146 N. Car. 544, 60 S. E. 513; Hembree v. Blackburn, 16 Ore. 153, 19 Pac. 73.

[2] Weeks v. Baker, 152 Mass. 20, 24 N. E. 905.

parties are concerned, he may thenceforth treat it as his own; he may sell it or give it away, squander it or destroy it.[3] In this respect a mortgage of personal property is like a mortgage of real estate under the old common law, and differs widely from a mortgage of real estate, as the latter has gradually come to be viewed within the past half century in many of the states and territories of the United States; for while in these states such a mortgage is regarded as conferring no legal title upon the mortgagee, but as being a mere lien or security, in these same states, with some few exceptions, a mortgage of personal property is regarded as not being a mere security, but as passing the legal title, which becomes absolute in the mortgagee upon default.[4]

§ 4751. **Distinguished from pledge.**—The chief distinction between a mortgage and a pledge is that by a mortgage the general title is transferred to the mortgagee, subject to be revested by performance of the condition; while by a pledge the pledgor retains the general title in himself, and parts with the possession for a special purpose.[5] By a mortgage the title is transferred;

[3] Korman v. Henry, 32 Kans. 49, 3 Pac. 764; Tompkins v. Batie, 11 Nebr. 147, 7 N. W. 747, 38 Am. Rep. 361; Blake v. Corbett, 120 N. Y. 327, 24 N. E. 477; Porter v. Parmly, 43 How. Pr. (N. Y.) 445, 13 Abb. Prac. (N. S.) (N. Y.) 104, 24 N. Y. Super. Ct. 398; Levi v. Legg, 23 S. Car. 282; Mitchell v. Roberts, 5 McCrary (U. S.) 425, 17 Fed. 776.

[4] Perry County Bank v. Rankin, 73 Ark. 589, 84 S. W. 725, 86 S. W. 279; Mathew v. Mathew, 138 Cal. 334, 71 Pac. 344; Keith v. Haggart, 4 Dak. 438, 33 N. W. 465; Everett v. Buchanan, 2 Dak. 249, 6 N. W. 439, 8 N. W. 31; Simonds v. Pearce, 31 Fed. 137; O'Neill Mfg. Co. v. Woodley, 118 Ga. 114, 44 S. E. 980; First Nat. Bank v. Steers, 9 Idaho 519, 75 Pac. 225, 108 Am. St. 174; Flanders v. Chamberlain, 24 Mich. 305; Moore v. Norman, 43 Minn. 428, 45 N. W. 857, 9 L. R. A. 55, 19 Am. St. 247; Fletcher v. Neudeck, 30 Minn. 125, 14 N. W. 513; Kellogg v. Olson, 34 Minn. 103, 24 N. W. 364; Drummond Carriage Co. v. Mills, 54 Nebr. 417, 74 N. W. 966, 40 L. R. A. 761, 69 Am. St. 719; Gould v. Armagost, 46 Nebr. 897, 65 N. W. 1064; Camp v. Pollock, 45 Nebr. 771, 64 N. W. 231; Randall v. Persons, 42 Nebr. 607, 60 N. W. 898; Robinson v. Kilpatrick-Koch Dry Goods Co., 50 Nebr. 795, 70 N. W. 378; Marseilles Mfg. Co. v. Morgan, 12 Nebr. 66, 69, 10 N. W. 462; Adams v. Nebraska City Nat. Bank, 4 Nebr. 370; Nelson v. Garey, 15 Nebr. 531, 19 N. W. 630; Finkel v. Lepkin, 62 N. J. L. 580, 41 Atl. 718; Woodward v. Republic Fire Ins. Co., 32 Hun (N. Y.) 365; Stewart v. Slater, 13 N. Y. Super. Ct. 83; Edmisson v. Drumm-Flato Commission Co., 13 Okla. 440, 73 Pac. 958; Hixon v. Hubbell, 4 Okla. 224, 44 Pac. 222; Knowles v. Herbert, 11 Ore. 54, 240, 4 Pac. 126; Backhaus v. Buells, 43 Ore. 558, 72 Pac. 976, 73 Pac. 342; Levi v. Legg, 23 S. Car. 282; Reese v. Lyon, 20 S. Car. 17; Jencks v. Murphy, 15 S. Dak. 425, 89 N. W. 1121; Preston v. Carter, 80 Tex. 388, 16 S. W. 17; Byrd v. Forbes, 3 Wash. Ter. 318, 13 Pac. 715.

[5] Campbell v. Woodstock Iron Co., 83 Ala. 351, 3 So. 369; Jackson v. Rutherford, 73 Ala. 155; Sims v. Canfield, 2 Ala. 555; Wright v. Ross,

by a pledge, the possession. It often happens that there is a union in the same transaction of both forms of security; that there is a mortgage by virtue of a transfer of the title, and a pledge by virtue of a delivery of possession. Whether it be one or the other, the purpose of the instrument is the same,—to secure the payment of money, or the performance of some act by the maker of the instrument, or by some one else, for whom he undertakes. The importance of determining whether the transaction be a pledge or a mortgage arises from consequences resulting from the instrument being the one or the other: the title to the property in the former case remaining in the debtor both before and after breach of the condition; and in the latter case the title being all the while in the creditor, and becoming absolute in him at law after the debtor's default.[6] Whether a transaction be a pledge or a mortgage depends largely upon the intention of the parties in the inception of it. If the transaction in its origin was intended to be a mortgage, and the creditor took possession of the property as mortgagee, and held it in that capacity alone, he cannot, upon the mortgage proving void and of no effect, claim that he holds as pledgee, without some new contract between the parties. If the transaction was clearly a mortgage, and the mortgage title fails while the mortgagee is in possession, he is then left with a bare naked possession of the property, without title and without any lien; the property belongs to the mortgagor, who may recover possession of it; or his creditors may secure or enforce their claims upon it. The whole character of the possession of the property cannot be changed at once, and without any new act or contract of the parties.[7] Another dis-

36 Cal. 414; Heyland v. Badger, 35 Cal. 404; Evans v. Darlington, 5 Blackf. (Ind.) 320; Jordan v. Turner, 3 Blackf. (Ind.) 309; Eastman v. Avery, 23 Maine 248; Beeman v. Lawton, 37 Maine 543; Day v. Swift, 48 Maine 368; Walker v. Staples, 5 Allen (Mass.) 34; Tannahill v. Tuttle, 3 Mich. 104, 61 Am. Dec. 480; Palmer v. Mutual Life Ins. Co., 114 Minn. 1, 130 N. W. 250; Brown v. Bement, 8 Johns. (N. Y.) 96; White v. Cole, 24 Wend. (N. Y.) 116, revd. 26 Wend. (N. Y.) 511; Doak v. Bank of State, 28 N. Car. 309; McCoy v. Lassiter, 95 N. Car. 88; Barfield v. Cole, 4 Sneed (Tenn.) 465; Conner v. Carpenter, 28 Vt. 237; Wood v. Dudley, 8 Vt. 430; Gifford v. Ford, 5 Vt. 532; Marsh v. Wade, 1 Wash. St. 538, 546, 20 Pac. 578.

[6] Jones on Pledges (3d ed.), § 9; Wright v. Ross, 36 Cal. 414; Tyler v. Strang, 21 Barb. (N. Y.) 198; Casey v. Cavaroc, 96 U. S. 467, 24 L. ed. 779.

[7] Janvrin v. Fogg, 49 N. H. 340.

tinction between a pledge and a mortgage is that a delivery must always accompany the former, while the latter may be valid without a delivery, and without any record or filing of the deed, in the absence of any statute requiring such delivery and record.[8] The fact that there is a delivery of the property may be decisive that the transaction is a pledge; and on the other hand the fact that there is no delivery may be decisive that it was a mortgage and not a pledge. In such case the delivery of possession is an element of the transaction which serves to determine its character, which was left uncertain by the circumstances attending it.[9]

§ 4752. Distinguished from conditional sale.—If an absolute sale be made without continuing or creating a debt on the part of the vendor, and he merely obtains the privilege of repurchasing within a specified time, the transaction is a conditional sale.[10] Whether there is a debt between the parties is an important inquiry in determining the nature of the transaction. If there was a previous debt, and this was not extinguished by the sale, but remained as a subsisting obligation, the bill of sale, when connected with the debt by proper evidence, will be regarded as a mortgage.[11] But if the previous debt was extinguished by the sale, and the vendor has the privilege of repurchasing within a given time, the transaction is a conditional sale.[12] When the evi-

[8] Thompson v. Dolliver, 132 Mass. 103; Walker v. Staples, 5 Allen (Mass.) 34; Homes v. Crane, 2 Pick. (Mass.) 607; Barrow v. Paxton, 5 Johns. (N. Y.) 258, 4 Am. Dec. 354; Parshall v. Eggart, 52 Barb. (N. Y.) 367, affd. 54 N. Y. 18; People v. Remington, 59 Hun (N. Y.) 282, 36 N. Y. St. 282, 12 N. Y. S. 824, affd. 59 Hun (N. Y.) 621, 36 N. Y. St. 1021, 14 N. Y. S. 947, and 126 N. Y. 654, 27 N. E. 853; McCoy v. Lassiter, 95 N. Car. 88.

[9] Ward v. Sumner, 5 Pick. (Mass.) 59; Thompson v. Dolliver, 132 Mass. 103; Shaw v. Silloway, 145 Mass. 503, 14 N. E. 783.

[10] Sewall v. Henry, 9 Ala. 24; Eiland v. Radford, 7 Ala. 724, 42 Am. Dec. 610; Weathersly v. Weathersly, 40 Miss. 462, 90 Am. Dec. 344; Gomez v. Kamping, 4 Daly (N. Y.) 77.

[11] Wasey v. Whitcomb, 167 Mich. 58, 132 N. W. 572; Spalding v. Brown, 36 Ore. 160, 59 Pac. 185; Lessing v. Grimland, 74 Tex. 239, 11 S. W. 1095; Peters Saddlery & Harness Co. v. Schoelkopf, 71 Tex. 418, 9 S. W. 336; Thompson v. Terry, 3 Willson Civ. Cas. Ct. App. (Tex.), § 28; Rockwell v. Humphrey, 57 Wis. 410, 15 N. W. 394.

[12] Jones Mtg. (6th ed.), § 326; Sewall v. Henry, 9 Ala. 24; Eiland v. Radford, 7 Ala. 724, 42 Am. Dec. 610; Haynie v. Robertson, 58 Ala. 37; Peoples v. Stolla, 57 Ala. 53; M'Ginnis v. Hart, 4 Bibb (Ky.) 327; Harrison v. Lee, 1 Litt. (Ky.) 190; Bishop v. Rutledge, 7 J. J. Marsh. (Ky.) 217; Hart v. Burton, 7 J. J. Marsh. (Ky.) 322; Magee v. Catching, 33 Miss. 672; Poindexter v. McCannon, 1 Dev. Eq. (N. Car.) 373, 18 Am. Dec. 591; Hickman v. Cant-

dence of a previous debt is given up at the time of a sale apparently absolute, nothing short of the clearest and most convincing proof that a remedy still existed for the recovery of the debt will suffice to convert the sale into a mortgage.[12a] But although the giving up of the evidence of a former debt is a very strong circumstance to show that the relation of debtor and creditor was destroyed, and that the property was taken in payment, yet it is not altogether conclusive.[13] If the previous debt was not discharged by the sale, its continuance raises a strong presumption that the transaction was a mortgage.[14] If the debt was in fact extinguished by the sale, the mere retention of the paid note for the purposes of the conditional repurchase does not continue it as a legal obligation of any force or effect, and does not make the transaction a mortgage.[15] If there is no previous debt, but one is created at the time of the sale, and this is made merely as security for the loan, there is a strong indication that the transaction is a mortgage. It is an important element in the transaction that the negotiation commences by a proposition to borrow or lend money.[16] Although the fact that the negotiation between the parties commenced with a proposition for a loan is to be considered, still it is to be recognized that the parties may have concluded upon a sale instead of a mortgage.[17] An express promise to pay on the part of the alleged mortgagor is not absolutely essential to sustain the claim; and the absence of such a promise, while it strongly tends to disprove the claim, is not conclusive

rell, 9 Yerg. (Tenn.) 172, 30 Am. Dec. 396; Collins v. Denny Clay Co., 41 Wash. 136, 82 Pac. 1012.

[12a] McKinstry v. Conly, 12 Ala. 678; Hudson v. Wilkinson, 45 Tex. 444; Ruffier v. Womack, 30 Tex. 332; Peters Saddlery & Harness Co. v. Schoelkopf, 71 Tex. 418, 9 S. W. 336.

[13] Locke's Exr. v. Palmer, 26 Ala. 312.

[14] Rapier v. Gulf City Paper Co., 69 Ala. 476, 77 Ala. 126; Folsom v. Fowler, 15 Ark. 280; Mosely v. Crocket, 9 Rich. Eq. (S. Car.) 339; Dabney v. Green, 4 Hen. & M. (Va.) 101, 4 Am. Dec. 503.

[15] Gomez v. Kamping, 4 Daly (N. Y.) 77.

[16] Locke's Exr. v. Palmer, 26 Ala. 312; Ross v. Ross, 21 Ala. 322; Sewall v. Henry, 9 Ala. 24; Smith v. Quartz Mining Co., 14 Cal. 242; Powers v. Georgia-Florida Grocery Co., 7 Ga. App. 592, 67 S. E. 685; Perkins v. Drye, 3 Dana (Ky.) 170; Weathersly v. Weathersly, 40 Miss. 462, 90 Am. Dec. 344; Kollock v. Emmert, 43 Mo. App. 566; Good v. Rogers, 19 R. I. 1, 31 Atl. 264; Thompson v. Terry, 3 Willson Civ. Cas. Ct. App. (Tex.), § 28; Rockwell v. Humphrey, 57 Wis. 410, 15 N. W. 394.

[17] Quirk v. Rodman, 12 N. Y. Super. Ct. 285.

against it.[18] Inadequacy of price is a circumstance which indicates that the transaction is a mortgage rather than a conditional sale.[19] On the other hand, when a bill of sale is made for the full price of the property, and no evidence of indebtedness is given, and there is no covenant to repay, this fact indicates an absolute sale or, if there be an agreement to reconvey, a conditional sale.[20] The courts incline to construe an absolute sale and simultaneous agreement for a resale to be a mortgage, rather than a conditional sale, if there is anything to show that the transaction was intended as security for a debt, or the evidence leaves the intention of the parties in doubt.[21] If the intention of the parties cannot be determined from the instrument itself, parol evidence is admissible in a proper case to show what the character of the instrument is. Such evidence is not admissible when the instrument upon its face is clearly a mortgage or clearly a conditional sale.[22] A vendor who alleges that his absolute bill of sale was intended only as a mortgage must make strict proof of the fact. Having given the transaction this form, he should be bound according to its terms until he shows by evidence clear and convincing that both parties to it really intended it should have a different effect, and that it does not express their real contract.[23] Whenever it appears that the parties intended a conditional sale and not a mortgage, the instrument will be so

[18] Morris v. Budlong, 78 N. Y. 543.

[19] Rapier v. Gulf City Paper Co., 77 Ala. 126; Parish v. Gates, 29 Ala. 254; Todd v. Hardie, 5 Ala. 698; Eiland v. Radford, 7 Ala. 724, 42 Am. Dec. 610; Hudson v. Isbell, 5 Stew. & P. (Ala.) 67; Knox v. Black, 1 A. K. Marsh. (Ky.) 298; LeBlanc v. Bouchereau, 16 La. Ann. 11; Cooper v. Brock, 41 Mich. 488, 2 N. W. 660; Quirk v. Rodman, 12 N. Y. Super. Ct. 285; Wilson v. Weston, 57 N. Car. 349; Fountain v. Bryce, 12 Rich. Eq. (S. Car.) 234; Wilson v. Carver, 4 Hayw. (Tenn.) 90; Thompson v. Terry, 3 Willson Civ. Cas. Ct. App. (Tex.), § 28; DeBruhl v. Maas, 54 Tex. 464.

[20] Scott v. Britton, 2 Yerg. (Tenn.) 215.

[21] Locke's Exr. v. Palmer, 26 Ala. 312; Rapier v. Gulf City Paper Co., 77 Ala. 126; Scott v. Henry, 13 Ark. 112; Folsom v. Fowler, 15 Ark. 280; Hull v. Burr, 58 Fla. 432, 50 So. 754; Barnes v. Holcomb, 12 Sm. & M. (Miss.) 306; Desloge v. Ranger, 7 Mo. 327; Turner v. Brown, 82 Mo. App. 30; Poindexter v. McCannon, 1 Dev. Eq. (N. Car.) 373, 18 Am. Dec. 591; Fowler v. Stoneum, 11 Tex. 478, 62 Am. Dec. 490.

[22] Sparks v. Green, 85 S. Car. 109, 67 S. E. 230; Hubby v. Harris, 68 Tex. 91, 3 S. W. 558; Rockwell v. Humphrey, 57 Wis. 410, 15 N. W. 394.

[23] Sewell v. Price's Admr., 32 Ala. 97; Brantley v. West, 27 Ala. 542; Williams v. Cheatham, 19 Ark. 278; Trieber v. Andrews, 31 Ark. 163; Purington v. Akhurst, 74 Ill. 490. See Jones Mtg. (6th ed.), § 335.

construed,[24] notwithstanding the leaning of the courts in favor of construing an instrument which leaves the intention of the parties in doubt to be a mortgage rather than a conditional sale.[25] There is in general no difference in point of law between a sale for a price paid or to be paid, to become absolute on the happening of a particular event, and a purchase accompanied by an agreement to resell upon certain agreed terms. In both cases the sale is to be regarded as conditional; and if the condition which is to defeat it be promptly performed, in the one case the title will not vest in the vendee, and in the other it will be divested.[26] If the condition be performed at the stipulated time, not only the jus ad rem but the jus in re will vest in the party who is to become, by the contract, the proprietor of the thing.[27]

§ 4753. **Conditional transfer of title essential.**—A decisive test of a legal mortgage of personal property is the use of language which makes the instrument one of sale, conveying the title of the property to the creditor conditionally, so that the sale is defeated by the debtor's performance of his agreement;[28] or, as it is stated by some courts, so that, by the mere non-performance of the condition by the debtor, the title is transferred absolutely to the creditor.[29] If there be no such transfer upon a condition express or implied, the transaction is not a chattel mortgage. A writing which does not convey the title to the mort-

[24] Budlong v. Cottrell, 64 Iowa 234, 20 N. W. 166; Powers v. Burdick, 126 App. Div. (N. Y.) 179, 110 N. Y. S. 883; Nash v. Weaver, 23 Hun (N. Y.) 513; Brennan v. Crouch, 125 N. Y. 763, 26 N. E. 620, 3 Silvernail Ct. App. (N. Y.) 437, affg. 57 Hun (N. Y.) 585, 32 N. Y. St. 273, 10 N. Y. S. 419; Carpenter v. Scott, 13 R. I. 477; Bracken v. Chaffin, 5 Humph. (Tenn.) 575; Hubby v. Harris, 68 Tex. 91, 3 S. W. 558; Morgan v. Kidder, 55 Vt. 367; Chapman v. Turner, 1 Call (Va.) 280, 1 Am. Dec. 514; Strider v. Reid's Admr., 2 Grat. (Va.) 38; Forkner v. Stuart, 6 Grat. (Va.) 197.

[25] Starnes v. Boyd (Ark.), 142 S. W. 1143. See, however, Campbell Printing Press &c. Co. v. Walker, 22 Fla. 412, 1 So. 59; Gigray v. Mumper, 141 Iowa 396, 118 N. W. 393; Dallas Nat. Bank v. Davis, 78 Tex. 362, 14 S. W. 706.

[26] Thompson v. Terry, 3 Willson Civ. Cas. Ct. App. (Tex.), § 28; Garretson v. De Poyster, 4 Willson Civ. Cas. Ct. App. (Tex.), § 137, 16 S. W. 106.

[27] Sewall v. Henry, 9 Ala. 24.

[28] People v. Remington, 59 Hun (N. Y.) 282, 36 N. Y. St. 282, 12 N. Y. S. 824, 14 N. Y. S. 98, affd. 59 Hun (N. Y.) 621, 36 N. Y. St. 1021, 14 N. Y. S. 947, and 126 N. Y. 654, 27 N. E. 853; Blake v. Corbett, 120 N. Y. 327, 24 N. E. 477.

[29] Campbell v. Woodstock Iron Co., 83 Ala. 351, 3 So. 369; Pollard v. Saltonstall, 56 Fed. 861; Parshall v. Eggart, 52 Barb. (N. Y.) 367, affd. 54 N. Y. 18.

gaged property is not a mortgage and, in the absence of words of alienation in the instrument creating the security, the creditor must seek the enforcement of his rights in a court of equity.[30] Thus, a writing given by a debtor to his creditor or surety, providing that upon default in payment of the debt the latter may take possession of the debtor's goods in the store occupied by him, and sell out of the same as much as will pay the debt with a reasonable compensation for his services, is not a mortgage, for it does not in any way purport to change the title to the property. It is nothing but a naked power, not coupled with an interest, and could never operate to give any rights in the property itself, until reduced to possession.[31] The court is bound to look to the paper itself for the intent of the instrument, and not beyond it. Even in equity an instrument must stand as written, if deliberately adopted by the parties, although they mistook its legal effect. A reservation in a bill of sale or note of a lien for the purchase-money does not at law constitute a mortgage, for no title passes from the debtor to the creditor.[32] It is a lien by express contract, and nothing more. Consequently such an instrument need not be filed as a chattel mortgage to be valid. A bill of sale of chattels, declared to be made to secure a debt, possession of them remaining with the vendor, is a mortgage at law.[33] And

[30] Davis v. Childers, 45 S. Car. 133, 22 S. E. 784, 55 Am. St. 757.

[31] Barnett v. Mason, 7 Ark. 253; McGriff v. Porter, 5 Fla. 373; Bonsey v. Amee, 8 Pick. (Mass.) 236; Holmes v. Hall, 8 Mich. 66, 77 Am. Dec. 444; Grand Ave. Bank v. St. Louis Union Trust Co., 135 Mo. App. 366, 115 S. W. 1071; Neidig v. Eifler, 18 Abb. Pr. (N. Y.) 353; Parshall v. Eggart, 52 Barb. (N. Y.) 367, affd. 54 N. Y. 18; Britt v. Harrell, 105 N. Car. 10, 10 S. E. 902; Whilden v. Pearce, 27 S. Car. 44, 2 S. E. 709.

[32] Barnett v. Mason, 7 Ark. 253; Sawyer v. Fisher, 32 Maine 28; Gushee v. Robinson, 40 Maine 412; Shaw v. Wilshire, 65 Maine 485; Crane v. Pearson, 49 Maine 97; Goddard v. Coe, 55 Maine 385; Field v. Gellerson, 80 Maine 270, 14 Atl. 70; Ambuehl v. Matthews, 41 Minn. 537, 43 N. W. 477; Wallace v. Palmer, 36 Minn. 126, 30 N. W. 445; Metcalfe v. Fosdick, 23 Ohio St. 114; Whilden v. Pearce, 27 S. Car. 44, 2 S. E. 709.

[33] Ross v. Ross, 21 Ala. 322; Moore v. Murdock, 26 Cal. 514; Spalding v. Mattingly, 89 Ky. 83, 8 Ky. L. (abstract) 343, 12 Ky. L. 243, 1 S. W. 488; Cooper v. Brock, 41 Mich. 488, 2 N. W. 660; Sloan v. Coburn, 26 Nebr. 607, 42 N. W. 726, 4 L. R. A. 470; Bissell v. Hopkins, 3 Cow. (N. Y.) 166, 15 Am. Dec. 259; Woodworth v. Hodgson, 56 Hun (N. Y.) 236, 31 N. Y. St. 66, 9 N. Y. S. 750; Smith v. Beattie, 31 N. Y. 542; McFadden v. Turner, 48 N. Car. 481; Harris v. Chaffee, 17 R. I. 193, 21 Atl. 104; Musgat v. Pumpelly, 46 Wis. 660, 1 N. W. 410. In this case a bill of sale in the usual form contained this clause: "This bill of sale is given for the security of moneys advanced." It was held to be a mortgage. The court, by Marston, J.,

so an absolute bill of sale of goods, and a stipulation by the vendee that the vendor shall remain in possession of the goods until the expiration of a certain time allowed for the payment of a previous debt, is a mortgage.[34] Such instruments in terms fulfil in themselves the essential conditions of a mortgage; for they make a transfer by way of security, and name a contingency on which the transfer is to become void, namely, the payment of the debt.

§ 4754. Statement of conditions and defeasance.—A technical mortgage must contain a condition or defeasance making the instrument void upon performance of the condition, whether this be the payment of a sum of money, or the fulfilment of some other duty or obligation. In a formal mortgage the condition is formally expressed. But a formal expression of it is not essential. The condition may be implied from a recital that the sale was made to secure a debt.[35] But if there are words which negative any implication that the sale is to be void upon payment, or if there be a provision that the creditor shall then assign the property, the transaction may not be a mortgage. It is not essential that the condition should be inserted in the bill of sale itself: it may be written at the end of the instrument,[36] or indorsed upon it; or it may be contained in a separate paper executed and delivered simultaneously with the absolute bill of sale. It is, however, regarded as important that the condition should not only be expressed, but that the terms should be stated so definitely as to enable creditors to ascertain with a good degree of certainty the true character of the contract.[37] It is also held

said: "The mere fact that an instrument does not contain terms of defeasance cannot be at all decisive in determining the question whether it shall be considered a mortgage or not. If from the entire instrument, either standing alone or read in the light of the surrounding circumstances, it appears to have been given as a security, it must be considered as a mortgage, and the law will apply thereto the rules applicable to mortgages."

[34] Bartels v. Harris, 4 Greenl. (Maine) 146; Ford v. Ransom, 8 Abb. Pr. (N. S.) (N. Y.) 416, 39 How. Pr. (N. Y.) 429; Joyner v. Vincent, 20 N. Car. 512; Gifford v. Ford, 5 Vt. 532; Blodgett v. Blodgett, 48 Vt. 32.

[35] Dothan Guano Co. v. Ward, 132 Ala. 380, 31 So. 748; Weed v. Mirick, 62 Mich. 414, 29 N. W. 78; Cooper v. Brock, 41 Mich. 488, 2 N. W. 660; National Bank v. Lovenberg, 63 Tex. 506.

[36] Kent v. Allbritain, 4 How. (Miss.) 317.

[37] Miller v. Baker, 20 Pick. (Mass.) 285.

that a defeasance cannot be engrafted upon a conveyance of personal property by parol.[38]

§ 4755. **Bill of sale with separate defeasance.**—A conveyance of goods absolute in form, and an agreement simultaneously executed by the assignee to reconvey them upon payment of a loan made by him to the assignor, constitute a mortgage as between the parties.[39] The two instruments are construed together as part of the same transaction. But to have this effect they must be executed at the same time, or, if the defeasance be subsequently executed, it must be in pursuance of an agreement to execute it as part of the original transaction. A subsequent defeasance, not executed in fulfilment of such an agreement, is void in law unless it be made upon a new consideration.[40] A bill of sale of chattels with a separate defeasance is as clearly a mortgage as if the defeasance formed a part of the bill of sale.[41] An agreement made by the vendee to reconvey upon certain terms, although not in the form of a defeasance, will be considered as in effect a defeasance when shown to have been made at the time of the making of the bill of sale, and as part of the same transaction, and to have been intended only as a security for a previous indebtedness, or for a loan made at the time.[42] A valid defeasance subsequently executed will make the sale a mortgage in equity.[43]

§ 4756. **Absolute bill of sale at law and in equity.**—At law, as a general rule, the terms of a deed cannot be varied by parol; and therefore a formal bill of sale absolute in its terms and under seal, conveying personal property with covenants of warranty,

[38] Pennock v. McCormick, 120 Mass. 275.

[39] 1 Jones Mtg. (6th ed.), §§ 241, 255; Davis v. Hubbard, 38 Ala. 185; Polhemus v. Trainer, 30 Cal. 685; Reebie v. Brackett, 109 Ill. App. 631; Lobban v. Garnett, 9 Dana (Ky.) 389; Winslow v. Tarbox, 18 Maine 132; Bartels v. Harris, 4 Greenl. (Maine) 146; Carpenter v. Snelling, 97 Mass. 452; Taber v. Hamlin, 97 Mass. 489, 93 Am. Dec. 113; Potter v. Boston Locomotive Works, 12 Gray (Mass.) 154; Story v. Cordell, 13 Mont. 204, 33 Pac. 6; Blake v. Corbett, 120 N. Y. 327, 24 N. E. 477; Woodworth v. Hodgson, 56 Hun (N. Y.) 236, 31 N. Y. St. 66, 9 N. Y. S. 750; Bessing v. Grimland, 74 Tex. 239, 11 S. W. 1095.

[40] Freeman v. Baldwin, 13 Ala. 246.

[41] Brown v. Bement, 8 Johns. (N. Y.) 96.

[42] Barnes v. Holcomb, 12 Sm. & M. (Miss.) 306.

[43] Locke's Exr. v. Palmer, 26 Ala. 312.

cannot, in an action at law between the parties, be shown by parol evidence to have been intended as a mortgage; for this would be altering or varying by parol evidence the legal effect of the instrument.[44] But such evidence is admissible for the purpose of showing that the bill of sale was a pretense and a fraud, intended merely to deceive creditors, or those who might deal with the parties, as to the goods, and not to express a real transaction.[45] And in equity a bill of sale of chattels absolute in terms becomes a mortgage upon proof by parol that it was made to secure a debt, such evidence being always admissible in a proper case for this purpose.[46] It is the fact that there is a defeasance, and not the evidence of the fact, that makes an absolute bill of sale

[44] Hartshorn v. Williams, 31 Ala. 149; Cunningham v. Hawkins, 27 Cal. 603; Jackson v. Lodge, 36 Cal. 28; McAnnulty v. Seick, 59 Iowa 586, 13 N. W. 743; Reed v. Jewett, 5 Maine 96; Bryant v. Crosby, 36 Maine 562, 58 Am. Dec. 767; Harper v. Ross, 10 Allen (Mass.) 332; Fuller v. Parrish, 3 Mich. 211; Montany v. Rock, 10 Mo. 506.

[45] Hartshorn v. Williams, 31 Ala. 149; Pennock v. McCormick, 120 Mass. 275.

[46] Hudson v. Isbell, 5 Stew. & P. (Ala.) 67; Todd v. Hardie, 5 Ala. 698; Parish v. Gates, 29 Ala. 254; Scott v. Henry, 13 Ark. 112; Johnson's Exr. v. Clark, 5 Ark. 321; Rogers v. Vaughan, 31 Ark. 62; Nattin v. Riley, 54 Ark. 30, 14 S. W. 1100; Horn v. Reitler, 12 Colo. 310, 21 Pac. 186; Williams v. Chadwick, 74 Conn. 252, 50 Atl. 720; In re Reynolds, 153 Fed. 295; Stokes v. Hollis, 43 Ga. 262; National Ins. Co. v. Webster, 83 Ill. 470; Whittemore v. Fisher, 132 Ill. 243, 24 N. E. 636; Love v. Blair, 72 Ind. 281; Seavey v. Walker, 108 Ind. 78, 9 N. E. 347; Butts v. Privett, 36 Kans. 711, 14 Pac. 247; Ward v. Deering, 2 T. B. Mon. (Ky.) 9; Baldwin v. Crow, 86 Ky. 679, 9 Ky. L. 836, 7 S. W. 146; Watson v. James, 15 La. Ann. 386; Farrell v. Bean, 10 Md. 217; Ing v. Brown, 3 Md. Ch. 521; Dougherty v. McColgan, 6 Gill & J. (Md.) 275; Laeber v. Langhor, 45 Md. 477; Williams v. Nichols, 121 Mass. 435; Clark v. Williams, 190 Mass. 219, 76 N. E. 723; Parks v. Hall, 2 Pick. (Mass.) 206; Seligman v. Ten Eyck's Estate, 74 Mich. 525, 42 N. W. 134; Wetmore v. Moloney, 127 Mich. 372, 86 N. W. 808; Carter v. Burris, 10 Smedes & M. (Miss.) 527; Humphries v. Bartee, 10 Smedes & M. (Miss.) 282; Russell v. Longmoor, 29 Nebr. 209, 45 N. W. 624; Muchmore v. Budd, 53 N. J. L. 369, 22 Atl. 518; Despard v. Walbridge, 15 N. Y. 374; Hodges v. Tennessee Marine & Fire Ins. Co., 8 N. Y. 416, Seld. Notes 119; Smith v. Beattie, 31 N. Y. 542; Coe v. Cassidy, 72 N. Y. 133; Michelson v. Fowler, 27 Hun (N. Y.) 159; Keller v. Paine, 107 N. Y. 83, 13 N. E. 635; Hurford v. Harned, 6 Ore. 362; Bartel v. Lope, 6 Ore. 321; Nicklin v. Betts Spring Co., 11 Ore. 406, 5 Pac. 51, 50 Am. Rep. 477; Loyd v. Currin, 3 Humph. (Tenn.) 462; Hickman v. Cantrell, 9 Yerg. (Tenn.) 172, 30 Am. Dec. 396; Wilson v. Carver, 4 Hayw. (Tenn.) 90; Lessing v. Grimland, 74 Tex. 239, 11 S. W. 1095; First Nat. Bank v. Damm, 63 Wis. 249, 23 N. W. 497; Lamson v. Moffat, 61 Wis. 153, 21 N. W. 62; Manufacturers' Bank v. Rugee, 59 Wis. 221, 18 N. W. 251; Rockwell v. Humphrey, 57 Wis. 410, 15 N. W. 394; Bertschy v. Bank of Sheboygan, 89 Wis. 473, 61 N. W. 1115; Salter v. Bank of Eau Claire, 97 Wis. 84, 72 N. W. 352.

a mortgage.[47] This fact must be established by clear and decisive testimony.[48] But it does not require the same amount or strictness of proof to declare a mere bill of sale to be a chattel mortgage as it does to make a deed to be a mortgage. A bill of sale not under seal is not governed by the strict rules applicable to deeds under seal.[49] A bill of sale absolute on its face, but accompanied by a verbal defeasance, is a mortgage not only as between the parties to it, but also as to third persons who have actual notice, or such knowledge of the facts as will charge them with notice; and a sale of the chattels by the mortgagor to a third person, in payment of a debt due from him to them, conveys no title.[50] If, however, third persons have in good faith placed trust and confidence in the apparent absolute title of such a purchaser, and have been misled by the form of the transfer to believe that it is indefeasible, they generally have the right to insist that as to them the instrument shall be what upon its face it purports to be.[51] All the attendant circumstances may be considered in a proper case for the purpose of ascertaining the true intention of the parties to an absolute bill of sale; such as the situation of the parties, their acts and declarations, the existence of a previous debt from the vendor to the vendee, the seeking of a loan by the vendor from the vendee, the value of the property and the price paid for it, the continued possession of the vendor, or his delay in asserting the transaction to be a mortgage; in short, any and all circumstances attending the transaction in its inception, its continuance, or its close, tending to show the object of it, may be shown upon the one side or the other.[52]

§ 4757. **Verbal mortgages—Necessity for writing.** — At common law a valid mortgage of personalty may be made with-

[47] Rogers v. Vaughan, 31 Ark. 62; Wilmerding v. Mitchell, 42 N. J. L. 476.

[48] Trieber v. Andrews, 31 Ark. 163; Wasey v. Whitcomb, 167 Mich. 58, 132 N. W. 572; Seligman v. Ten Eyck's Estate, 74 Mich. 525, 42 N. W. 134.

[49] Seligman v. Ten Eyck's Estate, 74 Mich. 525. 42 N. W. 134.

[50] Omaha Book Co. v. Sutherland, 10 Nebr. 334, 6 N. W. 367.

[51] Morgan's Assignees v. Shinn, 15 Wall. (U. S.) 105, 21 L. ed. 87.

[52] Smith v. Pearson, 24 Ala. 355; Scott v. Henry, 13 Ark. 112; Perkins v. Drye, 3 Dana (Ky.) 170; Cooper v. Brock, 41 Mich. 488, 2 N. W. 660; Wasey v. Whitcomb, 167 Mich. 58, 132 N. W. 572; Carter v. Burris, 10

out writing. This results from the established principle that at common law a valid sale or transfer of personal property need not be in writing; save only in case there is no delivery of the property, and the value of it is fifty dollars or more, there must be a writing to satisfy the statute of frauds. Except, therefore, so far as a mortgage is required to be in writing to satisfy the statute of frauds, or a statute requiring the recording or filing of the mortgage, a verbal mortgage is still valid.[53] But in almost every state there are statutes requiring the recording or filing of a chattel mortgage, in order to render it valid against creditors of the mortgagor, or subsequent purchasers or mortgagees, unless the property be delivered to, and retained by, the mortgagee. In the latter case the delivery of the property being made without writing to a creditor for the purpose of securing a debt, the transaction would ordinarily be a pledge. Therefore it is not often that a verbal mortgage comes under consideration in court; and when it does, the contention is almost necessarily one between the parties themselves.[54] The main distinction between a verbal mortgage and a pledge of a chattel is that in the one case title to the property passes to the creditor, while in the other the title remains in the debtor, the creditor having only a right to retain possession of the chattel. A delivery of property as se-

Smedes & M. (Miss.) 527; Desloge v. Ranger, 7 Mo. 327; Coe v. Cassidy, 72 N. Y. 133; Peters Saddlery & Harness Co. v. Schoelkopf, 71 Tex. 418, 9 S. W. 336.

[53] Morrow v. Turney, 35 Ala. 131; May v. Eastin, 2 Port. (Ala.) 414; Deshazo v. Lewis, 5 Stew. & P. (Ala.) 91, 24 Am. Dec. 769; Brooks v. Ruff, 37 Ala. 371; Dosbaugh Nat. Bank v. Jelf, 86 Kans. 41, 119 Pac. 538; Mower v. McCarthy, 79 Vt. 142, 64 Atl. 578, 7 L. R. A. (N. S.) 418; Flory v. Denny, 7 Exch. 581; Shelburne v. Letsinger, 52 Ala. 96; Bickley v. Keenan, 60 Ala. 293; Thrash v. Bennett, 57 Ala. 156; Alabama Warehouse Co. v. Lewis, 56 Ala. 514; Stearns v. Gafford, 56 Ala. 544; Brown v. Coats, 56 Ala. 439; Rees v. Coats, 65 Ala. 256; Glover v. McGilvray, 63 Ala. 508; Burns v. Campbell, 71 Ala. 271; Williams v. Davis, 154 Ala. 422, 45 So. 908; Weaver v. Bell, 87 Ala. 385, 6 So. 298; Winslow v. Jones, 88 Ala. 406, 7 So. 262; Weil v. Ryus, 39 Kans. 564, 18 Pac. 524; Bates v. Wiggin, 37 Kans. 44, 14 Pac. 442, 1 Am. St. 234; First Nat. Bank v. Taylor, 69 Kans. 28, 76 Pac. 425; Sparks v. Wilson, 22 Nebr. 112, 34 N. W. 111; Conchman v. Wright, 8 Nebr. 1; Western Assur. Co. v. Kilpatrick-Koch Dry Goods Co., 54 Nebr. 241, 74 N. W. 592; Bank of Rochester v. Jones, 4 N. Y. 497, 55 Am. Dec. 290; Ferguson v. Union Furnace Co., 9 Wend. (N. Y.) 345; Ackley v. Finch, 7 Cow. (N. Y.) 290; Ceas v. Bramley, 18 Hun (N. Y.) 187; Bardwell v. Roberts, 66 Barb. (N. Y.) 433; McCoy v. Lassiter, 95 N. Car. 88; J. F. White Co. v. Carroll, 146 N. Car. 230, 59 S. E. 678; Loyd v. Currin, 3 Humph. (Tenn.) 462.

[54] Jones on Pledges (3d ed.), § 6.

curity constitutes a pledge; but, to constitute a mortgage, there must be a sale or transfer of the property upon condition.[55] Delivery of the property mortgaged is not indispensable as between the parties under a verbal mortgage, any more than it is under a written mortgage,[56] but, in case of parol mortgages, delivery is essential as against third persons purchasing without notice.[57] A parol agreement to give a mortgage, upon which money has been advanced, may be enforced in equity as between the parties and their representatives, on the principle that equity will consider that as done which ought to be done.[58] But the party seeking to establish such an agreement must prove its existence by clear and convincing evidence. Casual and indefinite expressions will not suffice.[59] For a stronger reason a written agreement to give a mortgage is good between the parties.[60] Of course such an agreement is of no validity as against creditors and bona fide purchasers without notice.[61]

[55] Beeman v. Lawton, 37 Maine 543; Bardwell v. Roberts, 66 Barb. (N. Y.) 433; Britt v. Harrell, 105 N. Car. 10, 10 S. E. 902.

[56] Morrow v. Turney, 35 Ala. 131; Bates v. Wiggin, 37 Kans. 44, 14 Pac. 442, 1 Am. St. 234; Bardwell v. Roberts, 66 Barb. (N. Y.) 433.

[57] Mueller v. Parcel, 71 Nebr. 795, 99 N. W. 684.

[58] Morrow v. Turney, 35 Ala. 131; Coster's Exrs. v. Bank of Georgia, 24 Ala. 37; Glover v. McGilvray, 63 Ala. 508; Conchman v. Wright, 8 Nebr. 1; Creech v. Long, 72 S. Car. 25, 51 S. E. 614.

[59] Shelburne v. Letsinger, 52 Ala. 96.

[60] Riddle v. Norris, 46 Mo. App. 512.

[61] Hees v. Carr, 115 Mich. 654, 74 N. W. 181; Conchman v. Wright, 8 Nebr. 1.

CHAPTER CXLIV.

REQUISITES IN FORM AND EXECUTION OF INSTRUMENT.

§ 4765. The form.
4766. Affidavit.
4767. Alteration and filling in blanks.
4768. Statutory forms.
4769. Mortgage of infant.
4770. Mortgage of insane person.
4771. Married woman as mortgagor.
4772. Husband's mortgage of wife's property.
4773. Husband mortgaging property to wife.
4774. Mortgage of community property.
4775. Mortgage of partnership property.
4776. Mortgage of corporation property.
4777. Mortgage executed by agent.
4778. Mortgage by executors or administrators.
4779. Description of property in general.
§ 4780. Description of live stock.
4781. Stating location and ownership.
4782. Crops to be raised by mortgagor.
4783. Specifying number of articles out of larger number.
4784. Excepting articles included in description.
4785. Defective description cured by subsequent actual delivery.
4786. Effect of false description.
4787. Good will.
4788. Including additions to stock.
4789. Substitution of other property.
4790. Schedule forming part of mortgage.
4791. General clause after particular description.
4792. Construction.

§ 4765. **The form.**—In general no particular words are required to constitute a mortgage of personal property. All that is requisite in a formal mortgage is that there should be a sale of property by the mortgagor to the mortgagee as security for the payment of a debt, or the performance of some other duty or obligation, with a condition that the sale shall be void upon the payment of such debt, or the performance of such duty or obligation. The most informal instruments will be regarded in law as mortgages if they show that a sale was made as security;[1] and in

[1] Davis v. Turner, 120 Fed. 605, 56 C. C. A. 669; Howard v. Rumble, 4 Ga. App. 327, 61 S. E. 297; American Storage & Moving Co. v. Harding, 136 Mo. App. 484, 104 S. W. 484; J. F. White Co. v. Carroll, 146 N. Car. 230, 59 S. E. 678; Whitehead v. Spivy, 103 N. Car. 66, 9 S. E. 319; Comron v. Standland, 103 N. Car. 207, 9 S. E. 317, 14 Am. St. 797; Odom v. Clark, 146 N. Car. 544, 60 S. E. 513; Peet v. Dakota Fire & Mar. Ins. Co., 7 S. Dak. 410, 64 N. W. 206.

equity, as a general rule, any sale of chattels as security for a debt is regarded as a mortgage, although the fact, that such was the purpose of the sale, be not expressed by the instrument of sale, if it be proved by evidence aliunde. The form of the sale is immaterial if in fact it was made as security; only in law this fact must appear upon the face of the instrument, while in equity it need not so appear. If the instrument reasonably expresses the intention of the parties to secure a particular debt, indicating the property and conforming to the statutory requirements as to acknowledgement and recording, it should be deemed a chattel mortgage. It is the general rule that if it appears from the instrument that the parties intended it as a security, it is a mortgage.[2] This general statement should be limited by the qualification that the instrument must contain a personal grant. Though no particular or set form of words is required, there must not only be language from which the intention of the parties is apparent, but the terms employed must be legally sufficient to carry out such purpose.[3] Any words which serve to transfer the property as security for a debt or obligation of any kind are sufficient to constitute an informal mortgage, which will still be a mortgage at law. Whatever language may be used, if it shows that the parties intended a sale of chattels as security, the instrument will be construed to be a mortgage.[4]

§ 4766. **Affidavit.**—In several states an affidavit verifying the essential facts or recitals of the mortgage, or that the mortgage is given in good faith, or that the consideration is truly stated, must be affixed to the instrument.[5] Thus a great many states provide that the parties shall make and attach an affidavit that the mortgage was made for the bona fide purpose of securing a debt or making indemnity as the case may be and was not made to cover the property of the mortgagor, nor protect it from his

[2] Lumbert v. Woodard, 144 Ind. 335, 43 N. E. 302, 55 Am. St. 175. See also, Andre v. Murray (Ind. App.), 98 N. E. 322.

[3] Harding v. Eldridge, 186 Mass. 39, 71 N. E. 115.

[4] Wood v. Holly Mfg. Co., 100 Ala. 326, 13 So. 948, 46 Am. St. 56; Horn v. Reitler, 12 Colo. 310, 21 Pac. 186; Swafford's Admr. v. Asher, 31 Ky. L. 1338, 105 S. W. 164; Saunders v. Ohlhausen, 127 Mo. App. 546, 106 S. W. 541; Blake v. Corbett, 120 N. Y. 327, 24 N. E. 477; J. F. White Co. v. Carroll, 146 N. Car. 230, 59 S. E. 678.

[5] Hicks v. National Sure'y Co., 50 Wash. 16, 96 Pac. 515.

creditors, or to hinder or delay them in the collection of their debts.[6] Other states require an affidavit that the consideration in said mortgage is true and bona fide as set forth.[7] This requirement as in the case of a prescribed form is generally held to be for the benefit of creditors and third persons and does not effect the validity of the mortgage as between the parties.[8]

§ 4767. Alteration and filling in blanks.—Under statutes requiring the recording of chattel mortgages, the instrument should be all written before the sealing, delivery and acknowledgment of it. Such an instrument, with a blank left for the name of the mortgagee, has been held of no validity as against a purchaser from the mortgagor.[9] A fraudulent alteration of a chattel mortgage in a material part, such as including additional property in the description, renders the instrument wholly void.[10] Though an alteration is innocently made, if it is material, it is held a cancelation of the deed and has the same effect as tearing off the seals would have at common law. This rule comes down from a time when the contract contained in a sealed instrument was bound so indissolubly to the substance of the document that the soul perished with the body when the latter was destroyed or changed in its identity for any cause.[11] As between the parties themselves, the mortgage is good though altered by consent after execution, as by making it include additional property.[12] As already stated, it is held that a chattel mortgage in which the name of the mortgagee is left blank is of no effect as against a subsequent purchaser of the property. The same formalities as to the

[6] Ariz. Rev. Stat. (1901), § 3282; Cal. Civ. Code 2957; Del. Laws (1893), p. 633; Idaho Civ. Code (1901), § 2820; Mont. Code (1895), vol. 1, § 3861. See also, First Nat. Bank v. Clifton Armory Co. (Ariz.), 128 Pac. 810.

[7] Md. Pub. Gen. Laws (1904), art. 21, §§ 30, 50; N. J. Laws (1902), p. 487; Utah Compiled Laws (1907), § 150, par. 2.

[8] Marchand v. Ronaghan, 9 Idaho 95, 72 Pac. 731. For affidavit held sufficient under Michigan law, see Rameau v. Valley, 168 Mich. 569, 134 N. W. 987.

[9] Herr v. Denver Milling & Mercantile Co., 13 Colo. 406, 22 Pac. 770, 6 L. R. A. 641.

[10] Hollingsworth v. Holbrook, 80 Iowa 151, 45 N. W. 561, 20 Am. St. 411; Bowser v. Cole, 74 Tex. 222, 11 S. W. 1131.

[11] The executed transfer is not annulled by the destruction of the instrument, but a power to enter premises and take the mortgaged property is entirely gone after a material alteration. Bacon v. Hooker, 177 Mass. 335, 58 N. E. 1078, 83 Am. St. 279; Gurley Bros. v. Bunch, 130 Mo. App. 665, 108 S. W. 1109.

[12] Adams v. Rice, 65 N. H. 186, 18 Atl. 652.

names of parties are required as in the case of real estate mortgages.[13] The record of such a mortgage does not impart constructive notice. A sale or transfer to a person not named is a nullity.[14]

§ 4768. **Statutory forms.**—In a few states there are statutory forms, but these forms are not exclusive of other forms. They are only forms that may be used. They have generally been enacted in the interest of brevity and simplicity in conveyances, and are useful as showing how brief and simple a form may be used. Some states require that the mortgage shall be subscribed in the presence of witnesses.[15] In Wyoming it must state distinctly on its face that it is intended for security, and must state the amount.[16] In Indiana a mortgagee of household goods must give the mortgagor a certain kind of receipt for all sums paid on the mortgage debt.[17] In Illinois the notes secured by a chattel mortgage shall state upon their face that they are so secured.[18] These forms vary in the different states and are usually required for the protection of creditors and third persons and do not generally affect the validity of the mortgage as between the parties.

§ 4769. **Mortgage of infant.**—An infant's mortgage is not void but voidable. It is binding until it is avoided. Any act of his clearly showing his intention not to be bound by the mortgage will usually amount to an avoidance of it. An unconditional sale of the mortgaged property is such an act. In most jurisdictions he may avoid the mortgage before he is of age or afterward,

[13] Herr v. Denver Milling & Mercantile Co., 13 Colo. 406, 22 Pac. 770, 6 L. R. A. 641.

[14] See 1 Jones on Mortgages (6th ed.), § 90.

[15] By statute in South Dakota the mortgagee may sign as a witness. Fisher v. Porter, 11 S. Dak. 311, 77 N. W. 112. A mortgage not signed by two witnesses is valid between the parties and against purchasers with notice. Walter A. Wood Mowing &c. Mach. Co. v. Lee, 4 S. Dak. 495, 57 N. W. 238. See Okla. Stat. (1893), ch. 51, § 23, amended in Compiled Laws (1910), ch. 68, § 4427. Witnessing it by beneficiary parties will not invalidate registration where it is entitled to registration without witnesses. Neeley &c. Co. v. Lacy Bros. (Tex. Civ. App.), 152 S. W. 441.

[16] Rev. St. Wyo. 1899, § 2807.

[17] Zumpfe v. Gentry, 153 Ind. 219, 54 N. E. 805.

[18] Laws Ill., 1895, p. 260; Rev. St. 1912, ch. 95, § 25; Hogan v. Akin, 181 Ill. 448, 55 N. E. 137; Butler v. Colwell, 89 Ill. App. 133; Central School Supply House v. Hirschy, 106 Ill. App. 258; Smith v. Schey, 101 Ill. App. 223.

but he must disaffirm it within a reasonable time after attaining his majority. What would be a reasonable time would depend upon circumstances; and where there are various circumstances to be passed upon as matters of fact, the question is one for the jury to determine under the instructions of the court.[19] If the property be taken from the infant's possession by virtue of such a mortgage, he may disaffirm the contract and reclaim the property.[20] Moreover, in a proper case, an infant may disaffirm his mortgage without returning the money borrowed upon it, the mortgage not having been given for purchase-money, or for the purchase of articles necessary for his use. If he could not repudiate the transaction except upon the condition of returning the loan, the privilege which the law accords to infancy for its protection would often be of little benefit.[21] An infant who has bought personal property, and given back a mortgage for a part of the purchase-money, may upon coming of age avoid the mortgage; but by so doing he annuls the sale to himself, and cannot claim the property by virtue of it.[22] The sale and the mortgage amount in law to one transaction, and one part of it cannot be disaffirmed without also disaffirming the other.

§ 4770. **Mortgage of insane person.**—A mortgage made by an insane person is not binding upon him in law or equity. The

[19] Miller v. Smith, 26 Minn. 248, 2 N. W. 942, 37 Am. Rep. 407; State v. Plaisted, 43 N. H. 413. In Chapin v. Shafer, 49 N. Y. 407, the court said: "By another rule of the common law it is declared that where the contract or instrument is to the disadvantage of the infant, it is void; that no contracts of infants are void except those in which it would be better for the infant as a general principle that they should be so held. * * * It is difficult to see how, as a general principle, it can be advantageous to an infant to give a mortgage upon personal property at a short date to secure an old debt, which as a general rule puts a mortgagor in embarrassed circumstances quite in the power of the mortgagee, certainly in most cases to sacrifice the property at a forced sale. Giving a mortgage to secure the purchase-money of property is a different thing. The end of the rule is the protection of the infant. * * * But I do not rest the case upon this ground, as the tendency of modern authorities is to make nearly all deeds or contracts of infants not void, but voidable." See generally Vol. 1, §§ 334-344.

[20] Miller v. Smith, 26 Minn. 248, 2 N. W. 942, 37 Am. Rep. 407.

[21] Riley v. Mallory, 33 Conn. 201; Corey v. Burton, 32 Mich. 30; Miller v. Smith, 26 Minn. 248, 2 N. W. 942, 37 Am. Rep. 407; Green v. Green, 7 Hun (N. Y.) 492, affd. 69 N. Y. 553, 25 Am. Rep. 233. See as to this rule and limitations, Vol. 1, §§ 346-351.

[22] Corey v. Burton, 32 Mich. 30; Cogley v. Cushman, 16 Gil. (Minn.) 354; Heath v. West, 28 N. H. 101; Roberts v. Wiggin, 1 N. H. 73, 8 Am. Dec. 38; Skinner v. Maxwell, 66 N. Car. 45; Curtiss v. McDougal, 26 Ohio St. 66.

contract is voidable. To a suit brought to avoid such contract, it is no defense that the defendant, at the time he took the mortgage, was not apprised of the plaintiff's insanity, or had no reason to suspect it from his conduct or otherwise, and did not overreach him, or practice any fraud or unfairness in the transaction.[23] If the mental unsoundness of the mortgagor had not been judicially determined at the time the mortgage was executed, the title vests in the mortgagee with the right of possession upon a default; and if the mortgagee obtains possession under the mortgage, his possession is not wrongful; and before an action can be maintained to recover the property from him, there must be a disaffirmance in behalf of the mortgagor.[24]

§ 4771. **Married woman as mortgagor.**—In general it may be said that a married woman may make a valid mortgage of chattels which are her separate property,[25] though executed by her alone without her husband joining.[26] The common-law disabilities of married women have been in large part removed in this country by statutes which enable them to take and hold property by gift or purchase, and to contract with reference to such property as if sole. It has been held that a mortgage by a married woman, of goods of which she avouches herself to be the lawful owner, but which really belong to her husband, passes no title such as will enable the mortgagee to replevy the goods from a third person, although the husband has indorsed on the mortgage his formal sanction of it, with a declaration that his wife acted as his agent. Such ratification supplied whatever authority was necessary to give validity to the execution of the instrument by the wife; but it did not change the character of the instrument so as to give it an effect which its own terms did not import. It did not purport to convey his property at all, but her property. Therefore

[23] Seaver v. Phelps, 11 Pick. (Mass.) 304, 22 Am. Dec. 372.

[24] Fay v. Burditt, 81 Ind. 433, 42 Am. Rep. 142. See generally upon the whole subject, and as to when the contract is absolutely void, Vol. 1, ch. 12.

[25] Scott v. Cotten, 91 Ala. 623, 8 So. 783; Wilkinson v. Rowland, 3 Willson Civ. Cas. Ct. App. (Tex.), § 11. A mortgage by J. M. Coons signed by Mrs. J. M. Coons is held a valid mortgage by Sally Coons, J. M. being her husband's initials. Taylor v. Bowen, 84 Mo. App. 613.

[26] Vette v. Leonori, 42 Mo. App. 217; Turner v. Shaw, 96 Mo. 22, 8 S. W. 897, 9 Am. St. 319.

the mortgagee could not replevy the goods from an officer who had attached them as the property of the husband, for he must maintain his action on the strength of his own title.[27]

§ 4772. **Husband's mortgage of wife's property.**—A husband cannot execute a valid mortgage of personal property belonging to his wife; and though he recites in the mortgage that the property is his own, it seems that he is not estopped from setting up his wife's title, and the invalidity of his mortgage. He has no power to make such a mortgage, and the estoppel only prevents his denying that he has done what he had no power to do.[28]

[27] Lewis v. Buttrick, 102 Mass. 412.

[28] This is so in Alabama as regards the wife's statutory estate, although the husband holds it as trustee for his wife. McIntosh v. Parker, 82 Ala. 238, 3 So. 19. In Illinois no mortgage by a married man or woman on household goods is valid unless the wife or the husband, as the case may be, joins in the same. Laws 1899, p. 208; Rev. Stat. 1905, ch. 95, § 24. This act has been held constitutional. Flynn v. Coakley, 164 Ill. 470, 45 N. E. 1070; Gaines v. Williams, 146 Ill. 450, 34 N. E. 934. It does not forbid purchase-money mortgages executed by one spouse alone. Mantonya v. Martin Emerich Outfitting Co., 172 Ill. 92, 69 Ill. App. 62, 49 N. E. 721; Paterson v. Higgins, 58 Ill. App. 268. A mortgage on household goods, executed by a married woman alone, is void, though she is living separate and apart from her husband. McKelvy v. Kolbe, 89 Ill. App. 661. The act does not apply to sales of household goods on the instalment plan. Bernstein v. Zolotkoff, 70 Ill. App. 369. Trade tools are not household goods. Peter Schoenhofen Brewing Co. v. Merrion, 67 Ill. App. 123. A piano is not household goods except when used as a means of livelihood. Johnson v. Wise, 66 Ill. App. 501. Such question is one of fact. Chiles v. Kahle, 65 Ill. App. 361. In Kansas it is unlawful for either husband or wife (where that relation exists) to create any lien, by chattel mortgage or otherwise, upon any personal property owned by either or both of them, and now exempt by law to resident heads of families from seizure and sale upon any attachment, execution, or other process issued from any court in this state, without the joint consent of both husband and wife, provided that this act shall not be construed to invalidate any such mortgage or other lien except so far as relates to the exempt property covered thereby. Laws 1901, p. 197. Jackson v. Lambertson, 71 Kans. 138, 80 Pac. 55; Alexander v. Logan, 65 Kans. 505, 70 Pac. 339. Such a mortgage covering exempt property and property not exempt is void as to the remainder. Skinner v. First Nat. Bank, 63 Kans. 842, 66 Pac. 997. Under the Massachusetts Statute (R. L., ch. 102, § 53), making certain requirements for mortgages of "household furniture," furniture used by members of boarding-house keeper's family constitutes household furniture. Glidden v. Nason, 186 Mass. 140, 71 N. E. 304. This act does not apply to purchase-money mortgages on household furniture. Day v. Cohen, 165 Mass. 304, 43 N. E. 109. Under the New Jersey statute a chattel mortgage, not signed by the wife, which includes household furniture is not invalid unless it be shown that the mortgage was not for purchase-money and that the furniture was in use by a family within the state. Dunham v. Cramer, 63 N. J. Eq. 151, 51 Atl. 1011. The furniture must be in "use" by the mortgagor and not merely in his "possession." Green v. McCrane, 55 N. J. Eq. 436, 37 Atl. 318; Brown v. Koenig, 99 Mo. App.

Payment of interest on the mortgage note by the wife is not necessarily a ratification of the mortgage. In order to establish a ratification, not only full knowledge on her part must be shown but an intention to ratify and adopt the transaction.[29] But a mortgage by a husband on chattels belonging to him, without notice to the mortgagee of the pendency of divorce proceedings between the mortgagor and his wife, and before final decree setting apart the same goods to the wife, is valid.[30] If a husband execute a mortgage upon property of his wife to secure his own debt, without her knowledge or consent, the wife is not estopped from setting up her ownership when the mortgagee takes possession of the property.[31] The mere fact that the husband executed such a mortgage does not tend to show that he owned the property, or that it was given for the benefit of his wife.[32]

§ 4773. Husband mortgaging property to wife.—Whether a husband may make a valid chattel mortgage to his wife, or a wife may make such a mortgage to her husband of her separate estate, depends upon the statutes relating to married women, and the interpretation of such statutes. Such a mortgage has been held valid in New Jersey,[33] New York,[34] Wisconsin,[35] Iowa[36] and Kansas;[37] and in a contest between a married woman and her husband's creditors, the burden of showing a valuable consideration paid out of her separate estate, or by some other person for her,

653, 74 S. W. 407. In North Carolina a mortgage of household or kitchen furniture is invalid unless a privy examination of the wife of the owner be taken as now prescribed in cases of real estate. Laws 1891, ch. 91, Revisal 1905, § 1041. In Wisconsin a chattel mortgage of personal property exempt by law from seizure and sale upon execution shall not be valid unless the same be signed by the wife of the person making such chattel mortgage, if he be a married man and his wife at the time be a member of his family, and unless such signature of such wife be witnessed by two witnesses. Annot. Stats. 1889, § 2313; Lashua v. Myhre, 117 Wis. 18, 93 N. W. 811. Creditors cannot attack a mortgage of exempt property because it is not signed by the wife. Cunningham v. Brictson, 101 Wis. 378, 77 N. W. 740.

[29] Prall v. Richards, 9 Colo. App. 165, 48 Pac. 668.

[30] McClelland v. Phillips, 6 Colo. App. 47, 39 Pac. 893.

[31] Taylor v. Riley, 37 Kans. 90, 14 Pac. 476.

[32] Gavigan v. Scott, 51 Mich. 373, 16 N. W. 769.

[33] Rue v. Scott (N. J.), 21 Atl. 1048.

[34] Spaulding v. Keyes, 52 Hun (N. Y.) 612, 1 Silvernail (N. Y.) 203, 23 N. Y. St. 454, 5 N. Y. S. 227, affd. 125 N. Y 113, 26 N. E. 15.

[35] Fenelon v. Hogoboom, 31 Wis. 172.

[36] Headington v. Langland, 65 Iowa 276, 21 N. W. 650.

[37] Miller v. Krueger, 36 Kans. 344, 13 Pac. 641; Bailey v. Kansas Mfg. Co., 32 Kans. 73, 3 Pac. 756.

is upon the wife; but, that being shown, the burden of showing fraudulent intent is upon the creditor.[38] In New Jersey a chattel mortgage made by a husband directly to his wife, without the intervention of trustees, is good at equity.[39] A husband may make a valid mortgage to a third person to secure a loan made him by his wife of money which was her sole and separate estate; and if such third person assign it to the wife by an assignment in the usual form, but without indorsing the mortgage note, the wife may maintain trover against an officer who has attached the property on a writ against the husband.[40] She could not, of course, foreclose the mortgage while her husband continued to own the equity of redemption, because she could not be a party to an action against him; but, being the legal and lawful holder of the mortgage, she could maintain any action necessary to protect her title or possession against a third person.[41] Such a mortgage would be without legal consideration in case the money loaned by the wife were not, under the existing laws, her separate property, but property which the husband had the right to reduce to possession and use.[42]

§ 4774. **Mortgage of community property.**—Community property belonging to husband and wife jointly can be mortgaged only by complying with statutory provisions where they are in force. Thus, in Idaho, such property cannot be seized on execution to the amount of the statutory exemption and can be mortgaged only by the joint act of the husband and wife. Foreclosure of a mortgage signed by the husband alone, and covering exempt property, will be enjoined by a court of equity.[43]

§ 4775. **Mortgage of partnership property.**—A mortgage by partners upon partnership property to secure an individual debt of one of the partners is valid. The rule preferring part-

[38] Hoey v. Pierron, 67 Wis. 262, 30 N. W. 692.

[39] Garwood v. Garwood, 56 N. J. Ep. 265, 38 Atl. 954.

[40] If the note had been indorsed so as to pass the legal title in it to the wife, it might have been extinguished in law, because of her incapacity to be a party to a contract with, or to an action against her husband. Degnan v. Farr, 126 Mass. 297.

[41] Degnan v. Farr, 126 Mass. 297.

[42] Phillips v. Frye, 14 Allen (Mass.) 36.

[43] Kindall v. Lincoln Hardware & Implement Co., 8 Idaho 664, 70 Pac. 1056.

nership property for the payment of partnership debts is for the benefit of the partners, and they may waive it. The giving of such a mortgage is itself a waiver.[44] The partners, while the partnership property is still under their control, have power to appropriate it to secure their individual debts. The mere preference of individual debts by mortgage to secure them over partnership debts is not such a fraud upon partnership creditors that a court of equity will set it aside.[45] The partnership creditors have no lien on the property of the partnership if the partners themselves have none.[46] But such a preference of individual creditors when the partnership is insolvent, and this fact is known to the mortgagee, may render the mortgage void as against the partnership creditors.[47] One member of a copartnership may mortgage his interest in the firm to secure his own individual debt. Such a mortgage is, of course, subject to the prior equities of the partnership creditors. If after such a mortgage the partnership business be closed, and a receiver of it appointed, in whose hands, after settling the affairs of the firm, there remains a surplus to the credit of the members of the firm, such surplus will belong to the mortgagee in preference to the assignee in bankruptcy of the mortgagor.[48] A mortgage by one partner of specific partnership property, to secure his individual debt, confers no title or lien upon that property as against the partnership or its creditors, but only a right to the mortgagor's interest therein after the partnership debts are paid,[49] and the firm has been dis-

[44] Fisher v. Syfers, 109 Ind. 514, 10 N. E. 306; Purple v. Farrington, 119 Ind. 164, 21 N. E. 543, 4 L. R. A. 535; Kirby v. Schoonmaker, 3 Barb. Ch. (N. Y.) 46, 49 Am. Dec. 160; Carver Gin & Machine Co. v. Bannon, 85 Tenn. 712, 4 S. W. 831, 4 Am. St. 803; In re Kahley, 2 Biss. (U. S.) 383, Fed. Cas. No. 7593.

[45] Fisher v. Syfers, 109 Ind. 514, 10 N. E. 306; Winslow v. Wallace, 116 Ind. 317, 17 N. E. 923, 1 L. R. A. 179; Kennedy v. Nat. Union Bank, 23 Hun (N. Y.) 494; National Bank v. Sprague, 20 N. J. Eq. 13.

[46] Jones Liens (2d. ed.), § 788; Carver Gin & Machine Co. v. Bannon, 85 Tenn. 712, 4 S. W. 831, 4 Am. St. 803.

[47] Cribb v. Morse, 77 Wis. 322, 46 N. W. 126.

[48] Sloan v. Wilson, 117 Ala. 583, 23 So. 145; Monroe v. Hamilton, 60 Ala. 226; Smith v. Andrews, 49 Ill. 28; Thompson v. Spittle, 102 Mass. 207. Under the English Bills of Sale Act of 1854, a mortgage by a partnership was regarded as an assignment of a chose in action, and not within the act. In re Bainbridge, L. R. 8 Ch. Div. 218.

[49] Nichol v. Stewart, 36 Ark. 612; Millhiser v. Pleasants, 118 N. Car. 237, 23 S. E. 969; Moline Wagon Co. v. Rummell, 2 McCrary (U. S.) 307, 12 Fed. 658.

solved.[50] A mortgage of partnership property, executed by one partner to secure his individual debt, may, however, be ratified and confirmed by his copartner, so as to be an effectual mortgage by the partnership.[51] One partner may execute a valid mortgage of partnership goods to secure a partnership debt by signing the firm name, or the individual names of the members of the firm.[52] One copartner having authority to pass a valid title to such property by bill of sale may, as incident thereto, execute a transfer of it in any form or mode by which such title could in any case be legally transferred. It is immaterial whether he sign the name of each copartner separately, or sign the firm name.[53] The addition of a seal to the individual names does not invalidate the mortgage, because a seal is unnecessary.[54]

§ 4776. **Mortgage of corporation property.**—The authority of the president and general manager of a corporation to execute a mortgage of its personal property need not be given by a formal vote. Such an act, with the knowledge of all the members of the board of directors, except one who is absent from the country, and with the concurrence, at the time, of those

[50] Fort Worth Nat. Bank v. Daugherty, 81 Tex. 301, 16 S. W. 1028.

[51] Kennedy v. Nat. Union Bank, 23 Hun (N. Y.) 494.

[52] Gates v. Bennett, 33 Ark. 475; McCoy v. Boley, 21 Fla. 803; Nelson v. Wheelock, 46 Ill. 25; Letts-Fletcher Co. v. McMaster, 83 Iowa 449, 49 N. W. 1035; Citizens' Nat. Bank v. Johnson, 79 Iowa 290, 44 N. W. 551; Patch v. Wheatland, 8 Allen (Mass.), 102; Harvey v. Ford, 83 Mich. 506, 47 N W. 242; Walker v. White, 60 Mich. 427, 27 N. W. 554; Rogers v. Gage, 59 Mo. App. 107; Columbus State Bank v. Dole, 56 Nebr. 508, 76 N. W. 1054; Neer v. Oakley, 18 N. Y. St. 374, 2 N. Y. S. 482; Graser v. Stellwagen, 25 N. Y. 315; Mabbett v. White, 12 N. Y. 442; Odom v. Clark, 146 N. Car. 544, 60 S. E. 513; Hembree v. Blackburn, 16 Ore. 153, 19 Pac. 73; Bohler v. Tappan, 1 McCrary (U. S.) 134, 1 Fed. 469; Union Bank v. Kansas City Bank, 136 U. S. 223, 34 L. ed. 341, 10 Sup. Ct. 1013; West Coast Grocery Co. v. Stinson, 13 Wash. 255, 43 Pac. 35; Hage v. Campbell, 78 Wis. 572 47 N W. 179, 23 Am. St. 422. In Wyoming it is necessary for each and every member of a copartnership to execute and acknowledge a mortgage, bond, conveyance, or other instrument intended to operate as a chattel mortgage, for and on behalf of a partnership. Wyo. Laws (1891), ch. 7, § 2.

[53] Paterson v. Maughan, 39 U. C. Q. B. 371; Halpenny v. Pennock, 33 U. C. Q. B. 229; Cooley v. Hobart, 8 Iowa 358; Bernstein v. Hobelman, 70 Md. 29, 16 Atl. 374; Mabbett v. White, 12 N. Y. 442; Graser v. Stellwagen, 25 N. Y. 315; Johnson v. Nelson, 2 Ohio Dec. 487, 3 West. L. Month. 306.

[54] Milton v. Mosher, 7 Metc. (Mass.) 244; Tapley v. Butterfield, 1 Met. (Mass.), 515, 35 Am. Dec. 374; Lamb v. Durant, 12 Mass. 54, 7 Am. Dec. 31; Sweetzer v. Mead, 5 Mich. 107; Weeks v. Mascoma Rake Co., 58 N. H. 101; Purviance v. Sutherland, 2 Ohio St. 478; Hawkins v. Hastings Bank, 1 Dill. (U. S.) 462, Fed. Cas. No. 6244, 2 Nat. Bank. Reg. 337; Woodruff v. King, 47 Wis. 261, 2 N. W. 452.

who remain, or their long continued acquiescence afterward, may properly be regarded as the act of the corporation.[55] A mortgage made by the directors, at a meeting held without the notice required by a by-law of the company, is not for that reason invalid.[56] An instrument purporting throughout to be a mortgage by a corporation of personal property is not invalid because signed by the president only with his own name and title, and sealed with his individual seal. The seal may be disregarded, because it is not necessary to the validity of such a mortgage; and disregarding the seal the contract will operate as it was clearly intended to operate.[57] The seal of a corporation to a mortgage purporting to be executed in its name is prima facie evidence of its incorporation, and of the due execution of the mortgage.[58] Under a statute requiring that the written assent of stockholders owning at least two-thirds of the capital stock of a corporation shall first be filed in the office of the clerk of the county, in order to make a valid mortgage of its property, the execution of a chattel mortgage by the president and secretary, who were at the time owners of two-thirds of the stock, renders the filing of a separate written assent unnecessary.[59] In the absence of any statutory limitation upon the power of a corporation to mortgage its personal property, this power is incident to its existence.[60] The charter of a corporation granting it "all the powers

[55] Sherman v. Fitch, 98 Mass. 59; Lester v. Webb, 1 Allen (Mass.), 34; Emerson v. Province Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66; Eureka Iron & Steel Works v. Bresnahan, 60 Mich. 332, 27 N. W. 524; Nelson v. Drake, 14 Hun (N. Y.) 465. For a case where the president and secretary of a corporation were regarded as acting under insufficient authority in executing a mortgage, see Doyle v. Mizner, 40 Mich. 160. As to sufficient consent, see Star Co. v. Andrews, 31 N. Y. St. 188, 58 N. Y. Super. Ct. 188, 9 N. Y. S. 731.

[56] Samuel v. Holladay, 1 Woolw. (U. S.) 400, Fed. Cas. No. 12288, McCahon (Kans.) 214, 1 Kans. (Dass. ed.) 612.

[57] Sherman v. Fitch, 98 Mass. 59.

[58] Reed v. Bradley, 17 Ill. 321; Hamilton v. McLaughlin, 145 Mass. 20, 12 N. E. 424.

[59] Amerman v. Wiles, 24 N. J. Eq. 13.

[60] Moran v. Strauss, 6 Ben. (U. S.) 249, Fed. Cas. No. 9787. The power of corporations to mortgage their property is in some states limited by statute. Under the statute of New York, Laws 1864, ch. 517, § 2, as amended by Laws 1871, ch. 481, authorizing a manufacturing corporation, upon written consent of stockholders owning two-thirds of its capital stock, to mortgage its capital stock, to mortgage its real and personal estate to secure the payment of any debt contracted by it in the business for which it was incorporated, it is not essential to the validity of the mortgage that it should have been given to secure an antecedent debt; but it may secure a debt contracted simultaneously with the giving of the security. Lord v.

incident and useful to corporations" includes the power to make a chattel mortgage.[61]

§ 4777. **Mortgage executed by agent.**—An agent constituted such by parol may execute a valid mortgage of his principal's personal property, it not being necessary that such a mortgage should be executed under seal.[62] But authority conferred upon an agent to sell property does not authorize him to mortgage it; and a mortgage executed by an agent in his own name, having such authority only, is void.[63] An absolute bill of sale made by an agent who was only authorized to execute a mortgage is not binding upon the principal, and, if disaffirmed by him, it may be construed in favor of the purchaser, as a mere security for so much of the purchase-money as was applied to the use of the principal.[64] A mortgage may be made to an agent to secure a debt due his principal, and the agent may enforce the mortgage in his own name for the benefit of the principal.[65] If proceedings to enforce the mortgage are taken in the name of the agent, an adjudication therein is binding upon the principal, and may be invoked as res adjudicata against such principal.[66] The act of an agent, in taking a mortgage in behalf of his principal, is ratified by the latter's bringing suit to recover the value of the goods mortgaged, although the agent had no authority to take the mortgage.[67] And so a note and mortgage taken by one partner to secure a debt due to the partnership may be enforced by such partner in his own name.[68]

§ 4778. **Mortgage by executors or administrators.**—An executor or administrator may sell personal property of the deceased, and a purchaser for value and in good faith acquires a

Yonkers Fuel Gas Co., 99 N. Y. 547, 2 N. E. 909.

[61] Badger v. Batavia Paper Mfg. Co., 70 Ill. 302.

[62] Cook v. Harrison, 19 Ill. App. 402; Latham v. First Nat. Bank, 40 Kans. 9, 18 Pac. 824; Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Kittrell v. Blum, 77 Tex. 336, 14 S. W. 69; Cohen v. Oliver, 9 Tex. Civ. App. 35, 29 S. W. 81.

[63] Ryan v. Crosthwaite (Iowa), 113 N. W. 321; Switzer v. Wilvers, 24 Kans. 384, 36 Am. Rep. 259.

[64] Coppage v. Barnett, 34 Miss. 621.

[65] Consolidated Barb Wire Co. v. Purcell, 29 Kans. 267, 29 Pac. 160; Varney v. Hawes, 68 Maine 442.

[66] Lippman v. Campbell, 40 Mo. App. 564.

[67] Partridge v. White, 59 Maine 564.

[68] Lundburg v. Northwestern Elevator Co., 42 Minn. 37, 43 N. W. 685.

valid title; but the executor or administrator cannot make a valid mortgage of such property to secure his own private debt. The very fact that it secures his own debt carries upon the face of the transaction its own condemnation.[69]

§ 4779. Description of property in general.—It is not necessary that the property should be so described as to be capable of being identified by the written recital, or by the name used to designate it in the mortgage.[70] Parol evidence is admissible to show that a particular article is included within the general words of a description,[71] but not ordinarily to supply an essential word which has been omitted.[72] Thus, under a mortgage of all the stock, tools, and property belonging to the mortgagor in and about a wheelwright's shop occupied by him, parol evidence is admissible to show what articles were in and about the shop when the mortgage was made.[73] A description may be sufficient between the immediate parties to the mortgage which would not be sufficient as against creditors of the mortgagor or purchasers from him.[74] A description which is good between the parties is prima facie good against a trespasser,[75] or a purchaser with actual notice of the mortgage.[76] Generally, in treating of the sufficiency of a description in a mortgage, it is the sufficiency as regards

[69] Clark v. Coe, 52 Hun (N. Y.) 379, 24 N. Y. St. 269, 5 N. Y. S. 243.

[70] Gurley (Greeley) v. Davis, 39 Ark. 394; Buck v. Young, 1 Ind. App. 558, 27 N. E. 1106; Dendy v. First Nat. Bank, 76 Kans. 301, 91 Pac. 682; Comins v. Newton, 10 Allen (Mass.) 518; Big Stone County Bank v. Crown Elevator Co., 111 Minn. 399, 127 N. W. 181; State v. Cabanna, 14 Mo. App. 294; Dierling v. Pettit, 140 Mo. App. 88, 119 S. W. 524; Collerd v. Tully, 77 N. J. Eq. 439, 77 Atl. 1079; Morris v. Connor, 108 N. Car. 321, 12 S. E. 917.

[71] Nussbaum v. Waterman, 9 Ga. App. 56, 70 S. E. 259; A. S. Thomas Furniture Co. v. T. & C. Furniture Co., 120 Ga. 879, 48 S. E. 333; Colean Implement Co. v. Strong, 126 Iowa 598, 102 N. W. 506; Sparks v. Brown, 46 Mo. App. 529; Chicago Title & Trust Co. v. O'Marr, 18 Mont. 568, 46 Pac. 809, 47 Pac. 4.

[72] Augustine v. McDowell, 120 Iowa 401, 94 N. W. 918, where the mortgage read "seventy, more or less, of corn." Frick v. Fritz, 115 Iowa 438, 88 N. W. 961, 91 Am. St. 165, holding a mortgage covering a certain number of "yearlings and two-year-olds" was good though the kind of animal was not stated.

[73] Harding v. Coburn, 12 Metc. (Mass.) 333, 46 Am. Dec. 680; Winslow v. Merchants' Ins. Co., 4 Metc. (Mass.) 306, 38 Am. Dec. 368; Willey v. Snyder, 34 Mich. 60; Goff v. Pope, 83 N. Car. 123.

[74] Stickney v. Dunaway, 169 Ala. 464, 53 So. 770; Davis v. Horne, 54 Fla. 563, 45 So. 476, 127 Am. St. 151; Houser v. Andersch, 61 Mo. App. 15, 1 Mo. App. Rep. 286; Leighton v. Stuart, 19 Nebr. 546, 26 N. W. 198; Call v. Gray, 37 N. H. 428, 75 Am. Dec. 141.

[75] O'Brien v. Miller, 117 Fed. 1000.

[76] Johnson v. Hutchison, 81 Mo. App. 299.

third persons, who have in good faith acquired rights against the property, that is referred to. As to them even, the description is sufficient if it points to evidence whereby the precise thing mortgaged may be ascertained with certainty.[77] The description need not be such as would enable a stranger to select the property. A description which will enable third persons, aided by inquiries which the instrument itself suggests, to identify the property, is sufficient.[78] The mortgage, to be effectual as against third persons, must point out the subject-matter of it, so that a third person by its aid, together with the aid of such inquiries as the instrument itself suggests, may identify the property covered.[79] As between the parties to the mortgage, a specific and particular description is not necessary, and the articles intended to be mortgaged may be shown by parol evidence. But even as between the parties there must be an identification of the property, so that the mortgagee, whether legal or equitable, may say, with a rea-

[77] City Bank v. Ratkey, 79 Iowa 215, 44 N. W. 362.

[78] Tompkins v. Henderson, 83 Ala. 391, 3 So. 774; Connally v. Spragins, 66 Ala. 258; Gurley (Greeley) v. Davis, 39 Ark. 394; Webb v. Trogdon, 91 Ill. App. 238; Buck v. Young, 1 Ind. App. 558, 27 N. E. 1106; Tindall v. Wasson, 74 Ind. 495; Smith v. McLean, 24 Iowa 322; Yant v. Harvey, 55 Iowa 421, 7 N. W. 675; Kenyon v. Tramel, 71 Iowa 693, 28 N. W. 37; City Bank v. Ratkey, 79 Iowa 215, 44 N. W. 362; Sandwich Mfg. Co. v. Robinson, 83 Iowa 567, 49 N. W. 1031, 14 L. R. A. 126; Rhutasel v. Stephens, 68 Iowa 627, 27 N. W. 786; Winter v. Landphere, 42 Iowa 471; Griffiths v. Wheeler, 31 Kans. 17, 2 Pac. 842; Tolbert v. Horton, 31 Minn. 518, 18 N. W. 647, 33 Minn. 104, 22 N. W. 126; Chandler v. West, 37 Mo. App. 631; Jennings v. Sparkman, 39 Mo. App. 663; Vette v. Leonori, 42 Mo. App. 217; Stonebraker v. Ford, 81 Mo. 532; State v. Cabanna, 14 Mo. App. 294; Hughes v. Menefee, 29 Mo. App. 192; Golden v. Moore, 126 Mo. App. 518, 104 S. W. 481; Jordan v. Hamilton County Bank, 11 Nebr. 499, 9 N. W. 654; Price v. McComas, 21 Nebr. 195, 31 N. W. 511; Wiley v. Shars, 21 Nebr. 712, 33 N. W. 418; Buck v. Davenport Savings Bank, 29 Nebr. 407, 45 N. W. 776, 26 Am. St. 392; Rawlins v. Kennard, 26 Nebr. 181, 41 N. W. 1004; Lawrence v. Evarts, 7 Ohio St. 494; First Nat. Bank v. Rogers, 24 Okla. 357, 103 Pac. 582; Smith v. LaFayette, 29 Okla. 671, 119 Pac. 979; Advance Thresher Co. v. Schmidt, 9 S. Dak. 489, 70 N. W. 646; Des Moines Nat. Bank v. Council Bluffs Sav. Bank, 18 Am. Bank. 108; Alferitz v. Ingalls, 83 Fed. 964; Davis v. Horne, 54 Fla. 563, 45 So. 476, 127 Am. St. 151; Sparks v. Deposit Bank, 115 Ky. 461, 24 Ky. L. 2333, 25 Ky. L. 1481, 74 S. W. 185, 78 S. W. 171; Skowhegan Bank v. Farrar, 46 Maine 293; Elder v. Miller, 60 Maine 118; Chapin v. Cram, 40 Maine 561; Bozeman v. Fields, 44 Mo. App. 432; Golden v. Moore, 126 Mo. App. 518, 104 S. W. 481; Mendenhall v. Kratz, 14 Wash. 453, 44 Pac. 872.

[79] Buck v. Young, 1 Ind. App. 558, 27 N. E. 1106; Tindall v. Wasson, 74 Ind. 495; Eggert v. White, 59 Iowa 464, 13 N. W. 426; Tootle v. Lyster, 26 Kans. 589; Salabes v. J. Castelberg & Sons, 98 Md. 645, 57 Atl. 20, 64 L. R. A. 800; Willey v. Snyder, 34 Mich. 60; Cass v. Gunnison, 58 Mich. 108, 25 N. W. 52; Young v. Bank of Princeton, 97 Mo. App. 576, 71 S. W. 713; Holmes v. Strayhorn-

sonable degree of certainty, what it is that is subject to his lien.[80] As against creditors of the mortgagor, and others who may acquire any adverse rights, the mortgage is not effectual unless it affords some means of identifying the property. A description which is sufficient between the parties may be insufficient as against third persons.[81]

§ 4780. Description of live stock.—A mortgage of "one bay horse, seven years old," of a weight named, is sufficient, in connection with a provision that the property is to remain in the hands of the mortgagor, to impart notice by the record of it.[82] A description of horses or cattle by color, name and sex is good,[83] even, it seems, though it does not locate the property.[84] But where neither location, ownership nor possession were specified the description was held insufficient.[85] A mortgage of "a brindle cow, about three years old, and her increase" is sufficient to put a purchaser upon inquiry.[86] So is a mortgage of a "roan horse, 'Drummer.' "[87] A mortgage of "a flock of six hundred head of sheep, consisting of wethers, ewes, and lambs, and their increase for the year 1882," owned by the mortgagor in a county named, sufficiently describes the property.[88] Where the description was,

Hutton-Evans Commission Co., 81 Mo. App. 97; Bank of Atchison County v. Shackelford, 67 Mo. App. 475; Ranney v. Meisenheimer, 61 Mo. App. 434; Chandler v. West, 37 Mo. App. 631; Boeger v. Langenberg, 42 Mo. App. 7; Leffel v. Miller (Miss.), 7 So. 324; Allen v. Dicken, 63 Miss. 91; Nicholson v. Karpe, 58 Miss. 34.

[80] Payne v. Wilson, 74 N. Y. 348; Lee v. Cole, 17 Ore. 559, 21 Pac. 819.

[81] Gurley v. Davis, 39 Ark. 394; Dodds v. Neel, 41 Ark. 70; Cass v. Gunnison, 58 Mich. 108, 25 N. W. 52.

[82] Wheeler v. Becker, 68 Iowa 723, 28 N. W. 40. See also, Klug v. Munce, 40 Colo. 276, 90 Pac. 603; Preston v. Caul, 109 Iowa 443, 80 N. W. 522; Peters v. Parsons, 18 Nebr. 191, 24 N. W. 687; Rawlins v. Kennard, 26 Nebr. 181, 41 N. W. 1004.

[83] Nicholson v. Karpe, 58 Miss. 34.

[84] Crescent Coal & Mining Co. v. Raymond, 57 Ill. App. 197; Koehring v. Aultman, 7 Ind. App. 475, 34 N. E. 30, 35 N. E. 30; Barrett v. Magner, 105 Minn. 118, 117 N. W. 245, 127 Am. St. 531n; Massachusetts Sheep Co. v. Humble, 36 Mont. 201, 92 Pac. 527; Shum v. Claghorn, 69 Vt. 45, 37 Atl. 236; Huse v. Estabrooks, 67 Vt. 223, 31 Atl. 293, 48 Am. St. 810. See Street v. Sederburg, 41 Colo. 128, 92 Pac. 29, where it is held that such description would not be good as against a stranger.

[85] State Bank v. Felt, 99 Iowa 532, 68 N. W. 818, 61 Am. St. 253.

[86] Harkey v. Jones, 54 Ark. 158, 15 S. W. 192.

[87] Hickley v. Greenwood, 25 Q. B. Div. 277; Shreck v. Spain, 30 Nebr. 887, 47 N. W. 419.

[88] Corbin v. Kincaid, 33 Kans. 649, 7 Pac. 145. See also, City Bank v. Ratkey, 79 Iowa 215, 44 N. W. 362; Scrafford v. Gibbons, 44 Kans. 533, 24 Pac. 968; Johnson v. Gerber, 114 Minn. 174, 130 N. W. 995; Commercial Nat. Bank v. Davidson, 18 Ore. 57, 22 Pac. 517.

"twenty-three head of horses and mules, * * * all situated on their (the mortgagors') range on the South Loup river," the above-described chattels being then in their possession, and owned by them, and the testimony showed that the range in question was situated in the county where the mortgage was filed for record, and that the horses and mules were all those possessed by the mortgagors, it was held a sufficient description.[89]

§ 4781. **Stating location and ownership.**—It is important to state the location of the mortgaged property. A description which, without stating the location of the property, would be regarded as too indefinite and uncertain, may be rendered sufficiently definite and certain by making the mortgage itself indicate where the property may be found on inquiry.[90] A mortgage of "one span of colts, three years old, one gray, one bay," with no reference to ownership, location, or anything else which would enable third parties by inquiry to identify the property, is invalid for insufficiency of description.[91] The description would be sufficient if it had stated that the property was in the mortgagor's possession in a certain county.[92] But merely recit-

[89] Wiley v. Shars, 21 Nebr. 712, 33 N. W. 418. But see Crow v. Zollars, 11 S. Dak. 203, 76 N. W. 924.

[90] Muncie Nat. Bank v. Brown, 112 Ind. 474, 14 N. E. 358; Baldwin v. Boyce, 152 Ind. 46, 51 N. E. 334; McGarry v. McDonnell, 82 Iowa 732, 47 N. W. 866; Haller v. Parrott, 82 Iowa 42, 47 N. W. 996; Swayne v. Tillotson (Iowa), 123 N. W. 345; Adams v. Ryan, 61 Iowa 733, 17 N. W. 159; Adams v. Commercial Nat. Bank, 53 Iowa 491, 5 N. W. 619; Pennington v. Jones, 57 Iowa 37, 10 N. W. 274; Muir v. Blake, 57 Iowa 662, 11 N. W. 621; Iowa Lumber Co. v. Cassidy, 107 Iowa 564, 78 N. W. 210; Eggert v. White, 59 Iowa 464, 13 N. W. 426; Taylor v. Gilbert, 92 Iowa 587, 61 N. W. 203; Andregg v. Burnskiel, 87 Iowa 351, 54 N. W. 135, 53 Am. St. 388; Miller Supply Co. v. Louisa Water Co.'s Assignee, 128 Ky. 476, 33 Ky. L. 388, 108 S. W. 870; Adamson v. Horton, 42 Minn. 161, 43 N. W. 849; Randol v. Buchanan, 61 Mo. App. 445; Campbell v. Allen, 38 Mo. App. 27; Lafayette County Bank v. Metcalf, 29 Mo. App. 384; Jennings v. Sparkman, 39 Mo. App. 663; Buck v. Savings Bank, 29 Nebr. 407, 45 N. W. 776, 26 Am. St. 392; Grand Island Banking Co. v. First Nat. Bank, 34 Nebr. 93, 51 N. W. 596; Wiley v. Shars, 21 Nebr. 712, 33 N. W. 418; Grounds v. Ingram, 75 Tex. 509, 12 S. W. 1118; Joslyn v. Moose River Lumber Co., 83 Vt. 49, 74 Atl. 385.

[91] Rhutasel v. Stephens, 68 Iowa 627, 27 N. W. 786; Caldwell v. Trowbridge, 68 Iowa 150, 26 N. W. 49; Warner v. Wilson, 73 Iowa 719, 36 N. W. 719, 5 Am. St. 710; Barr v. Cannon, 69 Iowa 20, 28 N. W. 413; Barrett v. Fisch, 76 Iowa 553, 41 N. W. 310, 14 Am. St. 238; Citizens' Nat. Bank v. Johnson, 79 Iowa 290, 44 N. W. 551; Schmidt v. Bender, 39 Kans. 437, 18 Pac. 491; Bozeman v. Fields, 44 Mo. App. 432.

[92] Lightle v. Castleman, 52 Ark. 278, 12 S. W. 564; Johnson v. Grissard, 51 Ark. 410, 11 S. W. 585, 3 L. R. A. 795; Citizens' Nat. Bank v. Johnson, 79 Iowa 290, 44 N. W. 551; Adamson v. Horton, 42 Minn. 161, 43 N. W. 849.

ing the mortgagor's place of residence, and providing for the place of sale in case of foreclosure, does not cure the indefiniteness of the description.[93] A description of a pair of wagon scales by locating them in a certain town and state has been held an insufficient location.[94] And the description of a threshing outfit as being in a certain county, without stating it was in the possession of the owner, is insufficient.[95] A mortgage of "all the personal property of every kind of which one is possessed" passes all such property in existence and in his possession at the time of the conveyance.[96] Such a description would have the effect of excluding property not in the mortgagor's possession at the time the mortgage is made.[97]

§ 4782. **Crops to be raised by mortgagor.**—A mortgage of all the crops to be raised by the mortgagor in a certain county, for the term of three years, is too indefinite and uncertain to charge third persons with notice. The description is a roving one, with nothing in the way of identification to suggest inquiry where in the county the crops may be found. A crop might be in one place in the county for one year in the three, and in another place for another year, or there might be crops in different parts of the county for the same year. "A chattel mortgage ought not to be a drag-net covering a whole county in any such general terms."[98] A mortgage of ten acres of cotton to be grown, without further specification, is for the same reason void for

[93] The court said: "It could be understood from the recital, perhaps, that the mortgage was intended to cover property in Sioux county. But knowledge of that fact would not aid one who was seeking information as to the particular property intended. Aided by the recital, the description is simply of a sorrel horse, three years old, in Sioux county, which is as indefinite as that given in express terms in the mortgage." Adding a stipulation against removing the property from the county of the mortgagor's residence would make such a description good. Barrett v. Fisch, 76 Iowa 553, 41 N. W. 310, 14 Am. St. 238; Shellhammer v. Jones, 87 Iowa 520, 54 N. E. 363. See Street v. Sederburg, 41 Colo. 128, 92 Pac. 29.

[94] Gilchrist v. McGhee, 98 Iowa 508, 67 N. W. 392.

[95] Westinghouse Co. v. McGrath, 131 Iowa 226, 108 N. W. 449, 117 Am. St. 421.

[96] Harris v. Allen, 104 N. Car. 86, 10 S. E. 127. See also, Parker v. Farmers' Loan & Trust Co., 81 Iowa 458, 46 N. W. 1004; Farmers' & Merchants' Bank v. Stockdale, 121 Iowa 748, 96 N. W. 732; Goff v. Byers, 70 Nebr. 1, 96 N. W. 1037; Streeter v. Johnson, 23 Nev. 194, 44 Pac. 819.

[97] Baer v. Whittaker, 57 Ark. 151, 20 S. W. 1087.

[98] Muir v. Blake, 57 Iowa 662, 11 N. W. 621. Such a description was formerly held sufficient in Alabama. Hamilton v. Maas, 77 Ala. 253. It is now provided by statute that

uncertainty as against third persons.[99] A mortgage of eight bales of cotton, to be raised by the grantor in a certain place, is a sufficient description to hold the cotton raised, though the whole crop does not amount to eight bales.[1] A mortgage of all the cotton to be raised on a certain field described does not include cotton grown on another field, though that is the only cotton on the farm.[2] A mortgage of all the crops to be raised by the mortgagor, or in which he may have any interest, for a certain year, in a county named, is not void as to third persons for uncertainty.[3] But a general description of this kind will not cover crop rent due from subtenants under contracts which have been assigned before the mortgage is executed.[4] And a mortgage of forty acres of wheat to be grown on a quarter section described, when the particular forty acres is not designated, and the mortgagor has seventy-five acres sown in wheat, does not take effect upon any part of the latter tract, but is void for uncertainty.[5] In describing a crop to be raised, it is essential to state when it is to be raised as well as where it is to be raised; and generally a description which omits the year, and does not in any way indicate the time within which the crop is to be raised, is insufficient as against a third person acquiring rights in it.[6] But the time of raising the crops may be sufficiently indicated without naming

any provision in any chattel mortgage hereafter given in this state by which a lien is sought to be created upon any crops not in actual existence at the time of the giving of such mortgage, except crops to be grown within one year thereafter, is hereby declared to be and is void. Ala. Civ. Code (1907), § 4894.

[99] Krone v. Phelps, 43 Ark. 350; Thurlough v. Dresser, 98 Maine 161, 56 Atl. 654.

[1] Watson v. Pugh, 51 Ark. 218, 10 S. W. 493.

[2] Darr v. Kempe, 54 Ark. 91, 15 S. W. 14.

[3] Johnson v. Grissard, 51 Ark. 410, 11 S. W. 585, 3 L. R. A. 795; McConnell v. Langdon, 3 Idaho (Hasb.), 157, 28 Pac. 403; Brown v. Miller, 108 N. Car. 395, 13 S. E. 167; Weil v. Flowers, 109 N. Car. 212, 13 S. E. 761. See Woods v. Rose, 135 Ala. 297, 33 So. 41, where the mortgaged crops were not located by the instrument as being in the county except in so far as recording the mortgage in the county had this effect. Graves v. Currie, 132 N. Car. 307, 43 S. E. 897.

[4] Norfleet v. Baker, 131 N. Car. 99, 42 S. E. 544. A mortgage by a landowner of all crops raised on certain lands includes crops raised on the land by croppers which afterward come into the hands of the landlord by sale or assignment. Delta Cotton Co. v. Arkansan Cotton Oil Co., 80 Ark. 431, 97 S. W. 440.

[5] Wood Mowing &c. Machine Co. v. Minneapolis & N. Elevator Co., 48 Minn. 404, 51 N. W. 378; Russell v. Stevens, 70 Miss. 685, 12 So. 830.

[6] Eggert v. White, 59 Iowa 464, 13 N. W. 426; Pennington v. Jones, 57 Iowa 37, 10 N. W. 274; Luce v. Moorehead, 73 Iowa 498, 35 N. W. 598, 5 Am. St. 695; Cole v. Kerr, 19 Nebr. 553, 26 N. W. 598.

the year. Thus a mortgage of "crops growing and to be grown" on certain land has been held sufficiently definite to cover crops growing at the time of its execution.[7]

§ 4783. Specifying number of articles out of larger number.—A mortgage of a specified number of articles out of a larger number is void for uncertainty, when the particular articles intended to be conveyed are not separated, or designated in any way so that they can be separated from others of the same kind.[8] Thus a mortgage of two cows, the mortgagor at the time having others, is void for indefiniteness.[9] A description of a certain number of feet of logs, board measure, situated in a stream, and not designated in any way to distinguish the mortgaged logs, by fixing their location or otherwise, from a very large mass of logs bearing the same mark, is insufficient. Thus, a mortgage of "one hundred thousand feet of white pine saw logs, now on the North Branch, so called, of Thunder Bay River," without further description or identification to distinguish or separate them from a very much larger mass of logs belonging to the mortgagor in the same river, is void for uncertainty.[10] But a mortgage of a specified number of articles is valid if it provides

[7] Luce v. Moorehead, 73 Iowa 498, 35 N. W. 598, 5 Am. St. 695; Kimball v. Sattley, 55 Vt. 284, 45 Am. Rep. 614. See also, Henderson v. Gates, 52 Ark. 371, 12 S. W. 780.

[8] Comer v. Lehman, 87 Ala. 362, 6 So. 264; Lehman v. Comer, 89 Ala. 579, 8 So. 241; Person v. Wright, 35 Ark. 169; Washington v. Love, 34 Ark. 93; Krone v. Phelps, 43 Ark. 350; Croswell v. Allis, 25 Conn. 301; Meredith v. Kunze, 78 Iowa 111, 42 N. W. 619, 4 L. R. A. 455; Souders v. Voorhees, 36 Kans. 138, 12 Pac. 526; Clark v. Voorhees, 36 Kans. 144, 12 Pac. 529; Miller Supply Co. v. Louisa Water Co.'s Assignee, 128 Ky. 476, 33 Ky. L. 388, 108 S. W. 870; Bullock v. Williams, 16 Pick. (Mass.) 33; Wood Mowing &c. Machine Co. v. Minneapolis & N. Elevator Co., 48 Minn. 404, 51 N. W. 378; Kelly v. Reid, 57 Miss. 89; Draper v. Perkins, 57 Miss. 277; Stonebraker v. Ford, 81 Mo. 532; Lafayette County Bank v. Metcalf, 29 Mo. App. 384; Union State Bank v. Hutton, 61 Nebr. 571, 85 N. W. 535; Wattles v. Cobb, 60 Nebr. 403, 83 N. W. 195, 83 Am. St. 537; First Nat. Bank v. Johnson, 68 Nebr. 641, 94 N. W. 837; McCormick Harvesting Mach. Co. v. Reynolds, 62 Nebr. 892, 88 N. W. 130 (holding a mortgage of five hundred bushels out of a larger pile of corn valid); Newell v. Warner, 44 Barb. (N. Y.) 258, revd. 44 N. Y. 244; Atkinson v. Graves, 91 N. Car. 99; Blakely v. Patrick, 67 N. Car. 40, 12 Am. Rep. 600; Holman v. Whitaker, 119 N. Car. 113, 25 S. E. 793; Lupton v. Lupton, 117 N. Car. 30, 23 S. E. 184; Spivey v. Grant, 96 N. Car. 214, 2 S. E. 45; Northwestern Nat. Bank v. Freeman, 171 U. S. 620, 43 L. ed. 307, 19 Sup. Ct. 36; Jacobson v. Christensen, 18 Utah 149, 55 Pac. 562; Fowler v. Hunt, 48 Wis. 345, 4 N. W. 481.

[9] Parker v. Chase, 62 Vt. 206, 20 Atl. 198, 22 Am. St. 99.

[10] Richardson v. Alpena Lumber Co., 40 Mich. 203, 8 Cent. L. J. 297;

a way of separating them from a mass of like property; while otherwise it is not valid.[11] And so a mortgage of a specified number of articles described as being in a certain building is valid when it turns out that there is in the building a less number of such articles than the mortgage calls for. The mortgage will pass all the articles answering the description contained in the building, and beyond that it will be inoperative.[12]

§ 4784. **Excepting articles included in description.**—An exception of such articles included in the description as are exempt from attachment, or from levy and sale under execution, may make the mortgage wholly void for uncertainty.[13] For the same reasons a mortgage of a stock in trade and fixtures, consisting of clocks, watches, chains, show-cases, jewelry, and the like, excepting certain enumerated articles, and stock in trade to the amount of two hundred dollars, is void for uncertainty. This exception leaves in the mortgagor an interest in each article mortgaged, proportionate as the value excepted is to the whole value of the property. This interest is uncertain and unsevered, and moreover is inseverable and incomputable, except by some future act of the parties; or the instrument leaves to the mortgagor a right of future selection of any of the property of the value of two hundred dollars, the residue of which can be ascertained only by such selection; and in either view such uncertainty of description renders the mortgage void.[14] It has been held, however, that

Cass v. Gunnison, 58 Mich. 108, 25 N. W. 52, 68 Mich. 147, 36 N. W. 45; Stonebraker v. Ford, 81 Mo. 532.

[11] Dodds v. Neel, 41 Ark. 70; Dawson v. Cross, 88 Mo. App. 292.

[12] Croswell v. Allis, 25 Conn. 301; Kelly v. Reid, 57 Miss. 89. The proper mode of describing property such as a stock of cattle, horses and mules, where it is intended to convey all the property of that kind owned by the mortgagor, would be to say, "All my stock of cattle, consisting of about thirty head, and all my horses and mules, consisting of two head of the former and three head of the latter." If the description be merely so many head of cattle and so many horses and mules, and the mortgagor has in fact a greater number, and no intention is manifested to include the whole, there would be a failure to identify the particular animals conveyed, and the deed would be void. Kelly v. Reid, 57 Miss. 89. John S. Brittain Dry Goods Co. v. Blanchard, 60 Kans. 263, 56 Pac. 474, holding a chattel mortgage of 100 head of cattle, describing them, and being one-half of a total herd of 200 head of like description, is not void. Sparks v. Deposit Bank, 115 Ky. 461, 24 Ky. L. 2333, 25 Ky. L. 1481, 74 S. W. 185, 78 S. W. 171.

[13] Newell v. Warner, 44 Barb. (N. Y.) 258, revd. 44 N. Y. 244.

[14] Fowler v. Hunt, 48 Wis. 345, 4 N. W. 481.

an exception of property exempt from execution will not apply to articles specifically described, when there is property included in a general description to which it may apply.[15] Such an exemption does not render the description of the mortgage void for ambiguity and failure to specify definite property. Such a mortgage, subject to the debtor's right of exemption, affords no more difficulties in a separation of the property mortgaged from that which is exempt than in the case of a levy, or in the case of a bankruptcy, or in the case of a general assignment for the benefit of creditors.[16]

§ 4785. Defective description cured by subsequent actual delivery.—A defective description may be cured by a subsequent actual delivery of the property to the mortgagee, as against persons who have not acquired any right or interest before such delivery.[17] Where a mortgagor identifies and delivers to the mortgagee property as being that which was described in the mortgage, and the mortgagee takes full possession thereof by consent of the mortgagor, before the execution of an assignment for the benefit of creditors by the mortgagor, this cures any insufficiency or want of certainty of description so far as the mortgagor and the assignee are concerned, the assignee's right in this respect being the same as that of the mortgagor.[18] A provision in the mortgage for a delivery of the property may serve as a means of separating it from other like property, and thus identifying it.[19] A mortgage of crops to be sown or planted, which does not name the year in which they are to be grown, is too indefinite and uncertain to be regarded as valid as against third persons, unless the mortgagee cure the defect by taking possession before any rights attach in favor of third persons.[20]

§ 4786. Effect of false description.—A portion of a description which is false or inconsistent with the rest of the descrip-

[15] Giddey v. Uhl, 27 Mich. 94.

[16] Wilson v. Perrin, 62 Fed. 629, 11 C. C. A. 66.

[17] Horn v. Reitler, 12 Colo. 310, 21 Pac. 186; Kelley v. Andrews, 102 Iowa 119, 71 N. W. 251; Parsons Saving Bank v. Sargent, 20 Kans. 576; Nichols & Shephard Co. v. Bishop, 12 Okla. 250, 70 Pac. 188; Williamson v. Steele, 3 Lea (Tenn.) 527, 31 Am. Rep. 652.

[18] Frost v. Citizens' Nat. Bank of Beloit, 68 Wis. 234, 32 N. W. 110.

[19] Robinson v. Mauldin, 11 Ala. 977; Stephen v. Tucker, 14 N. J. L. 600.

[20] Pennington v. Jones, 57 Iowa 37, 10 N. W. 274; Muir v. Blake, 57 Iowa 662, 11 N. W. 621; Eggert v. White, 59 Iowa 464, 13 N. W. 426.

tion may be rejected, if the remainder of the description is sufficient to pass the property.[21] A misdescription of the location of a part of the mortgaged property does not invalidate the mortgage as to that part of the property, if it can be identified by the aid of parol evidence.[22] The question turns on whether the true description is sufficient to identify the property. Though the location of all property covered by a mortgage may be misdescribed, the rest of the description may be sufficient as to some of the property mortgaged, though insufficient as to the balance.[23] A description which is wholly false renders a mortgage ineffectual. If the falsity of it be a mistake, this may be cured by reforming the instrument in equity; but as against others acquiring interests in the property, such reformation is ineffectual after their interests have attached.[24] A description which is partially untrue does not render the mortgage void, if the part which is correct does not apply to other like property, and reasonably identifies the property in controversy.[25] But where the true part of the description is not so distinctive as to point out the very property mortgaged, a purchaser is usually justified in assuming that the property is not covered by mortgage.[26]

[21] Nussbaum v. Waterman, 9 Ga. App. 56, 70 S. E. 259; Buck v. Young, 1 Ind. App. 558, 27 N. E. 1106; Dendy v. First Nat. Bank, 76 Kans. 301, 91 Pac. 682; Adamson v. Fagan, 44 Minn. 489, 47 N. W. 56; The City Nat. Bank v. Goodlow-McClelland Com. Co., 93 Mo. App. 123; State v. Cabanna, 14 Mo. App. 294; Dodge v. Potter, 18 Barb. (N. Y.) 193; Goff v. Pope, 83 N. Car. 123.

[22] Goff v. Pope, 83 N. Car. 123.

[23] King v. Howell, 94 Iowa 208, 62 N. W. 738.

[24] Des Moines Nat. Bank v. Council Bluffs Sav. Bank, 150 Fed. 301, 80 C. C. A. 189; Adams v. Commercial Nat. Bank, 53 Iowa 491, 5 N. W. 619; First Nat. Bank v. Hendrickson, 61 Minn. 293, 63 N. W. 725.

[25] King v. Aultman, 24 Kans. 246. The mortgage in this case was "one bay mare, one hind foot white, and white spot in face, branded 'G', seventeen hands high, five years old," and being in the possession of the mortgagors, in Clay County, Kansas. This description was correct in every particular, except that the brand was J (though very indistinct and scarcely discernible), and the mare was not seventeen hands high, and possibly only fifteen and three-fourths hands high. The erroneous part of the description did not apply to any other animal, nor did the correct part apply to any other animal; and, taking the whole description together, it did not apply to any other animal. It was held that the description did not render the mortgage void in any respect. A mortgage of steers one and two years old does not cover bulls and cows. Wyman v. Herard, 9 Okla. 35, 59 Pac. 1009. See Tolbert v. Horton, 33 Minn. 104, 22 N. W. 126.

[26] Packers' Nat. Bank v. Chicago M. & St. P. R. Co., 122 Iowa 503, 98 N. W. 310.

§ 4787. Good will.—There is no general rule which makes the mere mortgaging of the entire assets of a business also the mortgaging of its good will. In the case of a lease of a business, such a rule might obtain without its being expressly stated, but not so with a mortgage of assets.[27] The good will of a business is property that may be mortgaged or sold in connection with the business; but it cannot be sold, by judicial decree or otherwise, unless it be in connection with a sale of the business on which it depends, and of which it is a mere incident. Thus a mortgage of the "machinery, type, presses, cases, furniture, paper, forms and tools" of a newspaper company, together with the "good will" of its business, cannot be foreclosed as to the good will after all the tangible property covered by the mortgage has been alienated, worn out or destroyed, and the corporation has become consolidated with another newspaper corporation.[28]

§ 4788. Including additions to stock.—A mortgage of a stock of goods, and any additions thereto which the mortgagor may make from time to time, is not void for uncertainty, but at law it conveys only the stock on hand at the date of the mortgage.[29] The fact, that it is attempted to embrace in the mortgage property which the mortgagor does not possess at the time, does not invalidate the conveyance of that which he then owns and is entitled to mortgage.[30] In order to include future acquisitions the mortgage must specifically describe the property either as property which will be acquired in and belong naturally to the business or as property which will be put in a certain building, place or locality.[31]

[27] Santa Fe Electric Co. v. Hitchcock, 9 N. Mex. 156, 50 Pac. 332.

[28] Metropolitan Nat. Bank v. St. Louis Dispatch Co., 36 Fed. 722, affd. 149 U. S. 436, 37 L. ed. 799, 13 Sup. Ct. 944.

[29] Green v. Rogers, 62 Ga. 166; Shaw v. Glen, 37 N. J. Eq. 32; Madson v. Rutten, 16 N. Dak. 281, 113 N. W. 872, 13 L. R. A. (N. S.) 554; Wagner v. Watts, 2 Cranch (U. S.) 169, Fed. Cas. No. 17040; Mower v. McCarthy, 79 Vt. 142, 64 Atl. 578, 7 L. R. A. (N. S.) 418n, 118 Am. St. 942; Eastman v. Parkinson, 133 Wis. 375, 113 N. W. 649, 13 L. R. A. (N. S.) 921n.

[30] Gardner v. McEwen, 19 N. Y. 123; Van Heusen v. Radcliff, 17 N. Y. 580, 72 Am. Dec. 480; Otis v. Sill, 8 Barb. (N. Y.) 102; Newell v. Warner, 44 Barb. (N. Y.) 258, revd. 44 N. Y. 244.

[31] Fidelity & D. Co. v. B. F. Sturtevant Co., 86 Miss. 509, 38 So. 783. But see, to the effect that a chattel mortgage governed by the laws of Minnesota includes after-acquired property, Title Guaranty & Surety Co. v. Witmire, 195 Fed. 41. See

§ 4789. **Substitution of other property.**—There can be no substitution of other property in place of that described in the mortgage by agreement of the parties, so as to make the mortgage a lien upon the substituted property as against third persons having no actual notice of the agreement; though, as between the parties to such agreement, the mortgage may be a lien upon the substitute property.[32] The registration of the mortgage is not constructive notice to third persons of a lien upon the substituted property, although the description used in the mortgage might apply as well to that property as to the property originally intended. Thus, where a mortgage was made of "one horse," and the mortgagor then owned a sorrel horse, which, with the consent of the mortgagee, he exchanged for a bay horse, the registry imparted notice of a lien upon the former and not upon the latter; for upon inquiry outside the deed a person would have found that the mortgagor then owned the former and not the latter.[33]

§ 4790. **Schedule forming part of mortgage.**—A schedule forms part of a mortgage when the mortgage refers to it as annexed, and as containing a description of the articles mortgaged; and a failure to annex the schedule will invalidate the mortgage, unless this contains a sufficient description of the property without the schedule.[34] Ordinarily, if such a mortgage be offered with the schedule annexed, this will prima facie be taken to be the schedule referred to in the deed, and the burden of showing that it was not annexed at the time of the execution of the deed would lie with the party objecting to it. And so where a mortgage described "the following goods and chattels," and there followed a list of articles on a separate paper attached to the mortgage by a wafer, it was held, in the absence of any evidence

also, as to progeny of mortgaged animal, Swint v. State, 3 Ala. App. 93, 57 So. 394.

[32] Winslow v. Jones, 88 Ala. 496, 7 So. 262; Bloch v. Edwards, 116 Ala. 90, 22 So. 600; Alferitz v. Perkins, 122 Cal. 391, 55 Pac. 149; Powers v. Freeman, 2 Lans. (N. Y.) 127; Blalock v. Strain, 122 N. Car. 283, 29 S. E. 408; McDonald v. Tower Lumber & Mfg. Co., 10 Wash. 474, 38 Pac. 1122.

[33] Sharpe v. Pearce, 74 N. Car. 600.

[34] Weeks v. Maillardet, 14 East 568; England v. Downs, 2 Beav. 522; Barkman v. Simmons, 23 Ark. 1; Lund v. Fletcher, 39 Ark. 325, 43 Am. Rep. 270; Edgell v. Hart, 9 N. Y. 213, 59 Am. Dec. 532; Broadhead v. Smith, 55 Hun (N. Y.) 499, 29 N. Y. St. 817, 8 N. Y. S. 760.

to the contrary, that, presumptively, the list was attached before the execution of the deed. The paper might have been annexed to the deed after its execution; but the mortgage would be incomplete without a schedule or description, of the mortgaged property, and the schedule attached to it will be taken to be that which completed the deed at the time of its execution.[35] The omission to prepare and annex a schedule or inventory referred to in a mortgage does not invalidate it if the description is sufficient to pass the property without it.[36] The making of the inventory was an act to be subsequently performed.[37] The omission to annex a schedule may invalidate the mortgage as to some articles, while it will be valid as to all the articles that can be identified without the schedule.[38] It is a sufficient description to refer to a schedule of the property attached to another mortgage of a date mentioned, made by the same mortgagor to another person. It need not be stated that the mortgage and schedule referred to are on file or recorded; but if they are recorded or filed, and the subsequent mortgage is also properly recorded or filed in the same office, it is notice to all the world.[39] The scope of a mortgage is not enlarged by reference to a schedule for further description by including therein things not within the general terms of the mortgage.[40]

§ 4791. General clause after particular description.—A general clause after an enumeration of particular articles will extend the mortgage over the property embraced in the general terms, if the language clearly indicates the purpose to do so.[41] Thus, in a mortgage specifically describing furniture and other articles used in connection with a hotel, a general clause, "Together with all other goods, effects, furniture, chattels, property, things of every name and nature, now used, attached, situate, and

[35] Belknap v. Wendell, 21 N. H. 175.
[36] England v. Downs, 2 Beav. 522; Baker v. Richardson, 6 Wkly Rep. 663.
[37] Van Heusen v. Radcliff, 17 N. Y. 580, 72 Am. Dec. 480.
[38] Winslow v. Merchants' Ins. Co., 4 Metc. (Mass.) 306, 38 Am. Dec. 368.
[39] Newman v. Tymeson, 13 Wis. 172, 80 Am. Dec. 735.
[40] Ex parte Jardine, 10 L. R. Ch. App. 322, 327.
[41] Butts v. Northwestern Printing & Pub. Co., 43 Minn. 56, 44 N. W. 879; Sumner v. Blakslee, 59 N. H. 242, 47 Am. Rep. 196; Russell v. Winne, 37 N. Y. 591, 4 Abb. Pr. (N. S.) (N. Y.) 384, 97 Am. Dec. 755.

being in or about the hotel," will embrace a schooner-rigged sailboat, then upon the water near the hotel, and which was used in connection with it, although four other schooner-rigged sailboats are specially mentioned in the mortgage.[42] General words used in connection with a special enumeration of particular articles ordinarily refer, however, to articles of the same general nature as those specifically named.[43] A mortgage by a railroad company describing specifically many different kinds of property then owned and thereafter to be acquired does not embrace, under the general word "property," municipal bonds issued to aid in building the road.[44] A mortgage by a wagon-maker which particularly describes certain property in his shop, and adds, "and unfinished woodwork in said premises," does not cover a quantity of rough lumber on the premises.[45] A mortgage of a saw-mill, "with all its fixtures and appurtenances," does not include an iron safe. In the same mortgage, the words "all the supplies I have on hand" do not include a lot of saw logs.[46] The words "all the furniture" in a certain house, used after an enumerated list of articles mortgaged, include all such articles in the house as were there for common use or ornament, and therefore include pictures, pianos, and billiard tables.[47] A mortgage of a brewery, including "all * * * accessories, appliances, and appurtenances used in or in any wise connected with" it, covers kegs branded with the mortgagor's name and used with the brewery.[48] General words of description may be modified and restricted by particular words following them. Thus, where a bill of sale was made of "all the household goods, etc., of every kind and description whatsoever" in a certain house, "more particularly set forth in an inventory or schedule of even date herewith," and the schedule did not specify

[42] Veazie v. Somerby, 5 Allen (Mass.) 280.

[43] Brainerd v. Peck, 34 Vt. 496. Where a chattel mortgage transferred all machinery, tools, implements, appliances and personal property mentioned in the annexed schedule and now in the buildings described, and the schedule attached contains a minute list of articles, including machinery, etc., the general words of the mortgage are to be limited to the articles named in the schedule. Broadhead v. Smith, 55 Hun (N. Y.) 499, 29 N. Y. St. 817, 8 N. Y. S. 760. See Vol. 2, §§ 1515, 1516, 1532.

[44] Smith v. McCullough, 104 U. S. 25, 26 L. ed. 637.

[45] Steinecke v. Uetz, 19 Mo. App. 145.

[46] Conner v. Littlefield, 79 Tex. 76, 15 S. W. 217.

[47] Sumner v. Blakslee, 59 N. H. 242, 47 Am. Rep. 196.

[48] Schaub v. Dallas Brewing Co., 80 Tex. 634, 16 S. W. 429.

all the household goods and furniture in the house, it was held that no goods passed except those specified in the inventory.[49]

§ 4792. **Construction.**—The construction of a mortgage, as regards the subject-matter of it, belongs to the court. This is the case when the construction is determined wholly by the terms of the instrument, and may also be true when extrinsic evidence is admitted to show the subject-matter to which the instrument applies. When it becomes necessary to resort to extrinsic evidence to ascertain the true meaning of the instrument, and the extrinsic facts are established by special verdict or otherwise, it becomes the duty of the court to construe the instrument in connection with, and in the light of, such facts, in the same manner as if expressed upon their face. When the facts have not been ascertained, and they are to be ascertained and applied on the trial, it may become necessary for the judge to charge the jury hypothetically, telling them what would be the true construction of the instrument, upon the different states of fact which might be found by them.[50] It has been held erroneous for the court to instruct the jury as a matter of law that certain inaccuracies in the description are not material.[51] Whether a description of the property contained in a mortgage is sufficient to identify the property is a question of fact to be determined by the jury.

[49] Wood v. Rowcliffe, 6 Exch. 407; Morrell v. Fisher, 4 Exch. 591, 19 L. J. Exch. 273; Barton v. Dawes, 19 L. J. C. P. 302; Kingston v. Chapman, 9 U. C. C. P. 130; Gunn v. Ruttan, 7 U. C. C. P. 516; Baker v. Richardson, 6 Wkly. Rep. 663; Cort v. Sagar, 3 H. & N. 370, 27 L. J. Ex. 378; Rubey v. Missouri Coal & Mining Co., 21 Mo. App. 159.

[50] Curtis v. Martz, 14 Mich. 506.

[51] Peterson v. Foli, 67 Iowa 402, 25 N. W. 677; Kern v. Wilson, 73 Iowa 490, 35 N. W. 594.

CHAPTER CXLV.

DEBT SECURED AND CONSIDERATION IN GENERAL.

§ 4805. The debt secured—In general.
4806. Legality and validity of consideration.
4807. Pre-existing debt as consideration.
4808. Contingent liability as consideration.
4809. Mortgage to secure debt of third person.
4810. Description of debt.
4811. Description of note secured.
4812. False description.
4813. Mortgage to secure future advances.
4814. Mortgage containing insurance clause.
4815. Time of payment of consideration.
§ 4816. Covenant of warranty.
4817. Seal not necessary.
4818. Delivery in general.
4819. Delivery and acceptance necessary.
4820. Acceptance by agent.
4821. Delivery to one of several mortgagees.
4822. Recording and filing in general.
4823. Effect of recording or filing.
4824. Requisites of valid filing and recording.
4825. Place of filing.
4826. Time of filing or recording.
4827. Refiling instrument.
4828. Law of the place of contract.

§ 4805. The debt secured—In general.—The debt which the mortgage makes a charge upon the property is that described in the condition of the deed. Therefore, if there be a discrepancy between the consideration mentioned in the commencement of the deed and the debt described in the condition, the latter will control, and the validity of the mortgage will not be affected. The consideration first recited may be more or less than the sum secured in the condition, without making the mortgage fraudulent and void.[1] While a mortgage may modify the contract, an irreconcilable contradiction by the mortgage of the terms of the notes cannot be allowed to affect the contract as shown by the notes. The indebtedness is represented by the notes which constitute the primary contract. To these the mortgage is collateral, and to them it refers only for the purpose of identification of the debt and contract.[2] The sum specified in the condition of the

[1] Kaysing v. Hughes, 64 Ill. 123.

[2] Ferris v. Johnson, 136 Mich. 227, 98 N. W. 1014.

mortgage cannot, ordinarily at least, be varied or contradicted by parol evidence. If this sum be larger than the debt actually due, the debtor can obtain remedy only in a court of equity.[3] As against attaching creditors, a mortgage is not valid unless there be a distinct and specific condition that can be clearly stated, on performance of which the property would be released. It must be such a demand or claim as can be stated under the requirements of the statute so definitely that the sum to be paid by the attaching officer is fixed and certain.[4] If a definite sum is stated as the debt secured, and nothing appears upon the face of the mortgage to indicate that it was intended to secure any other or greater sum, it is a valid security as against the creditors of the mortgagor only to the amount named.[5] It is not necessary, however, that the mortgage should secure the payment of a definite sum of money, or that it should secure any money payment whatever. It may secure the performance of any agreement; and in order to render the mortgage operative against third persons, it is not necessary that the agreement should be filed or recorded with the mortgage. Such an agreement is no more a part of the record than a promissory note secured by a mortgage is part of it.[6]

§ 4806. Legality and validity of consideration.—There must be a legal and valid consideration. But anything which is a consideration for a contract in general constitutes a valuable consideration for a chattel mortgage.[7] Thus, where one holding property under a conditional sale makes default, a waiver by the seller of his right to take possession and an extension of the time of payment constitute a valuable consideration for a mort-

[3] Patchin v. Pierce, 12 Wend. (N. Y.) 61.

[4] Fairfield Bridge Co. v. Nye, 60 Maine 372. In Wyoming it is provided that no instrument shall operate as a chattel mortgage unless it distinctly states upon its face that it is intended for security, and states the amount for which it is security. Wyo. Compiled Stat. (1910), § 3723. But it is generally held, in the absence of statute, that a mortgage to secure future advances is not required to specify definitely the amount to be advanced. Frank H. Buck Co. v. Buck, 162 Cal. 300, 122 Pac. 466; Candler v. Cromwell (Miss.), 57 So. 554.

[5] Mueller v. Provo, 80 Mich. 475, 45 N. W. 498, 20 Am. St. 525.

[6] Hellyer v. Briggs, 55 Iowa 185, 7 N. W. 490; Byram v. Gordon, 11 Mich. 531.

[7] Cobb v. Malone, 87 Ala. 514, 6 So. 299; Tompkins v. Crosby (N. J. Eq.), 19 Atl. 720. See also, Dunlap v. Broyles (Tex. Civ. App.), 146 S. W. 578.

gage by the purchaser to the seller.[8] And so where a mortgage is given upon a stock of goods to secure an existing indebtedness, and the time for the payment thereof is not extended, but the mortgagee goes into immediate possession, under an agreement that the property shall be sold in the usual course of business, the mortgage is not without a present consideration, and is valid.[9] A mortgage given to a sheriff or jail-keeper to secure the payment of costs in a criminal proceeding, by a person committed to jail until the same should be paid, is without consideration and void, because the officer has no authority to take such a mortgage, or to release the prisoner.[10] Where a first mortgage contains a provision that, if it shall prove ineffectual for the purposes intended, a second shall be executed in its place, the consideration of the first is sufficient to support the second mortgage, made in pursuance of such provision.[11] As between the parties, the objection that a mortgage which purports to be given for an amount named was void for want of a legal consideration, there being no evidence in rebuttal of such recital, is properly overruled.[12] But if a mortgage is given without any consideration, the mortgagor can maintain a bill in equity to have the mortgage and note delivered up and canceled.[13]

§ 4807. **Pre-existing debt as consideration.**—A pre-existing debt is generally held a valuable and sufficient consideration for a mortgage, and protects the mortgagee to the same extent that he would be protected if he had paid a new consideration at the time of the mortgage.[14] In New York, and also in sev-

[8] Sinker v. Green, 113 Ind. 264, 300, 15 N. E. 266; Avery Mfg. Co. v. Leathers, 130 Mo. App. 202, 109 S. W. 851.

[9] Clark v. Barnes, 72 Iowa 563, 34 N. W. 419.

[10] McCartney v. Wilson, 17 Kans. 294.

[11] Hume v. Eagon, 83 Mo. App. 576; Hincks v. Field, 60 Hun (N. Y.) 576, 37 N. Y. St. 724, 14 N. Y. S. 247, affd. 129 N. Y. 633, 29 N. E. 1030.

[12] Dyer v. State, 88 Ala. 225, 7 So. 267.

[13] Saunders v. Dunn, 175 Mass. 164, 55 N. E. 893.

[14] Turner v. McFee, 61 Ala. 468; Steiner v. McCall, 61 Ala. 406; Cromelin v. McCauley, 67 Ala. 542; Frey v. Clifford, 44 Cal. 335; Gassen v. Hendrick, 74 Cal. 444, 16 Pac. 242; Knox v. McFarran, 4 Colo. 586; McMurtrie v. Riddell, 9 Colo. 497, 13 Pac. 181; Nicholls v. McShane, 16 Colo. App. 165, 64 Pac. 375; Machette v. Wanless, 1 Colo. 225; In re Fulton, 153 Fed. 664; Kranert v. Simon, 65 Ill. 344; Butters v. Haughwout, 42 Ill. 18, 89 Am. Dec. 401; Kranert v. Simon, 65 Ill. 344; Prior v. White, 12 Ill. 261; Louthain v. Miller, 85 Ind. 161; Hewitt v. Powers, 84 Ind. 295; McLaughlin v. Ward, 77 Ind. 383; Gilchrist v. Gough, 63 Ind. 576,

eral other states, a pre-existing debt is not a sufficient consideration to support a mortgage of personal property against the true owner of the property, one, for instance, from whom the mortgagor obtained the property by fraud. Such a consideration, it is held, does not constitute the mortgagee a purchaser for value in good faith.[15] The existing demand may be properly called a valuable consideration; but a conveyance on such consideration is not one made in good faith when it comes in conflict with the title of the true owner, or in conflict with his prior conveyance given for value.[16] Yet the contrary is true where the mortgagee, in consideration of the mortgage and without knowledge of the fraud, extends the time of payment or assumes any additional obligation.[17] A pre-existing debt is sufficient considera-

30 Am. Rep. 250; Busenbarke v. Ramey, 53 Ind. 499; Wright v. Bundy, 11 Ind. 398; Kelly v. T. J. Ryan & Son, 140 Iowa 580, 118 N. W. 901; Clark v. Barnes, 72 Iowa 563, 34 N. W. 419; Merchants' Nat. Bank v. Soesbe, 138 Iowa 354, 116 N. W. 123; Johnston v. Robuck, 104 Iowa 523, 73 N. W. 1062; Heitman v. Griffith, 43 Kans. 553, 23 Pac. 589; Draper v. Cowles, 27 Kans. 484; Hayner v. Eberhardt, 37 Kans. 308, 15 Pac. 168; Curtis v. Martz, 14 Mich. 506; Gaerbner v. Western Elevator Co., 104 Minn. 467, 116 N. W. 945; Corning v. Rinehart Medicine Co., 46 Mo. App. 16; Avery Mfg. Co. v. Leathers, 130 Mo. App. 202, 109 S. W. 851; Laubenheimer v. McDermott, 5 Mont. 512, 6 Pac. 344; Henry v. Vliet, 33 Nebr. 130, 49 N. W. 1107, 29 Am. St. 478, revd. 36 Nebr. 138, 54 N. W. 122, 19 L. R. A. 590; Chaffee v. Atlas Lumber Co., 43 Nebr. 224, 61 N. W. 637, 47 Am. St. 753; Turner v. Killian, 12 Nebr. 580, 12 N. W. 101; State Bank v. O. S. Kelley, 49 Nebr. 242, 68 N. W. 481; Fair v. Howard, 6 Nev. 304; Collerd v. Tully, 78 N. J. Eq. 557, 80 Atl. 491, affg. 77 N. J. Eq. 439, 77 Atl. 1079; Kitchen v. Schuster, 14 N. Mex. 164, 89 Pac. 261; Robson v. Dailey, 130 N. Y. S. 1036; Smith v. Worman, 19 Ohio St. 145; Bank of Republic v. Carrington, 5 R. I. 515, 73 Am. Dec. 83; Barron v. San Angelo Nat. Bank (Tex. Civ. App.), 138 S. W. 142; Paine v. Benton, 32 Wis. 491; Shufeldt v. Pease, 16 Wis. 659.

[15] Boyd v. Beck, 29 Ala. 703; Craft v. Russell, 67 Ala. 9; Cassidy v. Harrelson, 1 Colo. App. 458, 29 Pac. 525; Atchison v. Graham, 14 Colo. 217, 23 Pac. 876; McKee v. Bassick Mining Co., 8 Colo. 392, 8 Pac. 561; Meyer v. Evans, 66 Iowa 179, 23 N. W. 386; Kemper, Hundley & McDonald Dry Goods Co. v. Kidder Sav. Bank, 81 Mo. App. 280; Tootle v. First Nat. Bank, 34 Nebr. 863, 52 N. W. 396; State Bank v. Kelley, 47 Nebr. 678, 66 N. W. 619; Milton v. Boyd, 49 N. J. Eq. 142, 22 Atl. 1078; Woodburn v. Chamberlin, 17 Barb. (N. Y.) 446; Thompson v. Van Vechten, 27 N. Y. 568; Van Slyck v. Newton, 10 Hun (N. Y.) 554; Kennedy v. National Union Bank, 23 Hun (N. Y.) 494; Jones v. Graham, 77 N. Y. 628; Van Heusen v. Radcliff, 17 N. Y. 580, 72 Am. Dec. 480; Harder v. Plass, 57 Hun (N. Y.) 540, 33 N. Y. St. 186, 11 N. Y. S. 226; Button v. Ruthbone, 59 Hun (N. Y.) 615, 35 N. Y. St. 169, 12 N. Y. S. 667, affd. 126 N. Y. 187, 27 N. E. 266; Deeley v. Dwight, 16 Daly (N. Y.) 300, 32 N. Y. St. 616, 11 N. Y. S. 60, revd. 132 N. Y. 59, 30 N. E. 258, 18 L. R. A. 298; Doig v. Haverly, 92 Hun (N. Y.) 176, 72 N. Y. St. 728, 37 N. Y. S. 455; Payne v. Mason, 7 Ohio St. 198; Goldsmith v. Hain, 1 Ohio C. D. 185, 1 Ohio Cir. Ct. 333; Overstreet v. Manning, 67 Tex. 657, 4 S. W. 248.

[16] Tiffany v. Warren, 37 Barb. (N. Y.) 571, 24 How. Pr. (N. Y.) 293.

[17] Adam, M. & A. Co. v. Stewart,

tion for a chattel mortgage as between the parties and their assigns.[18] A mortgage to secure a pre-existing debt is good, also, against the mortgagor's assignee for the benefit of his creditors. The assignee takes no better right to the property than the mortgagor had.[19] A subsequent mortgage, given for the consideration of a precedent debt only, has been held not entitled to preference over a prior unfiled mortgage of the same property, although taken without notice of such prior mortgage.[20] A mortgage given for a past debt cannot be called in question by a creditor whose own lien was acquired subsequently.[21] If, by mutual agreement of a debtor and creditor, a book account or other existing debt be put into a note payable at a future day, and the note be secured by mortgage, the remedy upon the debt being thereby suspended until the maturity of the note, the extension of credit is a new and adequate consideration for the note and mortgage.[22] The surrender of a note and acceptance of another which extends the term of credit imports a consideration and is sufficient to constitute a mortgagee a purchaser for value.[23]

§ 4808. Contingent liability as consideration.—A contingent liability is a sufficient consideration for a mortgage, and the ratio of the consideration to the value of the property pledged is of no consequence so far as concerns the validity of the transaction.[24] A mortgage which appears upon its face to secure an absolute debt is not fraudulent as to the mortgagor's creditors because it was in fact given to secure a contingent liability as surety. The mortgage is good for whatever the mortgagee may be required to pay upon the debt for which he has bound him-

157 Ind. 678, 61 N. E. 1002, 87 Am. St. 240.

[18] Close v. Hodges, 44 Minn. 204, 46 N. W. 335.

[19] Meyer v. Evans, 66 Iowa 179, 23 N. W. 386.

[20] Matthews v. Kennedy, 113 Ga. 378, 38 S. E. 854; Sparks v. Brown, 33 Mo. App. 505; Tiffany v. Warren, 37 Barb. (N. Y.) 571, 24 How. Prac. (N. Y.) 293; Bowen v. Lansing Wagon Works, 91 Tex. 385, 43 S. W. 872.

[21] Dalton v. Stiles, 74 Mich. 726, 42 N. W. 169.

[22] Lundburg v. Northwestern Elevator Co., 42 Minn. 37, 43 N. W. 685; Barnes v. Gray, 14 Tex. Civ. App. 439, 37 S. W. 162.

[23] Walter A. Wood M. & R. M. Co. v. Lee, 9 S. Dak. 69, 68 N. W. 170.

[24] Kackley v. State, 91 Ind. 437; Jewett v. Warren, 12 Mass. 300, 7 Am. Dec. 74; Adams v. Niemann, 46 Mich. 135, 8 N. W. 719; Sparks v. Wilson, 22 Nebr. 112, 34 N. W. 111; Grimes v. Sherman, 25 Nebr. 843, 41 N. W. 814; Hezel v. Schatz, 17 S. Dak. 211, 95 N. W. 926.

self as surety.[25] It has been held that a condition to save the mortgagee harmless, and to indemnify him from all costs, trouble and expense, in consequence of signing a bond for the mortgagor, entitles the mortgagee, after being compelled by suit to pay the bond, to recover compensation for the trouble and expense thus incurred. The costs, trouble, and expense in such case are not merely those incurred in the suit upon the bond, but also those incurred in resorting to the mortgaged property for indemnity.[26] A mortgage to a surety conditioned to pay the debt for which the surety is liable, and to save him harmless therefrom, creates a trust and an equitable lien in favor of the creditor; and the surety holds the property subject to such trust and lien, even after the property has become absolute in him by foreclosure.[27] It is immaterial that the principal creditor did not act upon the faith of such security, or even did not know of its existence.[28] A mortgage lien may be made contingent upon the insufficiency of a prior security upon other property to satisfy the same debt or undertaking; and in such case the insufficiency of the prior lien must be shown before the second becomes specific and absolute.[29]

§ 4809. Mortgage to secure debt of third person.—A mortgage may be made to secure debts to others besides the mortgagee. If a mortgage be made to a person to secure a debt due to him, and also a debt due to another person, it may be inferred, in the absence of any agreement to the contrary, that the security is given for the benefit of both parties pro rata to their respective demands.[30] A condition in a mortgage by a calico printer to pay all sums due to the mortgagee, and to all other persons for labor or services in operating the print works, and in any business connected with said print works, whether there or elsewhere, has been held to include the services of one employed under a sealed contract, for a stipulated percentage on the gross amount of all

[25] Goodheart v. Johnson, 88 Ill. 58; Kackley v. State, 91 Ind. 437. It may be shown by parol that a mortgage purporting to secure a note is, in fact, given for indemnity. Honaker v. Vesey, 57 Nebr. 413, 77 N. W. 1100.

[26] Robinson v. Hill, 15 N. H. 477.

[27] Eastman v. Foster, 8 Metc. (Mass.) 19; Sparks v. Wilson, 22 Nebr. 112, 34 N. W. 11.

[28] Richards v. Yoder, 10 Nebr. 429, 6 N. W. 629; Curtis v. Tyler, 9 Paige (N. Y.) 432.

[29] Trenchard v. Warner, 18 Ill. 142.

[30] Jones Mtg., § 135. See, however, Marshall v. Bryant, 12 Mass. 321.

sales of prints made at the works, to aid in getting up the styles of the prints, and in superintending that branch of his business, in Providence and New York, and in making sales of prints; but does not include fees due to attorneys at law in defending suits against the mortgagor, and in giving him advice in matters of law relating to his business.[31] The mortgage notes may be made payable to a nominal mortgagee "or bearer;" and when they are delivered to the person who actually furnished the money loaned, he becomes the "bearer" and is in fact the owner of the notes, and it does not matter that they were never delivered to the nominal mortgagee.[32]

§ 4810. **Description of debt.**—When the description of the debt is sufficient to direct a person to the proper source for information as to the amount of the encumbrance, the mortgage will not be held void on the ground of uncertainty in the description of the demand or liability intended to be included.[33] Thus, a mortgage to certain creditors in proportion to their several demands against and liabilities for the mortgagor sufficiently describes the demands and liabilities intended to be secured.[34] A condition to secure "all and any notes the said grantees may hold against me" is sufficient.[35] A mortgage given to secure all past indebtedness due and owing from the mortgagor to the mortgagee contains a sufficient description of the indebtedness.[36] It is sufficient to state the gross amount of the indebtedness intended to be secured, though such indebtedness be in fact upon several promissory notes, which, with accrued interest, aggregate such amount.[37] A chattel mortgage may secure advances covered by a statutory lien and other indebtedness which could not be secured by the lien if such is the expressed intention of the parties.[38]

[31] Spencer v. Pierce, 5 R. I. 63.
[32] Gilmore v. Roberts, 79 Wis. 450, 48 N. W. 522.
[33] Paine v. Benton, 32 Wis. 491; Weber v. Illing, 66 Wis. 79, 27 N. W. 834; Shores v. Doherty, 65 Wis. 153, 26 N. W. 577.
[34] Henshaw v. Sumner, 23 Pick. (Mass.) 446.
[35] Page v. Ordway, 40 N. H. 253. See Magirl v. Magirl, 89 Iowa 342, 56 N. W. 510.
[36] Curtis v. Flinn, 46 Ark. 70; Machette v. Wanless, 1 Colo. 225.
[37] Clark v. Hyman, 55 Iowa 14, 7 N. W. 386, 39 Am. Rep. 160.
[38] Bostick v. Ammons, 63 S. Car. 302, 41 S. E. 310.

§ 4811. Description of note secured.—It is not necessary that the condition of the mortgage should set forth all the particulars of a note, to secure which the mortgage was given. It is sufficient that the note be so far described that it appears with reasonable certainty to be the note intended to be secured.[39] Thus, a variance of the note offered in connection with the mortgage from the description in the condition, in that the note is payable with interest annually, whereas the mortgage describes the note as payable with interest, is not a material one.[40] The note and mortgage may be construed as one instrument, and an omission or defective statement in one may be supplied by the other.[41] It is no objection to a note offered in evidence, as the note secured by a mortgage, that it contains further particulars, as for instance, that it is to be paid in teaming at prices specified;[42] and it is no objection to a note that it is signed by other persons than the mortgagor, while the mortgage does not mention such other persons.[43] It does not invalidate the mortgage that it fails to state the date of the note secured.[44] If the note produced agrees with the general description of it contained in the mortgage, it is prima facie the note secured, although the mortgage omits some of the particulars of the note. A series of notes intended to be secured by a chattel mortgage, but described simply by giving the date, amount and maturity of each without naming the payee or maker, may be further identified by parol evidence.[45]

§ 4812. False description.—A mortgage which gives a totally false description of the note intended to be secured cannot be relied upon in an action at law. The mortgagee should first proceed in equity to reform the mortgage. Although the mortgage be made wrong by mistake, the parties are bound by it unless they take some appropriate means of correcting the mistake. The proper way is, not to prove the mistake in an action at law, and

[39] Robertson v. Stark, 15 N. H. 109; Colby v. Everett, 10 N. H. 429; Weber v. Illing, 66 Wis. 79, 27 N. W. 834.

[40] Webb v. Stone, 24 N. H. 282.

[41] Campbell v. Nicholson, 4 Willson Civ. Cas. Ct. App. (Tex.), § 288, 18 S. W. 135.

[42] Robertson v. Stark, 15 N. H. 109.

[43] Robertson v. Stark, 15 N. H. 109.

[44] Weber v. Illing, 66 Wis. 79, 27 N. W. 834. Nor that it bears a date prior to that of the note, Bates v. Hill (Tex. Civ. App.), 144 S. W. 288.

[45] Holmes v. Hinkle, 63 Ind. 518.

have the same benefit that might be had of a reformed instrument, at least where the old common-law system prevails, but to bring an action to reform the mortgage so that it can have its proper legal effect.[46]

§ 4813. Mortgage to secure future advances.—A mortgage made to secure future advances is valid.[47] The earlier cases started with the proposition that a mortgage of personal chattels made to secure an existing debt was not invalidated by a further provision intended to cover future advances.[48] While this proposition is true, the broader proposition, that a mortgage may be made to secure a debt which is wholly future, is also true, and has general recognition.[49] If the amount of the advances be defined, and there be a fixed obligation to make them or the mortgage show upon its face that it was given as a continuing security for advances to a certain amount, it is valid to that amount not only between the parties, but also as against creditors.[50] To give effect to such a mortgage as against a bona fide purchaser or a judgment creditor, it is held necessary for the mortgagee to establish by competent evidence the fact that he has made the

[46] Follett v. Heath, 15 Wis. 601.

[47] Dyer v. State, 88 Ala. 225, 7 So. 267; Jarratt v. McDaniel, 32 Ark. 598; Curtis v. Flinn, 46 Ark. 70; Martin v. Halbrooks, 55 Ark. 569, 18 S. W. 1046; Speer v. Skinner, 35 Ill. 282; Douglas v. Smith, 74 Iowa 468, 38 N. W. 163; Barnard v. Moore, 8 Allen (Mass.) 273; Madigan v. Mead, 31 Minn. 94, 16 N. W. 539; Berry v. O'Connor, 33 Minn. 29, 21 N. W. 840; Miller v. Finn, 1 Nebr. 254; Brown v. Kiefer, 71 N. Y. 610; Craig v. Tappin, 2 Sandf. Ch. (N. Y.) 78; Burritt v. Sheffer, 59 Hun (N. Y.) 628, 37 N. Y. St. 591, 13 N. Y. S. 849; Monnot v. Ibert, 33 Barb. (N. Y.) 24; Bank of Utica v. Finch, 3 Barb. Ch. (N. Y.) 293, 49 Am. Dec. 175; Walker v. Snediker, 1 Hoff. Ch. (N. Y.) 144; Ackerman v. Hunsicker, 85 N. Y. 43, 39 Am. Rep. 621; Nicklin v. Betts Spring Co., 11 Ore. 406, 5 Pac. 51, 50 Am. Rep. 477; Sabin v. Columbia Fuel Co., 25 Ore. 15, 34 Pac. 692, 42 Am. St. 756; Hendrix v. Gore, 8 Ore. 406; Ex parte Ames, 1 Lowell (U. S.) 561, Fed. Cas. No. 323; Jones v. Guaranty & Indemnity Co., 101 U. S. 622, 25 L. ed. 1030; McCarty v. Chalfant, 14 W. Va. 531; First Nat. Bank v. Damm, 63 Wis. 249, 23 N. W. 497; Carter v. Rewey, 62 Wis. 552, 22 N. W. 129; Shores v. Doherty, 65 Wis. 153, 26 N. W. 577.

[48] Moore v. Terry, 66 Ark. 393, 50 S. W. 998; Holbrook v. Baker, 5 Greenl. (Maine) 309, 17 Am. Dec. 236; Googins v. Gilmore, 47 Maine 9, 74 Am. Dec. 472; Badlam v. Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202; Page v. Ordway, 40 N. H. 253; North v. Crowell, 11 N. H. 251; Wescott v. Gunn, 4 Duer (N. Y.) 107; Fairbanks v. Bloomfield, 5 Duer (N. Y.) 434; Carpenter v. Blote, 1 E. D. Smith (N. Y.) 491; Lawrence v. Tucker, 23 How. (U. S.) 14, 16 L. ed. 474.

[49] Womble v. Leach, 83 N. Car. 84; Schuelenburg v. Martin, 1 McCrary (U. S.) 348, 2 Fed. 747.

[50] Brown v. Kiefer, 71 N. Y. 610; Shores v. Doherty, 65 Wis. 153, 155, 26 N. W. 577.

contemplated advance, or incurred the liability mentioned in the condition, and that the debt or liability is still outstanding.[51] If the mortgage shows that the parties intended that it should be a continuing security for all unpaid advances, however, it will be held to secure the amount of such advances within any specified limit, whenever made, although antecedent advances to that amount may have been made and discharged by payment.[52] It does not matter that the amount of the intended advances is not stated, if the purpose for which they are to be made is described.[53] The limit of the advances may be merely such as shall be made before a date named, and in that case no advances made after that date are secured by the mortgage.[54] A mortgage need not show upon its face that it was given to secure future advances. It is only necessary that the debt secured be described with such certainty as to enable subsequent creditors to ascertain, either from the condition of the mortgage or by inquiry aliunde, the extent of the encumbrance.[55] Advances made by a mortgagee after he has actual notice that others have acquired rights in the property will be postponed to the rights acquired by such other persons, unless the mortgagee be under a binding contract to make the advances, or it be essential to his own security to complete the advances contemplated by the mortgage.[56] The general rule is,

[51] Marsh v. Kinney, 11 N. Y. Wkly. Dig. 144.

[52] Brown v. Kiefer, 71 N. Y. 610; Douglass v. Reynolds, 7 Pet. (U. S.) 113, 8 L. ed. 626; Shores v. Doherty, 65 Wis. 153, 26 N. W. 577.

[53] Jarratt v. McDaniel, 32 Ark. 598; Curtis v. Flinn, 46 Ark. 70; First National Bank v. Reid, 122 Iowa 280, 98 N. W. 107. See also, Frank H. Buck Co. v. Buck, 162 Cal. 300, 122 Pac. 466; Candler v. Cromwell (Miss.), 57 So. 554.

[54] Fort v. Black, 50 Ark. 256, 7 S. W. 131.

[55] Tison v. People's Saving & Loan Assn., 57 Ala. 323; Speer v. Skinner, 35 Ill. 282; McConnell v. Scott, 67 Ill. 274; Berry v. O'Connor, 33 Minn. 29, 21 N. W. 840; Minor v. Sheehan, 30 Minn. 419, 15 N. W. 687; Westheimer v. Goodkind, 24 Mont. 90, 60 Pac. 813; North v. Crowell, 11 N. H. 251; Craig v. Tappin, 2 Sandf. Ch. (N. Y.) 78; Bank of Utica v. Finch, 3 Barb. Ch. (N. Y.) 293, 49 Am. Dec. 175; Lawrence v. Tucker, 23 How. (U. S.) 14, 16 L. ed. 474; Shirras v. Caig, 7 Cranch (U. S.) 34, 3 L. ed. 260. In Wisconsin it should appear on the face of the mortgage that it was intended as a continuing security for such advances. Carter v. Rewey, 62 Wis. 552, 22 N. W. 129. See also, Stone v. Lane, 10 Allen (Mass.) 74; Butts v. Peacock, 23 Wis. 359; Stein v. Hermann, 23 Wis. 132.

[56] Davis v. Carlisle, 142 Fed. 106, 73 C. C. A. 330; Speer v. Skinner, 35 Ill. 282; Preble v. Conger, 66 Ill. 370; Diver v. McLaughlin, 2 Wend. (N. Y.) 596, 20 Am. Dec. 655; Brinkerhoff v. Marvin, 5 Johns. Ch. (N. Y.) 320; Carpenter v. Blote, 1 E. D. Smith (N. Y.) 491; Davenport v. McChesney, 86 N. Y. 242.

that a prior mortgagee is affected only by actual notice of a subsequent encumbrance, and not by constructive notice of it;[57] but there are numerous authorities which hold that if the mortgagee has the option to make the advances or not, as he chooses, the mortgage, as to each advance made upon it, is to be regarded as a fresh mortgage, and is subject to the lien of any encumbrance which has been duly recorded at the time the advance is made, whether the mortgagee has actual notice of it or not.[58] Such a mortgage cannot be extended to cover advances not contemplated at the time of its execution.[59]

§ 4814. **Mortgage containing insurance clause.**—It is usual for a mortgage to contain an insurance clause whereby the mortgagor covenants with the mortgagee to keep the property insured for his benefit. The law applicable to this clause, as used in mortgages of personal property, does not differ materially from that applicable to a similar clause used in mortgages of real property. The mortgagor has an insurable interest in the property to the full value of the goods insured; and the mortgagee has an insurable interest measured by the amount for which he holds the mortgage as security.[60] Each acting independently may insure his own interest; but the more usual course is for the mortgagor to obtain a policy of insurance payable to the mortgagee in case of loss in pursuance of a covenant to insure for his benefit. Upon the happening of a loss, the mortgagee is entitled to the insurance money to the amount of the debt due him, though the mortgage be not recorded,[61] or be invalid.[62] Upon breach of a covenant to insure, the mortgagee may very properly insure; and he can add the premium, if fair and reasonable, to the debt secured.[63] But a breach of this covenant does not forfeit to the mortgagee the mortgagor's right to retain possession.[64]

[57] Jones Mtg. (6th ed.), § 372.
[58] Ackerman v. Hunsiker, 21 Hun (N. Y.) 53, revd. 85 N. Y. 43, 39 Am. Rep. 621.
[59] Johnson v. Anderson, 30 Ark. 745; Hall v. Glass, 123 Cal. 500, 56 Pac. 336, 69 Am. St. 77; Sims v. Mead, 29 Kans. 124; Anderson v. Liston, 69 Minn. 82, 72 N. W. 52.
[60] Appleton Iron Co. v. British Am. Assur. Co., 46 Wis. 23, 1 N. W. 9, 50 N. W. 1100, 8 Ins. L. J. 177.
[61] Manson v. Phœnix Ins. Co., 64 Wis. 26, 24 N. W. 407, 54 Am. Rep. 573.
[62] Leinkauf v. Calman, 110 N. Y. 50, 17 N. E. 389.
[63] Leland v. Collver, 34 Mich. 418.
[64] Baldridge v. Dawson, 39 Mo. App. 527.

§ 4815. Time of payment of consideration.—The omission of a time for the performance of a mortgage does not vitiate it. Thus, if a mortgage secure an obligation for the performance of which no time is fixed either by the mortgagor or by separate agreement, the law steps in and requires performance within a reasonable time.[65] If it secures a debt payable in money, and no time is fixed for the payment, the debt is held to become due at once.[66] When the mortgage implies that the debt is not due at once, parol evidence may be received to supply the omitted time of maturity.[67] If the day of payment named in the mortgage be a day earlier than the date of the mortgage, it is in legal effect payable immediately, and as between the parties it has been held not competent to contradict the express terms of the instrument by the admission of parol evidence that an error in the day of payment was made through a mistake of the draftsman.[68]

§ 4816. Covenant of warranty.—A covenant in a chattel mortgage that the mortgagor will warrant and defend the property is merely a warranty of title. It is not broken by his using up or disposing of the property. He does not thereby undertake to forever keep the property or to protect it.[69] The mortgagor's covenant of ownership or warranty of title estops him from denying his ownership in an action of trover brought against him by the mortgagee upon his refusal to deliver the property after default; and it appears to be immaterial that both parties knew at the time the mortgage was given that part of the chattels belonged to a third person. Evidence that would contradict the deed is inadmissible. Such a mortgage is good as between the parties.[70] If a mortgagor who has no title, or whose title fails, afterward acquires title, it inures to the mortgagee. Thus, where the title of a mortgagor of a growing wheat crop fails by reason of the foreclosure of a prior mortgage on the realty, and the mortgagor afterward acquires title to the wheat from the purchaser at

[65] Byram v. Gordon, 11 Mich. 531.
[66] McGraw v. Bishop, 85 Mich. 72, 48 N. W. 167; Bearss v. Preston, 66 Mich. 11, 32 N. W. 912.
[67] Crowley v. Langdon, 127 Mich. 51, 86 N. W. 391.
[68] Fuller v. Acker, 1 Hill (N. Y.) 473.
[69] Weed v. Covill, 14 Barb. (N. Y.) 242.
[70] Harvey v. Harvey, 13 R. I. 598.

the foreclosure sale of the realty, such after-acquired title inures to the mortgagee.[71] There is an implied warranty of title in the sale of personal property, and the same rule applies to a mortgage of such property.[72]

§ 4817. Seal not necessary.—It is not necessary that a mortgage of personalty should be executed under seal.[73] Though the mortgage be in the form of a deed, and purport to be sealed, the omission of the seal does not invalidate it.[74] A chattel mortgage is only a bill of sale with a defeasance; and a sale of personal property is never required to be by deed. It is not unusual to execute chattel mortgages as deeds, and the forms given in the books, and even those prescribed by statute, may sometimes include a seal. But the term "mortgage," used in a statute relating to personal property, does not import nor imply that a seal is necessary.[76] If a mortgage be signed by the mortgagor by mark only, and the subscribing witnesses also signed by mark only, and neither of them is able to identify the marks or the paper, the execution of the instrument may be proved by the testimony of the mortgagee, or of any other person who saw the maker execute it.[77] But under the Alabama statute a mortgage of personal property by one who is unable to write his name is "subscribed by the mortgagor" only when he has made his mark near his name subscribed for him and this making of his mark has been witnessed by a person who can and does write his own name as a witness. Without this attesting witness who writes his name as a witness, there can be no valid execution of the mortgage by such mortgagor.[78] The execution of a mortgage

[71] Hickman v. Dill, 39 Mo. App. 246; Gottschalk v. Klinger, 33 Mo. App. 410; Watkins v. Crenshaw, 59 Mo. App. 183.

[72] Schell v. Stephens, 50 Mo. 375; Moore v. Byrum, 10 S. Car. 452, 30 Am. Rep. 58; Sherman v. Champlain Transp. Co., 31 Vt. 162. Otherwise as regards real property, see Bowen v. McCarthy, 127 Ill. 17, 18 N. E. 757.

[73] Cook v. Harrison, 19 Ill. App. 402; Gerrey v. White, 47 Maine 504; Tapley v. Butterfield, 1 Met. (Mass.) 515, 35 Am. Dec. 374; Milton v. Mosher, 7 Metc. (Mass.) 244; Sherman v. Fitch, 98 Mass. 59; Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Comron v. Standland, 103 N. Car. 207, 9 S. E. 317, 14 Am. St. 797.

[74] Gerrey v. White, 47 Maine 504; Gibson v. Warden, 14 Wall. (U. S.) 244, 20 L. ed. 797.

[76] Gibson v. Warden, 14 Wall. (U. S.) 244, 20 L. ed. 797.

[77] Jones v. Hough, 77 Ala. 437; Russell v. Walker, 73 Ala. 315.

[78] Houston v. State, 114 Ala. 15, 21 So. 813.

on personal property purporting to be attested by a subscribing witness, cannot be proved by the mortgagor or mortgagee when the subscribing witness is not called, and no reason for not producing him is shown.[79]

§ 4818. Delivery in general.—The delivery of a mortgage to the recorder, or the filing it in the proper office by the mortgagor, is not in itself such a delivery as will operate to give the mortgagee any title under it, prior to his actual acceptance of the security,[80] except in case there be a prior agreement of the parties that the mortgage shall be executed and so delivered for record or filing.[81] But it is not necessary that the evidence should go so far as to constitute the register an agent of the mortgagee to receive the mortgage. It is sufficient if it be shown that at the time the debt was created the mortgagor agreed to secure it by mortgage, and accordingly made and left the mortgage for record, and the mortgagee soon afterward took possession of the property, and later obtained from the recorder a copy of the mortgage. The fact that the original mortgage in such case after it was recorded was lost or stolen from the recorder's office, or was accidentally destroyed while there, so that it never actually came into the hands of the mortgagee, is not sufficient to defeat its operation as a valid subsisting mortgage.[82] The mortgagor's delivery of a mortgage of specific property to the recorder, in pursuance of an agreement to do so, is effectual.[83] And leaving a mortgage at the recorder's office for registration, in such a case, with instructions to send it to the mortgagee after

[79] Petree v. Wilson, 104 Ala. 157, 16 So. 143.

[80] National State Bank v. Morse, 73 Iowa 174, 34 N. W. 803, 5 Am. St. 670; Wadsworth v. Barlow, 68 Iowa 599, 27 N. W. 775; Cobb v. Chase, 54 Iowa 253, 6 N. W. 300; Day v. Griffith, 15 Iowa 104; Oxnard v. Blake, 45 Maine 602; Dole v. Bodman, 3 Metc. (Mass.) 139; Maynard v. Maynard, 10 Mass. 456, 6 Am. Dec. 146; Wallis v. Taylor, 67 Tex. 431, 3 S. W. 321; McCourt v. Myers, 8 Wis. 236; Eastman v. Parkinson, 133 Wis. 375, 113 N. W. 649, 13 L. R. A. (N. S.) 921n.

[81] Jordan v. Farnsworth, 15 Gray (Mass.) 517; State v. O'Neill, 74 Mo. App. 134; Rein v. Kendall, 55 Nebr. 583, 75 N. W. 1104; Marlet v. Hinman, 77 Wis. 136, 45 N. W. 953, 20 Am. St. 102; Cooper v. Jackson, 4 Wis. 537; Harrington v. Brittan, 23 Wis. 541.

[82] Thayer v. Stark, 6 Cush. (Mass.) 11.

[83] Capital City Bank v. Hodgin, 24 Fed. 1; Everett v. Whitney, 55 Iowa 146, 7 N. W. 487; Day v. Griffith, 15 Iowa 104; Cobb v. Chase, 54 Iowa 253, 6 N. W. 300.

recording it, constitutes a valid delivery.[84] Proof of the delivery of the mortgage by the mortgagor for record, and its subsequent possession by the mortgagee, is sufficient, in the absence of other proof, to authorize a jury to find its delivery to him.[85] A delivery of a mortgage by a debtor to his own attorney for record, without the authority of the creditor, may be ratified by the creditor subsequently;[86] but in such case it seems that the mortgage becomes a valid security only from the time of such ratification, and not from the original delivery. The question of delivery is always a question of fact for the jury. It is competent to show by parol evidence that a mortgage was never delivered, and that it therefore never took effect.[87] And such evidence is admissible to show that it was delivered as an escrow, or that the mortgagee obtained possession of it by fraud, or in any unwarrantable manner.[88] The infallible test of delivery is the fact that the grantor has divested himself of all dominion and control over the conveyance.[90] A subsequent ratification by the mortgagee may make an undelivered mortgage valid. When the validity of a mortgage depends upon a subsequent ratification of its execution, it is held that no new record of the mortgage is necessary. The ratification relates back to the original execution of the mortgage.[91] A mortgage made without the creditor's knowledge cannot be ratified and made effectual by him after an assignment in bankruptcy or insolvency of the debtor's property. Although the recording of a mortgage is equivalent to an actual delivery, the record is of no effect until the mortgage is delivered. The debtor cannot appoint an agent to act in behalf of his creditor and make an effectual delivery to him.[92]

[84] Commonwealth v. Cutler, 153 Mass. 252, 26 N. E. 855.

[85] Brown v. Platt, 8 Bosw. (N. Y.) 324.

[86] Foster v. Perkins, 42 Maine 168; Molineux v. Coburn, 6 Gray (Mass.) 124.

[87] Molineux v. Coburn, 6 Gray (Mass.) 124; Jordan v. Farnsworth, 15 Gray (Mass.) 517.

[88] Roberts v. Jackson, 1 Wend. (N. Y.) 478. Acknowledgment in a chattel mortgage of the delivery of a copy of the mortgage to the mortgagor is prima facie evidence of such delivery. Cable Co. v. Rathgeber, 21 S. Dak. 418, 113 N. W. 88.

[90] Huiser v. Beck, 55 Mo. App. 668.

[91] Sherman v. Fitch, 98 Mass. 59.

[92] Dole v. Bodman, 3 Metc. (Mass.) 139.

§ 4819. Delivery and acceptance necessary.—A delivery and acceptance of the mortgage are essential to its validity.[93] Without these there is no mortgage, but only an attempt at one, or a proposition to make one. It is true, however, that although there may be no valid delivery of a mortgage at the time of its execution, a subsequent delivery will avail against those who have not in the meantime acquired rights to the property or interest in it. A mortgage executed by a debtor to his creditor without the knowledge of the latter, and without authority from him, and delivered to a stranger or to the mortgagor's attorney for his use, does not vest the title to the property in the mortgagee as of the time of such delivery, as between him and a creditor of the mortgagor who has acquired an interest in it by attachment or levy of execution between the time of such delivery and the mortgagee's acceptance of the mortgage after receiving notice of it.[94] Such a case is to be distinguished from one where the mortgagor has received previous authority or direction from the mortgagee to execute the mortgage, or has received general authority to act as his agent to loan money and to take any security for its payment at his discretion.[95] Parol evidence is admissible to show that a chattel mortgage, though in the hands of the mortgagee, is delivered conditionally and not absolutely. The terms of a written instrument cannot be varied by parol but such is not the object of this testimony. It is admissible to show that a deed, though in the hands of the grantee, is not delivered and the same can be shown of a chattel mortgage.[96] Mere knowledge on the part of the mortgagee of the existence of the mortgage is not sufficient without an acceptance of it, or a ratification of it. Not only is the mere execution and filing of a mortgage insufficient to constitute an acceptance,[97] but knowledge on the part

[93] Jewett v. Preston, 27 Maine 400; Foster v. Perkins, 42 Maine 168; Root v. Harl, 62 Mich. 420, 29 N. W. 29; Merrill v. Denton, 73 Mich. 628, 41 N. W. 823; Hargreaves v. Reese, 66 Minn. 434, 69 N. W. 223; Tooker v. Siegel-Cooper Co., 55 Misc. (N. Y.) 68, 106 N. Y. S. 277; Colean Mfg. Co. v. Blanchett, 16 N. Dak. 341, 113 N. W. 614; Meyer Bros. Drug Co. v. Kelley, 5 Okla. 118, 47 Pac. 1065; Griswold v. Case, 13 Wash. 623, 43 Pac. 876.

[94] McFadden v. Ross, 14 Ind. App. 312, 41 N. E. 607; Rogers v. Heads Iron Foundry, 51 Nebr. 39, 70 N. W. 527, 37 L. R. A. 429; Miller v. Blinebury, 21 Wis. 676; Welch v. Sackett, 12 Wis. 243.

[95] Sargeant v. Solberg, 22 Wis. 132.

[96] Van Norman v. Young, 228 Ill. 425, 81 N. E. 1060.

[97] Day v. Griffith, 15 Iowa 104; In-

of the mortgagee, before other rights have intervened, that a mortgage of property not definitely agreed upon has been made to him, is also insufficient for this purpose. Taking possession of the mortgaged property, even by means of an agent, however, is a sufficient acceptance of the mortgage by the mortgagee.[98]

§ 4820. Acceptance by agent.—An authorized agent may accept a delivery for his principal;[99] and it has been held that he may do this even when he was himself the mortgagor. Thus, an agent to whom money was sent to be invested at his discretion applied it to his own use, and executed to his principal a chattel mortgage as security. He delivered the mortgage to another, who was not, however, authorized to act for the principal, and he also caused the mortgage to be filed for record. He wrote informing the principal of the use he had made of the money, and of the security he had given; but the principal never received this letter. The mortgaged property having been taken under execution upon a judgment against the agent, the principal was allowed to recover it, upon the ground that the agent was authorized to act for the principal in accepting a delivery of the mortgage.[1]

§ 4821. Delivery to one of several mortgagees.—A delivery to one mortgagee of a mortgage made to several to secure a several debt to each is a sufficient delivery to all. It is not competent for the mortgagor to restrain the operation of the mortgage, by the use of words, so as to give it effect as his deed to one of the grantees, and prevent it from having that effect as to the others, for the operation of the mortgage deed must be ascertained from its terms, and cannot be varied by parol evidence.[2] If several mortgages are made by a debtor at one time, to secure several creditors. the refusal of one of them, on being informed of the

dependent Brew. Co. v. Durston, 106 N. Y. S. 686.

[98] Louden v. Vinton, 108 Mich. 313, 66 N. W. 222.

[99] Field v. Fisher, 65 Mich. 606, 32 N. W. 838; Springfield Co. v. Glazier, 55 Mo. App. 95; McCutchin v. Platt, 22 Wis. 561.

[1] Tooker v. Siegel-Cooper Co., 55 Misc. (N. Y.) 68, 106 N. Y. S. 277; Sargeant v. Solberg, 22 Wis. 132. As to the delivery to the wife of the mortgagee, see Jaffrey v. Brown, 29 Fed. 476.

[2] Breathwit v. Bank of Fordyce, 60 Ark. 26, 28 S. W. 511; Hubby v. Hubby, 5 Cush. (Mass.) 516, 52 Am. Dec. 742.

mortgage, to accept it, does not impair the mortgages accepted by the other creditors.[3] On the contrary, the mortgage which is first ratified will take precedence; and the others will become operative and take precedence in the order of their ratification; but such a mortgage which is not ratified will never take effect.[4]

§ 4822. Recording and filing in general.—In almost all the states and territories of the United States,[5] statutes have been enacted for the purpose of enabling mortgagors to retain possession of the mortgaged chattels, and at the same time to give mortgages which shall secure their creditors as effectually as if the latter had received and retained actual possession of the property. This purpose is accomplished by substituting a record or filing of mortgages in place of a delivery of possession of the mortgaged property. The statutes in effect make a recording or filing of the instrument equivalent to a change of possession of the property.[6] But while the statutes agree in the object to be attained, they differ widely in their mode of accomplishing it. In some states it is provided that the instrument shall be recorded at length, while in others the instrument is placed upon file, with an indorsement thereon of the time when it was received, without any record being made other than an index of the names of the parties, and perhaps a note of the time of filing. Inasmuch as personal property is movable and has no fixed and permanent location, but is for most purposes considered as following the person of the owner, the statutes have generally provided that a mortgage of such property shall be recorded in the town or county of the mortgagor's residence. In many states it is provided that in case the mortgagor be a nonresident of the state, the mortgage shall be recorded in the county or town in which the property may be at the time the mortgage is executed.[7] In several states it is pro-

[3] Brown v. Platt, 8 Bosw. (N. Y.) 324.

[4] Oxnard v. Blake, 45 Maine 602.

[5] The only states in which there is no general system of recording or filing mortgages of personal property seem to be Pennsylvania and Louisiana. In a few other states, as has already been noticed, chattel mortgages can be given of only certain specified articles.

[6] Stevenson v. Colopy, 48 Ohio 237, 27 N. E. 296; Crooks v. Stuart, 2 McCrary (U. S.) 13, 7 Fed. 800.

[7] Such is the case in the states of Arkansas, Georgia, Illinois, Kansas, Kentucky, New Hampshire, New Jersey, New York, North Carolina, Rhode Island, South Carolina, Maine, Massachusetts, Michigan, Nebraska, Tennessee, Texas, Utah, Vermont and Wisconsin.

vided that a mortgage of personal property shall be recorded not only in the county in which the mortgagor resides, but also in that in which the property is located.[8] But in other states such mortgage need be recorded only in the county in which the property is situated at the time the mortgage is made.[9] A retroactive act of congress rendering valid a recording in the county where the property is located when the mortgagor is a nonresident of the territory has been held valid and enforcible as to future claimants of the property adverse to the mortgagee.[10] In addition to the record so provided for, either at the place of residence of the mortgagor or where the property is situated, in a few states it is further provided that, in case the property be afterward removed to another county, the mortgage shall also be recorded in that county.[11] In some states a record ceases to be of any effect after a limited period from the original filing of the mortgage.[12] But provision is made in several states for a refiling of the mortgage.[13]

§ 4823. Effect of recording or filing.—The recording or filing of a mortgage is generally equivalent to a change of possession, under the statutes providing for such record or filing, and relieves the party claiming under the mortgage from the burden of proving the bona fides of the transaction.[14] When it is said

[8] Such is the case in the states of Alabama, Alaska T., Arizona, California, Georgia, Minnesota and Nevada.

[9] Such is the case in the states of Colorado, Connecticut, Delaware, Florida, Idaho, Mississippi, Missouri, New Mexico, North Dakota, Ohio, South Dakota, Virginia, Washington, West Virginia and Wyoming.

[10] McFaddin v. Evans-Snyder-Buell Co., 185 U. S. 505, 46 L. ed. 1012, 22 Sup. Ct. 758.

[11] Such is the case in the states of Alabama, Arkansas, California, Idaho, Mississippi, Montana and Wyoming.

[12] In Colorado and Minnesota this period is two years; in Delaware, three years; in Montana, one year; and in Nebraska, five years. In Wyoming the period is two months after the term for which the mortgage was given. In Illinois a mortgage is good only till the maturity of the debt, not exceeding two years from the filing.

[13] As in the states of Arkansas, Kansas, Michigan, Minnesota, New Mexico, New York, Ohio and Oregon, at the expiration of one year; in Wisconsin, at the expiration of two years; and in North Dakota and South Dakota, at the expiration of three years.

[14] Whittleshoffer v. Strauss, 83 Ala. 517, 3 So. 524; Smith v. Fields, 79 Ala. 335; Heflin v. Slay, 78 Ala. 180; Berson v. Nunan, 63 Cal. 550; Second Nat. Bank v. Thuet, 124 Ill. App. 501; Fromme v. Jones, 13 Iowa 474; Morrill v. Sanford, 49 Maine 566; Peaks v. Smith, 104 Maine 315, 71 Atl. 884; Cahoon v. Miers, 67 Md. 573, 11 Atl. 278; First Nat. Bank v. Lindenstruth, 79 Md. 136, 28 Atl.

that registration is a substitute, as well for a delivery as for retaining possession, it is to be understood that the mortgaged property is of such a nature and so situated as to be capable of being specifically designated and identified by description. If it requires to be weighed, measured, counted off, or otherwise separated from other like property, such requisites are not to be considered as dispensed with by registration.[15] While registration dispenses with delivery and possession, on the other hand delivery and possession dispense with the necessity of a record.[16] An official record conclusively imputes notice of its contents and of the rights of the mortgagee thereunder.[17] It is to be observed, however, that the statutes of several states do not make the recording or filing of chattel mortgages legally equivalent to an actual delivery and continued change of possession of the property. In these states the retaining of possession by the mortgagor is in all cases, whether the mortgage be recorded or not, prima facie a badge of fraud; and this presumption is only overcome by proof of the good faith of the transaction. The statute, in fact, "only adds another to the grounds on which a mortgage of personal chattels shall be void."[18] Such is the case in New York, Minnesota,[19] Nebraska,[20] and some other states. A mortgage is good between the parties to it although it does not conform to the require-

807, 47 Am. St. 366; Forbes v. Parker, 33 Mass. 462; Bullock v. Williams, 33 Mass. 33; Keenan v. Stimson, 32 Minn. 377, 20 N. W. 364; Miller v. Whitson, 40 Mo. 97; State v. Cooper, 79 Mo. 464; Feurt v. Rowell, 62 Mo. 524; Robinson v. Elliott, 22 Wall. (U. S.) 513, 22 L. ed. 758; Crooks v. Stuart, 2 McCrary (U. S.) 13, 7 Fed. 800; Cotton v. Marsh, 3 Wis. 221; Donaldson v. Johnson, 2 Pin. (Wis.) 482, 2 Chand. (Wis.) 160; Harrington v. Brittan, 23 Wis. 541. Though a separate instrument provides that the mortgagor shall retain possession, the mortgage is not fraudulent, the mortgage being recorded without the separate agreement. Gilmore v. Kilpatrick-Koch Dry Goods Co., 101 Iowa 164, 70 N. W. 175.

[15] Harding v. Thuet, 124 Ill. App. 437; Bullock v. Williams, 33 Mass. 33.

[16] Reichert v. Simons, 6 Dak. 239, 42 N. W. 657; Fromme v. Jones, 13 Iowa 474; Cooper v. Brock, 41 Mich. 488, 2 N. W. 660; Cass v. Rothman, 42 Ohio St. 380; Morrow v. Reed, 30 Wis. 81.

[17] Zorn v. Livesley, 44 Ore. 501, 75 Pac. 1057.

[18] Cornelius v. Boling, 18 Okla. 469, 90 Pac. 874. See also, People v. Burns, 161 Mich. 169, 125 N. W. 740, 137 Am. St. 466n; Rothchild & Co. v. Van Alstine, 90 Nebr. 441, 133 N. W. 843; Wood v. Lowry, 17 Wend. (N. Y.) 492. This presumption of fraud was overcome in Pochel v. Read, 20 App. Div. (N. Y.) 208, 46 N. Y. S. 775.

[19] Horton v. Williams, 21 Minn. 187. This presumption against the good faith of the mortgage arises only in favor of creditors of the mortgagor and purchasers from him. Hazlett v. Babcock, 64 Minn. 254, 66 N. W. 971.

[20] Marsh v. Burley, 13 Nebr. 261,

ments of the statute relating to acknowledgment, record, or the like.[21] The statutes make such a mortgage void only against persons other than the parties to it, or as to purchasers, mortgagees, and creditors of the mortgagor without notice. The only effect of delay in recording or filing a mortgage is to render it void as against intervening purchasers or mortgagees, or creditors obtaining liens by attachment, judgment, or execution.[22] An unrecorded mortgage is good against tort feasors, partners and creditors of a purchaser. A mortgage though not recorded vests the general property in the mortgagee, and, when there is no stipulation to the contrary, the right also to the immediate possession of the property; and therefore he may maintain an action of tort against one who, without any title, takes the property from

13 N. W. 279; South Omaha Nat. Bank v. Chase, 30 Nebr. 444, 46 N. W. 513; Sanford v. Jensen, 49 Nebr. 766, 69 N. W. 108.

[21] Jacoway v. Gault, 20 Ark. 190, 73 Am. Dec. 494; Watson v. Thompson Lumber Co., 49 Ark. 83, 4 S. W. 62; LeMay v. Williams, 32 Ark. 166; Hackett v. Manlove, 14 Cal. 85; Ward v. Ward, 131 Fed. 946, affd. 145 Fed. 1023, 74 C. C. A. 146; Walter A. Wood Co. v. Eubanks, 169 Fed. 929, 95 C. C. A. 273; Machette v. Wanless, 2 Colo. 169; Janes v. Penny, 76 Ga. 796; Smith v. Camp, 84 Ga. 117, 10 S. E. 539; Davis v. Ransom, 26 Ill. 100; Griffin v. Wertz, 2 Ill. App. 487; Fuller v. Paige, 26 Ill. 358, 79 Am. Dec. 379; Forest v. Tinkham, 29 Ill. 141; Porter v. Dement, 35 Ill. 478; Badger v. Batavia Paper Mfg. Co., 70 Ill. 302; Frank v. Miner, 50 Ill. 444; Patchin v. Crossland, 145 Ill. App. 589; McTaggart v. Rose, 14 Ind. 230; Reynolds v. Quick, 128 Ind. 316, 27 N. E. 621; Warner v. Warner, 30 Ind. App. 578, 66 N. E. 760; Beeman v. Lawton, 37 Maine 543; Hudson v. Warner, 2 Har. & G. (Md.) 415; Clagett v. Salmon, 5 Gill & J. (Md.) 314; McNeil v. Finnegen, 33 Minn. 375, 23 N. W. 540; Johnson v. Jeffries, 30 Mo. 423; Fitzgerald v. Andrews, 15 Nebr. 52, 17 N. W. 370; Fuller v. Brownell, 48 Nebr. 145, 67 N. W. 6; Smith v. Moore, 11 N. H. 55; Williamson v. New Jersey Southern R. Co., 26 N. J. Eq. 398; Hall v. Snowhill, 14 N. J. L. 8; Tremaine v. Mortimer, 128 N. Y. 1, 27 N. E. 1060; Hayman v. Jones, 7 Hun (N. Y.) 238; Wescott v. Gunn, 4 Duer (N. Y.) 107; Pancoast v. American Heating & Power Co., 66 How. Pr. (N. Y.) 49; Williams v. Jones, 95 N. Car. 504; Kilbourne v. Fay, 29 Ohio St. 264, 23 Am. Rep. 741; Wilson v. Leslie, 20 Ohio 161; Thompson v. Dyer, 25 R. I. 321, 55 Atl. 824; McGowan v. Reid, 27 S. Car. 262, 3 S. E. 337; Keller v. Smalley, 63 Tex. 512; San Antonio Brewing Assn. v. Arctic Ice Machine Mfg. Co., 81 Tex. 99, 16 S. W. 797; Winsor v. McLellan, 2 Story (U. S.) 492; Sawyer v. Turpin, 91 U. S. 114, 23 L. ed. 235; 13 Nat. Bank. Reg. 271; Stewart v. Platt, 101 U. S. 731, 25 L. ed. 816; Johnson v. Hibbard, 27 Utah 342, 75 Pac. 737; Eastman v. Parkinson, 133 Wis. 375, 113 N. W. 649, 13 L. R. A. (N. S.) 921n; Schlessinger v. Cook, 9 Wyo. 256, 62 Pac. 152.

[22] Stephenson v. Browning, 48 Ill. 78; Gaff v. Harding, 48 Ill. 148; Swafford's Admr. v. Asher, 31 Ky. L. 1338, 105 S. W. 164; Barrett v. Mack, 64 Misc. (N. Y.) 333, 118 N. Y. S. 538; Tremaine v. Mortimer, 128 N. Y. 1, 27 N. E. 1060; Smith v. Acker, 23 Wend. (N. Y.) 653; Wescott v. Gunn, 4 Duer (N. Y.) 107; Hayman v. Jones, 7 Hun (N. Y.) 238; Chase v. Tacoma Box Co., 11 Wash. 377, 39 Pac. 639.

the mortgagor's possession.[23] The recording acts do not attempt to make a mortgage absolutely void for an omission to record or file it, but simply declare that such omission renders it void as to creditors and subsequent purchasers in good faith.[24]

§ 4824. Requisites of valid filing and recording.—Statutes which prescribe the manner in which mortgages shall be executed and recorded must, in general, be strictly complied with. A record without an acknowledgment where this is required, or without an affidavit where that is required, is ineffectual; and it is equally ineffectual if there be any material defect in the certificate of acknowledgment, or of the taking of the oath, such as the omission of the officer before whom it was taken to sign the certificate.[25] A mortgage not executed or acknowledged in conformity with the statute, although spread upon the record, is not notice to creditors or purchasers.[26] In Colorado a failure to observe the statutory requirements as to acknowledgment is fatal to the validity of a mortgage. It is invalid at its inception, and no subsequent act of the parties will serve to give it life and vitality.[27] A false certificate of acknowledgment invalidates the mortgage, so that the property is liable to levy and sale on execution against the mortgagor.[28] The record of a mortgage imperfectly acknowledged imparts no notice, and accordingly a purchaser of the mortgaged property from the mortgagor will hold it against the mortgagee under such a mortgage, although the mortgage be copied upon the recorder's books and indexed as a mortgage in the usual index.[29] A mortgage recorded without the acknowledgment be-

[23] Pratt v. Harlow, 16 Gray (Mass.) 379; Brackett v. Bullard, 53 Mass. 308; Johnson v. Jeffries, 30 Mo. 423; Moses v. Walker, 2 Hilt. (N. Y.) 536; James Music Co. v. Hankwitz, 137 Wis. 302, 118 N. W. 806.

[24] Brooks v. Bank of Beaver City, 82 Kans. 597, 109 Pac. 409; Hayman v. Jones, 7 Hun (N. Y.) 238; Tremaine v. Mortimer, 128 N. Y. 1, 27 N. E. 1060. See also, Andre v. Murray (Ind. App.), 98 N. E. 322. So as against a subsequent mortgagee without notice in Texas. Dunlap v. Broyles (Tex. Civ. App.), 146 S. W. 578.

[25] Becker v. Anderson, 11 Nebr. 493, 9 N. W. 640; Hill v. Gilman, 39 N. H. 88; Tisdale v. John H. Pray Sons Co., 73 N. H. 357, 62 Atl. 168; Pease v. Magill, 17 N. Dak. 166, 115 N. W. 260; Williams v. First Nat. Bank, 48 Ore. 571, 87 Pac. 890.

[26] Frank v. Miner, 50 Ill. 444; Pease v. Magill, 17 N. Dak. 166, 115 N. W. 260; Hunt v. Allen, 73 Vt. 322, 50 Atl. 1103.

[27] Edinger v. Grace, 8 Colo. App. 21.

[28] MacDowell v. Stewart, 83 Ill. 538; Fahndrich v. Hudson, 76 Ill. App. 641.

[29] Selking v. Hebel, 1 Mo. App. 340.

ing entered upon the justice's docket, where this formality is required by statute, is not notice to purchasers and creditors of the mortgagor.[30] Whether a mortgage has been duly acknowledged and recorded is a question for the court.[31] An acknowledgment before a justice of the peace who is one of the mortgagees is void as to other mortgage creditors, it being against the policy of the law that any officer should perform either a ministerial or judicial act in his own behalf.[32]

§ 4825. **Place of filing.**—The statutes providing for recording of chattel mortgages generally require such record to be made in the town or city where the mortgagor resides at the time.[33] A description of the mortgagor as of the county where record was made is sufficient, prima facie, to show that the mortgage was recorded in the county where the mortgagor resided.[34] But it often becomes material to fix the residence of the mortgagor by extrinsic evidence, in order to determine whether the mortgage has been duly recorded; and this fact may be determined by any competent evidence. The declarations of the mortgagor made at the time of executing the mortgage are competent for this purpose.[35] A temporary absence from one's fixed domicil, on business or pleasure, with the intention of returning, and an actual return in accordance with such intention, does not work a change of domicil; and therefore a mortgage made during the period of such temporary absence should

[30] Koplin v. Anderson, 88 Ill. 120; Frank v. Miner, 50 Ill. 444; Porter v. Dement, 35 Ill. 478.

[31] Bailey v. Godfrey, 54 Ill. 507, 5 Am. Rep. 157; Durfee v. Grinnell, 69 Ill. 371; Bullock v. Narrott, 49 Ill. 62; Flynn v. Hathaway, 65 Ill. 462.

[32] Darst v. Gale, 83 Ill. 136; Hammers v. Dole, 61 Ill. 307; Wilson v. Traer, 20 Iowa 231; Beaman v. Whitney, 20 Maine 413. The same is true of an acknowledgment before the trustee in the trust deed. Holden v. Brimage, 72 Miss. 228, 18 So. 383. Or before the beneficiary in such deed. Baxter v. Howell, 7 Tex. Civ. App. 198, 26 S. W. 453.

[33] Beaver v. Frick Co., 53 Ark. 18, 13 S. W. 134; Davis v. Thomas, 154 Ala. 279, 45 So. 897; Second Nat. Bank v. Thuet, 124 Ill. App. 501; Miller Supply Co. v. Louisa Water Co.'s Assignee, 128 Ky. 476, 33 Ky. L. 388, 108 S. W. 870; State Bank of Williamson v. Fish, 120 N. Y. S. 365; Griffith v. Morrison, 58 Tex. 46. See as to necessity for recording where all of the mortgagors reside, where there is more than one, First Nat. Bank v. Biederman, 149 Wis. 8, 134 N. W. 1132.

[34] Brown v. Corbin, 121 Ind. 455, 23 N. E. 276; Tweto v. Horton, 90 Minn. 451, 97 N. W. 128.

[35] Veazie v. Somerby, 5 Allen (Mass.) 280.

be recorded at the place of the mortgagor's fixed residence.[36] The recording of a mortgage in the wrong office or county, though done through mistake, is of no avail as notice.[37] It is the place of residence of the mortgagor at the time the mortgage is executed, and not his place of residence at the time it is recorded or filed, that determines the place where it should be recorded or filed.[38] A recital in the mortgage of the place of residence of the mortgagor is prima facie evidence of the locality of the property, and indicates the place for recording the mortgage under a statute requiring the record to be made where the property is situated.[39] But it is held that such a recital is not a conclusive admission and may be overcome by testimony showing the mortgagor to be a nonresident.[40] If the statute simply requires the record to be made in the place of the mortgagor's residence, it does not matter that the property is situated in another town or county, and that it is never afterward brought to the place of residence of the mortgagor, if his mortgage be recorded there.[41] But it is the county where the property is at the time the mortgage is executed, which determines the place of record under a statute providing that a mortgage shall be recorded in the county where the property is located. It is the plain intent of such a statute that the filing should be in the township or city where the property is at the time of the execution and delivery of the mortgage, and not in some other township or city to which the property may be removed after such execution and delivery.[42]

[36] Boyd v. Beck, 29 Ala. 703.

[37] Mumford v. Harris, 8 Colo. App. 51, 44 Pac. 772; People v. Burns, 161 Mich. 169, 125 N. W. 740, 137 Am. St. 466n; Wallen v. Rossman, 45 Mich. 333, 7 N. W. 901; Duke v. Duke, 93 Mo. App. 244; London v. Youmans, 31 S. Car. 147, 9 S. E. 775, 17 Am. St. 17.

[38] Davis v. Thomas, 154 Ala. 279, 45 So. 897; Miller Supply Co. v. Louisa Water Co.'s Assignee, 128 Ky. 476, 33 Ky. L. 388, 108 S. W. 870; Hicks v. Williams, 17 Barb. (N. Y.) 523.

[39] Nickerson v. Wells-Stone Mercantile Co., 71 Minn. 230, 73 N. W. 959, 74 N. W. 891; Chaytor v. Brunswick-Balke-Collender Co., 71 Tex. 588, 10 S. W. 250.

[40] Hewitt v. General Electric Co., 61 Ill. App. 168, revd. 164 Ill. 420, 45 N. E. 725.

[41] Singleton v. Young, 3 Dana (Ky.) 559; Vaughn v. Bell, 9 B. Mon. (Ky.) 447.

[42] Stirk v. Hamilton, 83 Maine 524, 22 Atl. 391; First Nat. Bank v. Weed, 89 Mich. 357, 50 N. W. 864; Greenville Nat. Bank v. Evans-Snyder-Buel Co., 9 Okla. 353, 60 Pac. 249; Hales v. Zander, 24 Okla. 246, 103 Pac. 669, 138 Am. St. 879; Yund v. First Nat. Bank of Shawnee, 14 Wyo. 81, 82 Pac. 6.

§ 4826. Time of filing or recording.—Under a statute which makes void as against others than the parties a mortgage not recorded within a specified time after execution, it is incumbent upon the mortgagee, when asserting any rights under the mortgage, to show that it was recorded within the time limited.[43] The record is not constructive notice for any purpose unless it be made within the time limited.[44] Although the want of record within the proper time cannot be cured by a subsequent record, the mortgage may be made effectual by the mortgagee's taking possession before others have acquired rights in the property.[45] But under a statute which merely provides that a mortgage must be recorded within a specified time, or be postponed to other liens created or obtained, and to purchases made prior to the actual record of the mortgage, the mortgagee's only risk in not recording the mortgage within the time specified is the risk of having his mortgage lien postponed or destroyed by the recording of other liens, or the obtaining of judgments while his mortgage remains unrecorded.[46] Under a statute declaring a mortgage, not recorded within a certain time, invalid against other persons than the parties thereto, a mortgage not so recorded is good between the parties;[47] but it has been held that failure to record the mortgage renders it void as to all persons other than the parties thereto, whether such persons had or had not acquired a lien upon the property; and that, therefore, although a mortgagee acquire possession of the property after that time and before a creditor obtains any lien upon it, it is of no validity against such general creditor. The statute is regarded as applying not merely to controversies relating to the priority of liens, but as absolutely requiring the record to be made within a fixed time as against all others than the parties to it.[48] If the time within which a mort-

[43] Chenyworth v. Daily, 7 Ind. 284. Under a statute requiring a mortgage to be recorded within sixty days after its execution, a record made on the sixtieth day after its execution is in due time. Miller v. Henshaw & Co., 4 Dana (Ky.) 325.

[44] Sidener v. Bible, 43 Ind. 230; McCord v. Cooper, 30 Ind. 9; Lockwood v. Slevin, 26 Ind. 124.

[45] McTaggart v. Rose, 14 Ind. 230. See also, Center Creek Min. Co. v. Coyne, 164 Mo. App. 492, 147 S. W. 148. Contra, Burdick v. Coates, 22 R. I. 410, 48 Atl. 389. And compare In re Jules & Frederic Co., 193 Fed. 533 (cannot be validated by taking possession while deputy sheriff is in possession under attachment).

[46] Hardaway v. Semmes, 24 Ga. 305; Johnson v. Patterson, 2 Woods (U. S.) 443, Fed. Cas. No. 7403.

[47] McTaggart v. Rose, 14 Ind. 230.

[48] Sidener v. Bible, 43 Ind. 230.

gage must be recorded or filed be not expressly prescribed by statute, it is sufficient that this be done at any time before possession is taken or interests or liens acquired by others, no matter how long this be after the execution of the mortgage. The record of a mortgage being only a substitute for the mortgagor's possession, it follows that, in the absence of any record, possession taken by the mortgagee before others have acquired any interest in the property makes his mortgage lien complete.[49]

Though the recording officer be required to minute the time when the instrument is received, both in the book of records and on the mortgage itself, the instrument is regarded as recorded when it is received, and the date is noted on the mortgage, though not noted on the record.[50] But the recording of the mortgage supersedes the necessity of noting in the book of records the time when it was received.[51] Whether a statute requiring the recording officer to enter in a book certain facts touching a mortgage makes such minutes an essential part of the record, so that a failure to make them will invalidate a mortgage otherwise duly filed, or whether it be directory only, must depend much upon the terms of the statute.[52] But aside from a requirement that the time of receiving instruments for record shall be minuted or the like, the deposit of a mortgage in the proper office to be filed or recorded is equivalent to recording it.[53] The mere leaving of a mortgage with a recording officer, to record it at a future time, is not equivalent to a record.[54] But notice by record is effectual from the time that the in-

[49] Lyon v. Council Bluffs Sav. Bank, 29 Fed. 566; Mitchell v. Black, 6 Gray (Mass.) 100; Brunswick-Balke-Collender Co. v. Kraus, 132 Mo. App. 328, 112 S. W. 20; Sawyer v. Turpin, 91 U. S. 114, 23 L. ed. 235, 13 Nat. Bank. Reg. 271; Cragin v. Carmichael, 2 Dill. (U. S.) 519, Fed. Cas. No. 3319; Crooks v. Stuart, 2 McCrary (U. S.) 15, 7 Fed. 800. The contrary is expressly declared to be the law of California. Ruggles v. Cannedy, 127 Cal. 290, 53 Pac. 911, 59 Pac. 827, 46 L. R. A. 371.

[50] Monaghan v. Longfellow, 81 Maine 298, 301, 17 Atl. 74. In Iowa, on the contrary, the filing does not impart constructive notice until the entries required by statute have been made. Hibbard v. Zenor, 75 Iowa 471, 39 N. W. 714, 9 Am. St. 497.

[51] Head v. Goodwin, 37 Maine 181; McLarren v. Thompson, 40 Maine 284.

[52] A statute of this nature in Wisconsin was held to be directory only. Smith v. Waggoner, 50 Wis. 155, 6 N. W. 568.

[53] Heflin v. Slay, 78 Ala. 180; Dubose v. Young, 10 Ala. 365; Meherin v. Oaks, 67 Cal. 57, 7 Pac. 47; Cass v. Rothman, 42 Ohio St. 380; Parker v. Palmer, 13 R. I. 359.

[54] Dedman v. Earle, 52 Ark. 164, 12 S. W. 330.

strument is left for record in the proper office. It is not essential to give effect to the record, that the instrument be actually spread upon the record.[55] The time when the mortgage is received is generally required to be noted upon the instrument and in a book kept for the purpose. The instrument is considered as recorded when it is left with the recording officer and so noted as received. The subsequent recording relates back to the time of the noting. If, however, the noting be omitted, and the mortgage recorded without it, the record takes effect from the time when it is actually extended upon the record.[56] A mortgage is filed, within the meaning of the statutes relating to filing, when it is delivered to the proper officer for the purpose of notice.[57]

§ 4827. Refiling instrument.—The statutes of several states require a refiling of the mortgage at certain specified times, or the filing of an affidavit showing the mortgagee's interest therein, in order to prevent its becoming void as against subsequent creditors and subsequent purchasers and mortgagees in good faith of the mortgagor. The refiling must be effected within the time limited for that purpose. It is held nugatory if done either before or after that time.[58] A refiling after that time is not effectual to revive and continue the validity of the mortgage for a year after such refiling.[59] In case the last day for the refil-

[55] McGregor v. Hall, 3 Stew. & P. (Ala.) 397; Craig v. Dimock, 47 Ill. 308; Chandler v. Scott, 127 Ind. 226, 26 N. E. 797, 10 L. R. A. 374n; Monaghan v. Longfellow, 81 Maine 298, 17 Atl. 74; Miller v. Whitson, 40 Mo. 97; Parker v. Palmer, 13 R. I. 359; Freiberg v. Brunswick-Balke-Collender Co., 4 Willson Civ. Cas. Ct. App. (Tex.), § 142, 16 S. W. 784; Freiberg v. Magale, 70 Tex. 116, 7 S. W. 684.

[56] McLarren v. Thompson, 40 Maine 284; Head v. Goodwin, 37 Maine 181; Handley v. Howe, 22 Maine 560; Monaghan v. Longfellow, 81 Maine 298, 17 Atl. 74.

[57] Case v. Hargadine, 43 Ark. 144; Gorham v. Summers, 25 Minn. 81; Appleton Mill Co. v. Warder, 42 Minn. 117, 43 N. W. 791; Kribbs v. Alford, 120 N. Y. 519, 24 N. E. 811; Cass v. Rothman, 42 Ohio St. 380; Parker v. Palmer, 13 R. I. 359; Marlet v. Hinman, 77 Wis. 136, 45 N. W. 953, 20 Am. St. 102.

[58] In re Watts-Woodward Press, 181 Fed. 71, 104 C. C. A. 105; Newell v. Warner, 44 Barb. (N. Y.) 258; Cooper v. Koppes, 45 Ohio St. 625, 15 N. E. 662.

[59] Reynolds v. Case, 60 Mich. 76, 26 N. W. 838; National Bank of the Metropolis v. Sprague, 20 N. J. Eq. 13, revd. 21 N. J. Eq. 530; Herrick v. King, 19 N. J. Eq. 80; Marsden v. Cornell, 62 N. Y. 215; Herder v. Walther, 29 N. Y. St. 410; 9 N. Y. S. 926; Tremaine v. Mortimer, 128 N. Y. 1, 27 N. E. 1060, affg. 28 N. Y. St. 584, 57 N. Y. Super. Ct. 340, 7 N. Y. S. 681; Newell v. Warner, 44 Barb. (N. Y.) 258; Swift v. Hart, 12 Barb. (N. Y.) 530; Nixon v. Stanley, 33 Hun (N. Y.) 247.

ing of the mortgage falls upon Sunday, the mortgage must be refiled on or before the Saturday preceding.[60] A refiling after the expiration of the time limited is not equivalent to the filing of a new mortgage, or to the original filing of a mortgage.[61] If the refiling be not done in strict compliance with the statute, the mortgage becomes void as against creditors and bona fide purchasers and mortgagees, and cannot be revived.[62] A refiling is necessary although such purchasers and creditors have knowledge that the mortgage has not been fully discharged and satisfied, and that the mortgagor holds possession of the mortgaged property as the agent of the mortgagee.[63] A mortgage which was valid when executed remains valid during the year, at the expiration of which it is required to be filed, irrespective of what is necessary to be done to keep it on foot for a succeeding year.[64] A refiling without a statement of the interest of the mortgagee in the property is ineffectual in some states.[65] This statement must be positive and distinct as to that interest, and must give such precise information of the amount due as to enable others to judge how far it may be safe or prudent to give credit to the mortgagor.[66] There is no occasion for refiling if the mortgagee has taken actual possession of the property;[67] and the mortgage is valid against a judgment creditor levying upon the property after the mortgagee has taken possession, notwithstanding such possession is obtained after the expiration of one year from the filing of the mortgage, and no affidavit of renewal or continuance is filed.[68]

[60] Nitchie v. Townsend, 4 N. Y. Super. Ct. 299.

[61] Cooper v. Koppes, 45 Ohio St. 625, 15 N. E. 662.

[62] Crawford v. Trigg (Ark.), 15 S. W. 185; Swiggett v. Dodson, 38 Kans. 702, 17 Pac. 594; Lockwood v. Crawford, 29 Kans. 286; Cooper v. Koppes, 45 Ohio St. 625, 15 N. E. 662; Biteler v. Baldwin, 42 Ohio St. 125.

[63] McKennon v. May, 39 Ark. 442. See §§ 4312, 4316; Swiggett v. Dodson, 38 Kans. 702, 17 Pac. 594.

[64] Reynolds v. Case, 60 Mich. 76, 26 N. W. 838; Norris v. Sowles, 57 Vt. 360.

[65] Fitch v. Humphrey, 1 Denio (N. Y.) 163; Marsden v. Cornell, 62 N. Y. 215; Osborn v. Alexander, 40 Hun (N. Y.) 323.

[66] Theriot v. Prince, 1 Edm. Sel. Cas. (N. Y.) 219; In re Henry Brocamp, 2 Ohio C. C. 372.

[67] Frank v. Playter, 73 Mo. 672; National Bank of the Metropolis v. Sprague, 21 N. J. Eq. 530; Porter v. Parmley, 52 N. Y. 185, 14 Abb. Pr. (N. S.) (N. Y.) 16; Tremaine v. Mortimer, 128 N. Y. 1, 27 N. E. 1060; Wheeler v. Lawson, 103 N. Y. 40, 8 N. E. 360.

[68] Dayton v. People's Sav. Bank, 23 Kans. 421.

§ 4828. **Law of the place of contract.**—The law of the place of contract, when this is also the place where the property is, governs as to the nature, validity, construction and effect of a mortgage, which will be enforced in another state as a matter of comity, although not executed or recorded according to the requirement of the law of the latter state.[69] If the description of the mortgaged property is sufficient in the state where the mortgage is made and the property located, it will be enforced in another state to which the property is removed, though the description is insufficient under the decisions of the latter state.[70] But an exception to this rule prevails in those states which have not adopted the policy of recording mortgages of personal property. Thus, a chattel mortgage being wholly unknown to the law of Louisiana, the courts of that state do not feel bound by the comity of nations to enforce such a mortgage made in another state.[71] And so in Pennsylvania, where the rule of the common law prevails, by which a sale or mortgage of personal property, unaccompanied by delivery of possession, is void as against the intervening rights of creditors and purchasers, it is held that while a mortgage made in another state and duly recorded there, so that

[69] Beall v. Williamson, 14 Ala. 55; Teat v. Chapman, 1 Ala. App. 491, 56 So. 267; Hall v. Pillow, 31 Ark. 32; Van Buskirk v. Hartford Fire Ins. Co., 14 Conn. 583; Ames Iron Works v. Warren, 76 Ind. 512, 40 Am. Rep. 258; Blystone v. Burgett, 10 Ind. 28, 68 Am. Dec. 658; Arnold v. Potter, 22 Iowa 194; Simms v. McKee, 25 Iowa 341; Smith v. McLean, 24 Iowa 322; Ramsey v. Glenn, 33 Kans. 271, 6 Pac. 265; Handley v. Harris, 48 Kans. 606, 29 Pac. 1145, 17 L. R. A. 703, 30 Am. St. 322; Stirk v. Hamilton, 83 Maine 524, 22 Atl. 391; Wilson v. Carson, 12 Md. 54; Langworthy v. Little, 12 Cush. (Mass.) 109; Rice v. Cobb, 9 Cush. (Mass.) 302; Rhode Island Central Bank v. Danforth, 14 Gray (Mass.) 123; Keenan v. Stimson, 32 Minn. 377, 20 N. W. 364; Barker v. Stacy, 25 Miss. 471; Feurt v. Rowell, 62 Mo. 524; Lafayette County Bank v. Metcalf, 29 Mo. App. 384; Smith v. Hutchings, 30 Mo. 380; McDaniel v. Harris, 27 Mo. App. 545; Cushman v. Luther, 53 N. H. 562; Ferguson v. Clifford, 37 N. H. 86; Lathe v. Schoff, 60 N. H. 34; Offutt v. Flagg, 10 N. H. 46; Clark v. Tucker, 4 N. Y. Super. Ct. 157; Edgerly v. Bush, 81 N. Y. 199; Nichols v. Mase, 25 Hun (N. Y.) 640; Tyler v. Strang, 21 Barb. (N. Y.) 198; Hornthal v. Burwell, 109 N. Car. 10, 13 S. E. 721, 13 L. R. A. 740n, 26 Am. St. 556; Hicks v. Skinner, 71 N. Car. 539, 17 Am. Rep. 16; Kanaga v. Taylor, 7 Ohio St. 134, 70 Am. Dec. 62n; Jeter v. Fellowes, 32 Pa. St. 465; Ryan v. Clanton, 3 Strob. (S. Car.) 411; Best v. Farmers' & Merchants' Bank (Tex. Civ. App.), 141 S. W. 334; Bank of U. S. v. Lee, 13 Pet. (U. S.) 107, 10 L. ed. 81; Blyth & Fargo Co. v. Houtz, 24 Utah 62, 66 Pac. 611; Studebaker Bros. v. Mau, 13 Wyo. 358, 80 Pac. 151, 110 Am. St. 1001.

[70] Hughes v. Abston, 105 Tenn. 70, 58 S. W. 296.

[71] Delop v. Windsor, 26 La. Ann. 185.

it is valid there without a delivery, might be enforced by the courts of Pennsylvania as between the parties, these courts would not enforce such a mortgage as against a creditor or purchaser who had acquired rights in the property after it had been brought to that state.[72] Although the mortgage be not executed in conformity with the laws of the state to which the property is afterward removed, if executed and recorded according to the laws of the state or country of its execution, it is generally effectual to hold the property in the state to which it is removed.[73] This is in accordance with the general rule of law that the place of contract governs as to its nature, validity, construction, and effect. In determining whether a mortgage was executed according to the laws of a foreign state, those laws must be proved as facts by evidence addressed to the court, and not to the jury.[74] The lex situs governs when a mortgage is executed in a state other than that in which the property is situated.[75] Though it be executed according to the requirements of the law of the domicil of the owner in another state, the mortgage will be invalid as against attaching creditors in the state where the property is located unless the mortgage conforms to the laws of the latter state. The mortgage, to be valid, must be executed, acknowledged and re-

[72] McCabe v. Blymre, 9 Phila. (Pa.) 615.

[73] Hall v. Pillow, 31 Ark. 32; Ferguson v. Clifford, 37 N. H. 86; Hornthal v. Burwell, 109 N. Car. 10, 13 S. E. 721, 13 L. R. A. 740n, 26 Am. St. 556; Kanaga v. Taylor, 7 Ohio St. 134, 70 Am. Dec. 62n.

[74] Ferguson v. Clifford, 37 N. H. 86.

[75] Hardaway v. Semmes, 38 Ala. 657; In re Greene, 134 Fed. 137; Wickham v. Barlow, 131 Fed. 819; Bridges v. Barrett, 126 Ill. App. 122; Ames Iron Works v. Warren, 76 Ind. 512, 40 Am. Rep. 258; Golden v. Cockrill, 1 Kans. 259, 81 Am. Dec. 510; Denny v. Faulkner, 22 Kans. 89; Tweto v. Horton, 90 Minn. 451, 97 N. W. 128; Clark v. Tarbell, 58 N. H. 88. Contra, Runyan v. Groshon, 12 N. J. Eq. 86; Whitman v. Connor, 40 N. Y. Super. Ct. 339; Guillander v. Howell, 35 N. Y. 657; Third Nat. Bank v. National Bank of Commerce (Tex. Civ. App.), 139 S. W. 665; Green v. Van Buskirk, 7 Wall. (U. S.) 139, 19 L. ed. 109, 38 How. Pr. (N. Y.) 52; National Live Stock Bank v. First Nat. Bank, 15 Okla. 194, 79 Pac. 1134, affd. 203 U. S. 296, 51 L. ed. 192, 27 Sup. Ct. 79; Rice v. Courtis, 32 Vt. 460, 78 Am. Dec. 597; Martin v. Potter, 34 Vt. 87. Where the owner undertakes in one state to mortgage personal property in another state, the law of the forum will govern. The reason of the rule is, the state of the forum has the right to regulate the transfer of property in its bounds for the purpose of protecting its citizens and to enforce the laws enacted for the purpose in such cases. The observance of comity toward other states to the unjust injury of citizens of the forum cannot reasonably be expected nor required. This applies only when the actual situs of the property and the forum are the same. Smead v. Chandler, 71 Ark. 505, 76 S. W. 1066, 65 L. R. A. 353.

corded according to the law of the place where the property is at the time. Thus, if a mortgage be made in New York, where the parties reside, of property situate in Illinois, and the property be attached in the latter state before the mortgage is there recorded, or the property delivered in accordance with the laws of that state, the validity of it is determined by the laws of that state and not by the laws of New York.[76] As a general rule, personal property is governed by the law of the domicil of the owner, and not by the law of the situs of the property; but a transfer of such property by way of mortgage is an exception to the rule, and the lex situs and not the lex domicillii governs chattel mortgages.[77]

[76] Van Buskirk v. Warren, 41 N. Y. 119, 4 Abb. App. Dec. (N. Y.) 457, revd. 7 Wall. (U. S.) 139, 19 L. ed. 109, 38 How. Pr. (N. Y.) 32; Edgerly v. Bush, 81 N. Y. 199; Keller v. Paine, 107 N. Y. 83, 13 N. E. 635; Green v. Van Buskirk, 7 Wall. (U. S.) 139, 19 L. ed. 109, 38 How. Pr. (N. Y.) 52.

[77] Ames Iron Works v. Warren, 76 Ind. 512, 40 Am. Rep. 258.

CHAPTER CXLVI.

RIGHTS AND LIABILITIES OF MORTGAGOR AND MORTGAGEE.

§ 4835. Rights of possession as between the parties.
4836. Right of possession under insecurity clause.
4837. Mortgagor's right to sell the property.
4838. Mortgagor's power to create liens on the mortgaged property.
4839. Rights on confusion of mortgaged goods.
4840. Rights of subsequent purchasers.
§ 4841. Rights of subsequent mortgages.
4842. Rights of assignees.
4843. Rights of mortgagee after forfeiture.
4844. Right of redemption.
4845. Liability of mortgagor's interest to attachment and execution.
4846. Liability of mortgagee's interest to attachment or execution.

§ 4835. Rights of possession as between the parties.—The right of possession of mortgaged chattels vests in the mortgagee immediately upon the execution of the mortgage if there be no express or implied stipulation in it to the contrary, whether the mortgage debt be due and payable or not.[1] The mortgage vests

[1] Ellington v. Charleston, 51 Ala. 166; Brown v. Lipscomb, 9 Port. (Ala.) 472; Ross v. Ross, 21 Ala. 322; Heflin v. Slay, 78 Ala. 180; Elston v. Roop, 133 Ala. 331, 32 So. 129; Holman v. Ketchum, 153 Ala. 360, 45 So. 206; Hardison v. Plummer, 152 Ala. 619, 44 So. 591; Kannady v. McCarron, 18 Ark. 166; Wildman v. Radenaker, 20 Cal. 615; Wilson v. Brannan, 27 Cal. 258; Street v. Sinclair, 71 Ala. 110, 16 Cent. L. J. 53; Horn v. Reitler, 12 Colo. 310, 21 Pac. 186; Pease v. Odenkirchen, 42 Conn. 415; Clark v. Whitaker, 18 Conn. 543, 46 Am. Dec. 337; Lippincott v. Shaw Carriage Co., 34 Fed. 570, 25 Fed. 577; Whisler v. Roberts, 19 Ill. 274; Nelson v. Wheelock, 46 Ill. 25; Frank v. Miner, 50 Ill. 444; Chipron v. Feikert, 68 Ill. 284; Constant v. Matteson, 22 Ill. 546; Fay v. Burditt, 81 Ind. 433, 42 Am. Rep. 142; Case v. Winship, 4 Blackf. (Ind.) 425, 30 Am. Dec. 664; Broadhead v. McKay, 46 Ind. 595; Johnson v. Simpson, 77 Ind. 412; Whitehead v. Coyle, 1 Ind. App. 450, 27 N. E. 716; Lee v. Fox, 113 Ind. 98, 14 N. E. 889; Ross v. Menefee, 125 Ind. 432, 25 N. E. 545; Bean v. Barney, 10 Iowa 498; Hamlyn v. Boulter, 15 Kans. 376; Wolfley v. Rising, 12 Kans. 335; Brown v. Campbell Co., 44 Kans. 237, 24 Pac. 492, 21 Am. St. 274n; Pickard v. Low, 15 Maine 48; Flanders v. Barstow, 18 Maine 357; Pierce v. Stevens, 30 Maine 184; Ramsdell v. Tewksbury, 73 Maine 197; Holmes v. Sprowl, 31 Maine 73; Stewart v. Hanson, 35 Maine 506; Woodman v. Chesley, 39 Maine 45; Jamieson v. Bruce, 6 Gill & J. (Md.) 72, 26 Am. Dec. 557; McGuire v. Benoit, 33 Md. 181; Brackett v. Bullard, 53 Mass. 308; Holly v. Huggeford, 8 Pick. (Mass.) 73, 19 Am. Dec. 303; Dag-

the title to the chattel in the mortgagee, not an absolute title, indeed, but a present title, defeasible upon a condition subsequent.[2] The right of possession follows as incident to the right of property, unless the mortgage expressly or impliedly provides that the possession shall remain with the mortgagor until a breach of the condition. In the absence of such a stipulation the right of possession passes immediately to the mortgagee, and the possession of the mortgagor is the possession of the mortgagee.[3] If there be such a stipulation, the right of possession follows the right of property upon a breach of the condition. When the mortgagee is entitled to the possession of the property, the mortgagor, having no right to the possession as against the mortgagee or his assigns, cannot maintain an action of tort in the nature of trover for a conversion of the property.[4] A reservation of possession in favor of the mortgagor only affects the possession according to the terms of the reservation, the title to the property in the mean-

gett, Bassett & Hills Co. v. McClintock, 56 Mich. 51, 22 N. W. 105; Hayns v. Leppig, 40 Mich. 602; Fletcher v. Neudeck, 30 Minn. 125, 14 N. W. 513; Mann v. Flower, 25 Minn. 500; Thornhill v. Gilmer, 12 Miss. 153; Williams v. Rorer, 7 Mo. 556; Robinson v. Campbell, 8 Mo. 365; Ferguson v. Clifford, 37 N. H. 86; Leach v. Kimball, 34 N. H. 568; Miller v. Pancoast, 29 N. J. L. 250; Sanderson v. Price, 21 N. J. L. 637; Langdon v. Buell, 9 Wend. (N. Y.) 80; Burdick v. McVanner, 2 Denio (N. Y.) 170; Fuller v. Acker, 1 Hill (N. Y.) 473; Smith v. Acker, 23 Wend. (N. Y.) 653, 667; Patchin v. Pierce, 12 Wend. (N. Y.) 61; Willner v. Morrell, 40 N. Y. Super. Ct. 222; Shuart v. Taylor, 7 How. Pr. (N. Y.) 251; Chadwick v. Lamb, 29 Barb. (N. Y.) 518; Mattison v. Bancus, 1 N. Y. 295, 4 How. Pr. (N. Y.) 367; Bates v. Wiles, 1 Handy (Ohio) 532, 12 Ohio Dec. 274; Robinson v. Fitch, 26 Ohio St. 659; Good v. Rogers, 19 R. I. 1, 31 Atl. 264; Bergen v. Producers' Marble Yard, 72 Tex. 53, 11 S. W. 1027; Longey v. Leach, 57 Vt. 377; McLoud v. Wakefield, 70 Vt. 558, 43 Atl. 179; Hill v. Merriman, 72 Wis. 483, 40 N. W. 399; Appleton Iron Co. v. British America Assur. Co., 46 Wis. 23, 1 N. W. 9, 50 N. W. 1100; Manson v. Phœnix Ins. Co., 64 Wis. 26, 24 N. W. 407, 54 Am. Rep. 573. In Arkansas it is declared by statute that, in the absence of stipulations to the contrary, the mortgagee has the legal title and the right of possession. Brown v. Van Meter, 62 Fed. 557, 10 C. C. A. 544. See Horn v. Reitler, 12 Colo. 310, 21 Pac. 186; Hammond v. Solliday, 8 Colo. 610, 9 Pac. 781. Later decisions in Missouri hold that a trustee or mortgagee is not entitled to possession till after default is made or condition broken. Hickman v. Dill, 32 Mo. App. 509; Nat. Bank of Commerce v. Morris, 114 Mo. 255, 21 S. W. 511, 19 L. R. A. 463, 35 Am. St. 754. See also, Rosenbaum v. Dawes, 77 Ill. App. 295, affd. 179 Ill. 112, 53 N. E. 585.

[2] Sanford v. Bell, 2 N. Dak. 6, 48 N. W. 434.

[3] Boise v. Knox, 51 Mass. 40; Landon v. Emmons, 97 Mass. 37; Kellogg v. Olson, 34 Minn. 103, 24 N. W. 364; Gill v. Weston, 110 Pa. St. 312, 1 Atl. 921.

[4] Holmes v. Bell, 3 Cush. (Mass.) 322; Goodrich v. Willard, 2 Gray (Mass.) 203; Leach v. Kimball, 34 N. H. 568; Hill v. Merriman, 72 Wis. 483, 40 N. W. 399.

time remaining in the mortgagee, who becomes entitled to possession immediately upon breach of the condition.[5]

In Michigan, Minnesota, Oregon, and a few other states, a chattel mortgage does not transfer the legal title to the property until after foreclosure, or something equivalent to that; and this must usually be by sale. The true relation of the parties is that of debtor on the one side, and creditor secured by lien on property upon the other.[6] This relation is not changed by a provision giving the mortgage trustee a power to seize the property at any time and sell at public sale or in the usual course of trade. Such stipulations do not vest any title in the mortgagee.[7] But a mortgagee who has obtained possession cannot be deprived of it by the mortgagor or a purchaser from him without payment or tender of payment.[8] A provision allowing the mortgagor to remain in possession gives him a legal and exclusive right of possession until the event occurs whereby he loses such right. The mortgagor's possession is a legal right, and not a mere covenant. Neither is he in such case a mere bailee, but an owner with a right of possession.[9] But the stipulation that the mortgagor may retain possession until condition broken is personal to the mortgagor and cannot be assigned or transferred to another; therefore, if the mortgaged chattels be found in possession of another, without further license or authority, the mortgagee as the legal owner may recover possession.[10] The mortgage generally defines the cir-

[5] Holman v. Ketchum, 153 Ala. 360, 45 So. 206; Burns v. Campbell, 71 Ala. 271; Demers v. Graham, 36 Mont. 402, 93 Pac. 268, 14 L. R. A. (N. S.) 431n, 122 Am. St. 384; Robinson v. Fitch, 26 Ohio St. 659; Lindemann v. Ingham, 36 Ohio St. 1.

[6] Ely v. Williams, 6 Cal. App. 455, 92 Pac. 393; Everett v. Buchanan, 2 Dak. 249, 6 N. W. 439, 8 N. W. 31; Kohl v. Lynn, 34 Mich. 360; Lucking v. Wesson, 25 Mich. 443; Baxter v. Spencer, 33 Mich. 325; Cary v. Hewitt, 26 Mich. 228; Flanders v. Chamberlain, 24 Mich. 305; People v. Bristol, 35 Mich. 28; Warner v. Beebe, 47 Mich. 435 11 N. W. 258; Wineman v. Fisher Elec. Mfg. Co., 118 Mich. 636, 77 N. W. 245; Moore v. Norman, 43 Minn. 428, 45 N. W. 857, 9 L. R. A. 55, 19 Am. St. 247; Finkel v. Lepkin, 62 N. J. L. 580, 41 Atl. 718; Matthews v. Victor Hotel Co., 74 Misc. (N. Y.) 426, 132 N. Y. S. 375; Edmisson v. Drumm-Flato Commission Co., 13 Okla. 440, 73 Pac. 958; Watson v. Buckler, 29 Ore. 235, 45 Pac. 765.

[7] Cluett v. Rosenthal, 100 Mich. 193, 58 N. W. 1009, 43 Am. St. 446.

[8] Paulus v. Nunn, 48 Mich. 190, 12 N. W. 40; De Graff v. Byles, 63 Mich. 25, 29 N. W. 487.

[9] Fenn v. Bittleston, 21 L. J. Ex. 41; Johnson v. Simpson, 77 Ind. 412; Fairbanks v. Bloomfield, 12 N. Y. Super. Ct. 434.

[10] Levi v. Legg, 23 S. Car. 282. Contra, Jones v. Goodwillie, 143 Mass. 281, 9 N. E. 639.

cumstances under which the right of possession shall vest in the mortgagee, and this right is always subject to any agreements the parties may make regarding it.[11] The default of the mortgagor in paying the principal or interest of the debt secured is usually the event that is fixed upon to terminate his right of possession; but other circumstances may equally well be made the occasion of his forfeiting the right of possession. Ordinarily, a surety holding a mortgage of indemnity is not entitled to possession under the mortgage until he has paid the principal debt, or some part of it, unless the mortgage gives possession before default.[12] But under a mortgage to a surety conditioned that he shall be entitled to possession if the debt be not paid at maturity, the surety is entitled to possession without paying the mortgage debt.[13] The mortgagee may be authorized to take possession whenever he should "choose so to do," and then he may assert this right at his will.[14] The mortgage may authorize him to take possession whenever he may deem himself unsafe, and then the mortgagor's possessory right will terminate whenever the mortgagee in good faith exercises his discretionary authority in taking possession.[15] In like manner, the mortgagee may be authorized to take possession in case the mortgagor attempts to remove or dispose of the property;[16] and in that case the mortgagee may take possession of the property or take it in a replevin suit, although the time of payment of the debt secured by the mortgage has not arrived.[17] A provision that the mortgagee may take possession of the mortgaged chattels in case they are removed from the premises on which they were at the time of the mortgage, authorizes the mortgagee to take possession in case such chattels are levied upon and removed from the premises under a writ of at-

[11] Jamieson v. Bruce, 6 Gill & J. (Md.) 72, 26 Am. Dec. 557.

[12] Stonebraker v. Ford, 81 Mo. 532.

[13] Mattingly v. Paul, 88 Ind. 95; Kitchen v. Schuster, 14 N. Mex. 164, 89 Pac. 261.

[14] Wells v. Chapman, 59 Iowa 658, 13 N. W. 841; Sandager v. Northern Pac. El. Co., 2 N. Dak. 3, 48 N. W. 438.

[15] Hall v. Sampson, 35 N. Y. 274, 91 Am. Dec. 56; Cline v. Libby, 46 Wis. 123, 49 N. W. 832, 32 Am. Rep. 700.

[16] Jones v. Smith, 123 Ind. 585, 24 N. E. 368. A mere temporary loan of mortgaged horses to a neighbor is not a breach of a condition of the mortgage entitling the mortgagee to take possession if the mortgagor removes the property from the place where situated without the mortgagee's consent.

[17] Russell v. Butterfield, 21 Wend. (N. Y.) 300.

tachment against the mortgagor.[18] Under a provision authorizing possession to be taken by the mortgagee in case of a sale or attempted disposition of the property, a levy of attachment or execution is such a voluntary disposition of the property as will justify the taking of possession as for a breach of such condition.[19]

§ 4836. Right of possession under insecurity clause.—A provision that the mortgagee may take possession whenever he shall deem himself insecure is for his benefit, and authorizes him to take possession when, in his judgment, he deems it best for his safety to do so; and upon his taking possession before default no proof is required to show that he considered himself unsafe, as the legal presumption is that such was the fact.[20] He is usually made the sole judge of the happening of the contingency upon which he may take possession.[21] Though he takes possession two days after the mortgage was executed, this does not show the mortgage to be fraudulent, though it is a proper fact to be considered upon the question of fraud.[22] It is held immaterial whether his apprehension of loss be well or ill founded.[23] Being entitled to possession of the property for such cause, he may maintain an action for the possession of it against any one who detains it,[24] or trover for the conversion of it.[25]

[18] Kennedy v. Dodson, 44 Mo. App. 550; Lafayette County Bank v. Metcalf, 29 Mo. App. 384.

[19] State v. Murphy, 64 Mo. App. 63; State v. Althaus, 60 Mo. App. 122; Huiser v. Beck, 55 Mo. App. 668; Brown v. Hawkins, 54 Mo. App. 75.

[20] Durfee v. Grinnell, 69 Ill. 371; Fox v. Kitton, 19 Ill. 519; Werner v. Bergman, 28 Kans. 60, 42 Am. Rep. 152; Braley v. Byrnes, 21 Minn. 482; Evans v. Graham, 50 Wis. 450, 7 N. W. 380, 15 Am. Law Rev. 154; Cline v. Libby, 46 Wis. 123, 49 N. W. 832, 32 Am. Rep. 700; Huebner v. Koebke, 42 Wis. 319; Gage v. Wayland, 67 Wis. 566, 31 N. W. 108; Hill v. Merriman, 72 Wis. 483, 40 N. W. 399. A stipulation that the mortgagee may take possession whenever he considers his claim in jeopardy is equivalent to the usual provision for taking possession when he considers himself insecure. McGraw v. Bishop, 85 Mich. 72, 48 N. W. 167.

[21] Bailey v. Godfrey, 54 Ill. 507, 5 Am. Rep. 157; Lewis v. D'Arcy, 71 Ill. 648; Bank of Carroll v. Taylor, 67 Iowa 572, 25 N. W. 810; Crowley v. Langdon, 127 Mich. 51, 86 N. W. 391; Allen v. Vose, 34 Hun (N. Y.) 57; Hoey v. Pierron, 67 Wis. 262, 30 N. W. 692.

[22] Crowley v. Langdon, 127 Mich. 51, 86 N. W. 391; Hoey v. Pierron, 67 Wis. 262, 30 N. W. 692.

[23] Roy v. Goings, 96 Ill. 361, 36 Am. Rep. 151; Huebner v. Koebke, 42 Wis. 319. This provision is equivalent to giving the mortgagee the right of possession whenever he chooses to demand it. Gage v. Wayland, 67 Wis. 566, 31 N. W. 108.

[24] Frisbee v. Langworthy, 11 Wis. 375; Welch v. Sackett, 12 Wis. 243.

[25] Grove v. Wise, 39 Mich. 161;

He may, moreover, take possession, it seems, without making any previous demand for payment.[26] Having the right under such a clause to take possession before the debt is due, the mortgage is admissible in evidence without producing or accounting for the absence of the notes secured.[27] It is held in many jurisdictions that such a clause vests in the mortgagee an absolute discretion to take possession of the property whenever he may deem himself insecure, and the exercise of this right does not depend upon the fact that he has reasonable ground for deeming himself insecure. Nor is such a contract a hard and unconscionable one, especially as the right of possession passes with the legal title by force of the mortgage, in the absence of any agreement to the contrary. When the parties have made their own contract, the courts will not set that aside and make a new one for them.[28] Such a provision in a mortgage is a contract right, and therefore it cannot be impaired by subsequent legislation.[29] But the mortgagee must act in pursuance of the power conferred by the mortgage, and if he wrongfully takes possession in reliance upon an alleged permission by the mortgagor, he is liable for conversion.[30] Under a clause authorizing the mortgagee to take possession whenever he should deem himself insecure, he is entitled to exercise this right if he has good reason to think and did think that he had been overreached in regard to the value of the property.[31] But in some states it is held that if the mortgagee takes possession for any reason other than default in payment he must have a reasonable apprehension of insecurity, or danger of losing his debt by delaying its collection until its maturity, or of waste or removal of the goods.[32] And if he takes possession without such reasonable ap-

Harvey v. McAdams, 32 Mich. 472; Botsford v. Murphy, 47 Mich. 536, 11 N. W. 375; Wright v. Starks, 77 Mich. 221, 226, 43 N. W. 868; McGraw v. Bishop, 85 Mich. 72, 48 N. W. 167.

[26] Huggans v. Freyer, 1 Lans. (N. Y.) 276.

[27] Hill v. Merriman, 72 Wis. 483, 40 N. W. 399.

[28] Thorp v. Fleming, 78 Kans. 237, 96 Pac. 470; Cline v. Libby, 46 Wis. 123, 49 N. W. 832, 32 Am. Rep. 700.

[29] Werner v. Bergman, 28 Kans. 60, 64, 42 Am. Rep. 152; Boice v. Boice, 27 Minn. 371, 7 N. W. 687.

[30] Howery v. Hoover, 97 Iowa 581, 66 N. W. 772.

[31] Botsford v. Murphy, 47 Mich. 536, 13 Rep. 338, 11 N. W. 375; Woods v. Gaar, 93 Mich. 143, 53 N. W. 14.

[32] Furlong v. Cox, 77 Ill. 293; Davenport v. Ledger, 80 Ill. 574; Roy v. Goings, 96 Ill. 361, 36 Am. Rep. 151; Bailey v. Godfrey, 54 Ill. 507, 5 Am. Rep. 157; Lewis v. D'Arcy, 71 Ill. 648; Hogan v. Akin, 181 Ill. 448, 55

prehension, he will be liable to the mortgagor in trespass; and if the property be retaken by replevin by the mortgagor, the proper measure of the latter's damages will be the difference between the market value of the property at the time when it was first taken and its market value when retaken by replevin, together with such actual loss to business as may be proved as the direct result of the first taking; and if the first taking was malicious, the jury may also give exemplary damages.[33] The taking possession of the property at an unusual hour of the evening of the day the mortgage was executed, without previous notice, is a strong circumstance showing malice;[34] but if such possession was taken by an agent, the mortgagee, to disprove the inference of malice, may prove his directions to the agent as to taking possession. Even though the mortgage reads that if the mortgagee "with or without apparent cause" feels insecure, it has been held that his right to take possession is still dependent upon his feeling insecure, and his feeling of insecurity must be based on actual or apparent cause. "It is difficult to comprehend," says the court, "how he could feel insecure without any actual or apparent cause therefor."[35]

§ 4837. Mortgagor's right to sell the property.—Before forfeiture the mortgagor in possession may sell the mortgaged

N. E. 137; Feller v. McKillip, 109 Mo. App. 61, 81 S. W. 641; Lichtenberger v. Johnson, 32 Nebr. 185, 49 N. W. 336; Meyer v. Michaels, 69 Nebr. 138, 95 N. W. 63, 97 N. W. 817; Brown v. Hogan, 49 Nebr. 746, 69 N. W. 100; Newlean v. Olson, 22 Nebr. 717, 36 N. W. 155, 3 Am. St. 286; Case Plow-Works v. Marr, 33 Nebr. 215, 49 N. W. 1119; Allen v. Cerny, 68 Nebr. 211, 94 N. W. 151; Hyer v. Sutton, 59 Hun (N. Y.) 40, 35 N. Y. St. 174, 12 N. Y. S. 378; Humpfner v. Osborne, 2 S. Dak. 310, 50 N. W. 88. Two things are requisite: First, the mortgagee must act in good faith; second, he must have reasonable ground for his action. Slingo v. Steele-Wedeles Co., 82 Ill. App. 139; Deal v. Osborne, 42 Minn. 102, 43 N. W. 835; Nash v. Larson, 80 Minn. 458, 83 N. W. 451, 81 Am. St. 272. The mortgagee has no right arbitrarily to take possession of the property before default of the mortgagor, but can only take it for just cause, based upon an actual existence of facts constituting a reasonable ground for believing himself insecure. In Missouri the test is unreasonable depreciation between the time of making the mortgage and the time the mortgagee brings replevin. Kerbs v. Zumwalt, 86 Mo. App. 128; Newlean v. Olson, 22 Nebr. 717, 36 N. W. 155, 3 Am. St. 286; Brown v. Hogan, 49 Nebr. 746, 69 N. W. 100. See also, First Nat. Bank v. Teat, 4 Okla. 454, 46 Pac. 474; Brook v. Bayless, 6 Okla. 568, 52 Pac. 738. Contra, Robinson v. Gray, 90 Iowa 699, 57 N. W. 614, 23 L. R. A. 780; Huebner v. Koebke, 42 Wis. 319; Cline v. Libby, 46 Wis. 123, 49 N. W. 832, 32 Am. Rep. 700.

[33] Davenport v. Ledger, 80 Ill. 574.

[34] Davenport v. Ledger, 80 Ill. 574.

[35] Tanton v. Boomgaarden, 111 Ill.

property, subject, of course, to the payment of the mortgage debt.[36] The sale must be in recognition of, and not in antagonism to, the mortgage.[37] The purchaser takes all the interest the mortgagor had.[38] Such purchaser may again, before default, sell and deliver the property to another with like effect, and the remedy of the mortgagee upon maturity of the debt is to follow the property and recover it of the last purchaser.[39] Although the mortgage empowers the mortgagee to take possession of the property at any time, in case he deems himself unsafe, the mortgagor has full authority to sell the property so long as there has been no default and no demand of possession under the safety clause. Until such time a sale by the mortgagor does not amount to a conversion on his part, nor does the purchase amount to a conversion on the part of the purchaser.[40] But after forfeiture the mortgagor has no title to the mortgaged property and cannot make a legal sale of it. By the mortgage, the whole legal title passes conditionally to the mortgagee, whose title upon forfeiture becomes absolute at law, leaving no interest in the mortgagor save a right to redeem in equity.[41] Actual possession by the mortgagee is not essential to support his title. If the mortgagor be allowed to remain in possession after default, he may transfer such posses-

App. 37; Fuller & Fuller Co. v. Feinburg, 86 Ill. App. 585; O'Neil v. Patterson & Co., 52 Ill. App. 26; Galde v. Forsyth, 72 Minn. 248, 75 N. W. 219; Donovan v. Sell, 64 Minn. 212, 66 N. W. 722; Plano Mfg. Co. v. Hallberg, 61 Minn. 528, 63 N. W. 1114.

[36] Heflin v. Slay, 78 Ala. 180; Ilfeld v. Ziegler, 40 Colo. 401, 91 Pac. 825; McFadden v. Hopkins, 81 Ind. 459; Cadwell v. Pray, 41 Mich. 307, 2 N. W. 52; Daly v. Proetz, 20 Gil. (Minn.) 363; White v. Quinlan, 30 Mo. App. 54; Lafayette County Bank v. Metcalf, 29 Mo. App. 384; Davis v. Blume, 1 Mont. 463; Chapman v. Hunt, 13 N. J. Eq. 370; Mechanics' Building & Loan Assn. v. Conover, 14 N. J. Eq. 219; Netzorg v. National Supply Co., 28 Ohio C. C. 112; Illinois Trust & Sav. Bank v. Alexander Stewart Lumber Co., 119 Wis. 54, 94 N. W. 777.

[37] Lafayette County Bank v. Metcalf, 40 Mo. App. 494.

[38] McLaughlin v. Smith, 45 Mich. 277, 7 N. W. 908; Hughes v. Smith (Tex. Civ. App.), 129 S. W. 1142.

[39] Porter v. Parmly, 34 N. Y. Super. Ct. 398, 43 How. Pr. (N. Y.) 445, 13 Abb. Pr. (N. S.) (N. Y.) 104, revd. 52 N. Y. 185, 14 Abb. Pr. (N. S.) (N. Y.) 116.

[40] Heflin v. Slay, 78 Ala. 180; Hathaway v. Brayman, 42 N. Y. 322, 1 Am. Rep. 524; Martin v. Lewinski, 54 App. Div. (N. Y.) 573, 66 N. Y. S. 995. Though the mortgagor is guilty of conversion it does not follow that an innocent purchaser would be. Mere acceptance of delivery by a purchaser does not make him liable for conversion. Dean v. Cushman, 95 Maine 454, 50 Atl. 85, 55 L. R. A. 959, 85 Am. St. 425.

[41] Pollock v. Douglas, 56 Mo. App. 487; Chapman v. Hunt, 13 N. J. Eq. 370; Kraus v. Black, 56 Misc. (N. Y.) 641, 107 N. Y. S. 609.

sion together with his equity of redemption. That is all the interest he has in the property, and is all he can transfer. The mortgagee may at any time take possession. It is his property, and he may do what he chooses with it.[42] A purchaser from the mortgagor obtains his rights, and no other or greater rights.[43] A purchaser from a subsequent mortgagee in like manner acquires his interest subject to the prior mortgage.[44] A purchaser of the mortgaged property who merely buys, pays for, and takes possession, and does no act which is inimical to the rights of the mortgagee is not necessarily a wrongdoer. Such a purchase does not in itself constitute a conversion; and therefore the mortgagee cannot bring an action for the goods against such purchaser without a demand upon the purchaser and a refusal by him to deliver.[45] Under a statutory provision that the mortgagor shall not sell or pledge the mortgaged property without the written consent of the mortgagee, a sale without such consent is so far valid that when consummated by delivery of the chattel and payment of the price, the title passes;[46] but at the same time it is so far void that no action will lie to enforce a contract of sale; for the sale being prohibited, and a penalty affixed to the seller, the transaction, as to him, is void.[47] An absolute sale of the mortgaged property by the mortgagor or any one claiming under him, in exclusion of the rights of the mortgagee, is a conversion of it for which the mortgagee may maintain trover.[48]

[42] Porter v. Parmly, 34 N. Y. Super. Ct. 398, 43 How. Pr. (N. Y.) 445, 13 Abb. Pr. (N. S.) (N. Y.) 104, revd. 52 N. Y. 185, 14 Abb. Pr. (N. S.) (N. Y.) 116.

[43] Arnold v. Stock, 81 Ill. 407; Parker v. Farmers' Loan & Trust Co., 81 Iowa 458, 46 N. W. 1004; Black v. Robinson, 61 Miss. 54; Russell v. Fillmore, 15 Vt. 130; Hammond v. Plimpton, 30 Vt. 333.

[44] Hale v. Omaha Nat. Bank, 39 N. Y. Super. Ct. 207, affd. 64 N. Y. 550.

[45] Sanford v. Bell, 2 N. Dak. 6, 48 N. W. 434.

[46] Lafayette County Bank v. Metcalf, 29 Mo. App. 384.

[47] Gage v. Whittier, 17 N. H. 312. Under a similar statute in North Dakota, however, it was said that the statute does not make it penal in the purchaser who buys the mortgaged property; much less does it declare that the buyer obtains no title by such purchase. Sanford v. Bell, 2 N. Dak. 6, 48 N. W. 434.

[48] Heflin v. Slay, 78 Ala. 180; Ashmead v. Kellogg, 23 Conn. 70; Brown v. Campbell, 44 Kans. 237, 24 Pac. 492, 21 Am. St. 274; Whitney v. Lowell, 33 Maine 318; Coles v. Clark, 3 Cush. (Mass.) 399; Chamberlain v. Clemence, 8 Gray (Mass.) 389; Lafayette County Bank v. Metcalf, 40 Mo. App. 494; White v. Phelps, 12 N. H. 382; Spriggs v. Camp, 2 Speers (S. Car.) 181; Bellune v. Wallace, 2 Rich. (S. Car.) 80; Lowe v. Wing, 56 Wis. 31, 13 N. W. 892; Cone v. Ivinson, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933.

§ 4838. Mortgagor's power to create liens on the mortgaged property.—A mortgagor in possession has no power to create by contract a lien that shall have priority over a duly recorded mortgage.[49] A mortgagor cannot create a lien upon the property which shall take precedence of his duly recorded mortgage.[50] The purpose of a mortgage is to furnish security, and the property is usually left with the mortgagor for his convenience, with an understanding that nothing shall be done or permitted by him to impair the security. An agreement which will defeat the purpose of the transaction should not be inferred or implied against a mortgagee without very cogent evidence.[51] The mortgagor's authority for the creation of a lien upon the property may be implied,[52] however, and a lien given upon property by force of law or statute, without any contract to create it, may in exceptional cases have precedence of an existing mortgage.[53]

§ 4839. Rights on confusion of mortgaged goods.—If a mortgagor so confuses the mortgaged goods with his own that they cannot be distinguished, and refuses to separate them, the

[49] Charles v. Neigelsen, 15 Ill. App. 17; Central Nat. Bank v. Brecheisen, 65 Kans. 807, 70 Pac. 895; Reynolds v. Case, 60 Mich. 76, 26 N. W. 838; Hampton v. Seible, 58 Mo. App. 181; Hale v. Wigton, 20 Nebr. 83, 29 N. W. 177; State Bank v. Lowe, 22 Nebr. 68, 33 N. W. 482; Lanphere v. Lowe, 3 Nebr. 131; Gandy v. Dewey, 28 Nebr. 175, 44 N. W. 106; Bissell v. Pearce, 28 N. Y. 252; Jackson v. Kasseall, 30 Hun (N. Y.) 231; Bauman v. Kuhn, 108 N. Y. S. 773; Smith v. Worman, 19 Ohio St. 145; Ingalls v. Vance, 61 Vt. 582, 18 Atl. 452.

[50] Lynde v. Parker, 155 Mass. 481, 30 N. E. 74; Sargent v. Usher, 55 N. H. 287, 20 Am. Rep. 208. As to effect of lienholder parting with possession in such case, see Burrow v. Fowler, 68 Ark. 178, 56 S. W. 1061; Eisler v. Union Transfer & Storage Co., 16 Daly (N. Y.) 456, 35 N. Y. St. 374, 12 N. Y. S. 732; Baumann v. Post, 16 Daly (N. Y.) 385, 34 N. Y. St. 308, 12 N. Y. S. 213, 26 Abb. N. Cas. (N. Y.) 134. See Vette v. Leonori, 42 Mo. App. 217.

[51] Hanch v. Ripley, 127 Ind. 151, 26 N. E. 70, 11 L. R. A. 61; McGhee v. Edwards, 87 Tenn. 506, 11 S. W. 316, 3 L. R. A. 654; Ingalls v. Vance, 61 Vt. 582, 18 Atl. 452.

[52] Hammond v. Danielson, 126 Mass. 294; Ruppert v. Zang, 73 N. J. L. 216, 62 Atl. 998; McGhee v. Edwards, 87 Tenn. 506, 11 S. W. 316, 3 L. R. A. 654.

[53] The Scio, L. R. 1 Adm. & Eccl. 353; Williams v. Allsup, 10 C. B. (N. S.) 417; Clyde v. Steam Transp. Co., 36 Fed. 501, 1 L. R. A. 794; Hixon v. Callaway, 2 Ga. App. 678, 58 S. E. 1120; Barkley v. May (Ga. App.), 59 S. E. 440; Erickson v. Lampi, 150 Mich. 92, 113 N. W. 778, 121 Am. St. 607; Scott v. Delahunt, 65 N. Y. 128; Beall v. White, 94 U. S. 382, 24 L. ed. 173. In Nebraska a lien for the cost of repairs made upon a buggy is one arising by operation of law and not by act of the parties and takes precedence over a senior mortgage lien if the repairs are made with the express or implied consent of the mortgagee. Drummond Carriage Co. v. Mills, 54 Nebr. 417, 74 N. W. 966, 40 L. R. A. 761, 69 Am. St. 719.

mortgagee may take all such goods without becoming a trespasser.[54] He will not be compelled to suffer from the wrongful act of the mortgagor.[55] If he can distinguish the mortgaged goods from the goods with which they have been commingled, he is bound to do so.[56] Where the goods cannot be distinguished, the mortgagee may take his aliquot part of the entire quantity.[57] Whether a mortgagor has purposely or carelessly mingled other goods with his own so that they are not distinguishable, the result is the same. If he sells the whole, the mortgagee may replevy the whole from the purchaser, upon the failure of the latter to identify the specific articles not embraced in the mortgage.[58] If the mortgagor consign such goods to a third person for sale, the mortgagee is entitled to recover of the consignee the value of the whole when sold.[59] And so if a purchaser of mortgaged goods mixes his own goods with them and refuses to separate them, the mortgagee may take all the goods without being a trespasser.[60] The foundation of the doctrine of confusion of goods is the affording of protection to innocent owners. The loss and inconvenience arising from such confusion is therefore thrown upon the party who causes the confusion, and it is for him to distinguish and separate his own property or to lose it.[61]

§ 4840. Rights of subsequent purchasers.—A subsequent bona fide purchaser, within the meaning of the statutes making void as against such a purchaser a mortgage not duly recorded, filed or refiled, is one who becomes a buyer by mutual assent of the parties, express or implied; and not one who has unlawfully converted the mortgaged property, and has acquired title by the

[54] Burns v. Campbell, 71 Ala. 271; Fuller v. Paige, 26 Ill. 358, 79 Am. Dec. 379; Fleming v. Graham, 34 Mo. App. 160; Burr v. Dana, 72 Wis. 639, 39 N. W. 562, 40 N. W. 635.

[55] Simmons v. Jenkins, 76 Ill. 479; Kreth v. Rogers, 101 N. Car. 263, 7 S. E. 682; Queen v. Wernwag, 97 N. Car. 383, 2 S. E. 657; Merchants' Nat. Bank v. M'Laughlin, 1 McCrary (U. S.) 258, 2 Fed. 128.

[56] Frost v. Willard, 9 Barb. (N. Y.) 440.

[57] Horne v. Hanson, 68 N. H. 201, 44 Atl. 292.

[58] Kreuzer v. Cooney, 45 Md. 582; Adams v. Wildes, 107 Mass. 123.

[59] Willard v. Rice, 52 Mass. 493, 45 Am. Dec. 226.

[60] Fuller v. Paige, 26 Ill. 358, 79 Am. Dec. 379.

[61] Brackenridge v. Holland, 2 Blackf. (Ind.) 377, 20 Am. Dec. 123; Kreuzer v. Cooney, 45 Md. 582; Hart v. Ten Eyck, 2 Johns. Ch. (N. Y.) 62, revd. 1 Cow. (N. Y.) 744 note, 13 Am. Dec. 568; Bunning v. Stearns, 9 Barb. (N. Y.) 630.

payment of a judgment for the value of the property obtained against him by the mortgagor or his assignee. The intent of the enactments upon this subject is to protect creditors and honest dealers against hidden and unknown liens, and not to protect wrongdoers.[62] A purchaser for value of the mortgagor in possession, without notice, actual or constructive, that the property is encumbered, will hold it discharged of any prior encumbrance.[63] A purchaser with such notice acquires only the rights of the mortgagor.[64] A bona fide subpurchaser of chattels, however, may take free from the lien of an unrecorded mortgage, though the first purchaser has notice.[65] A purchaser of chattels upon execution sale, without notice of an unrecorded mortgage, is a subsequent purchaser as against whom the mortgage is void, whether the debt upon which the execution was issued was contracted before or after the mortgage was executed.[66] A purchaser who has in terms assumed the payment of an existing mortgage upon the property cannot object to the validity of it on the ground of an alleged defect in its execution, as that it was not recorded,[67] when the mortgagor does not interpose any objection upon that ground.[68] And so one who has purchased property subject to a mortgage, so that the amount of the mortgage forms a part of the consideration of the purchase, cannot deny its validity.[69] But a purchaser or mortgagee of goods subject to a prior mortgage is not precluded from showing that such prior mortgage has

[62] Hickey v. McDonald Bros., 160 Ala. 300, 48 So. 1031. The words "creditors of the mortgagor," in this connection have been held to mean subsequent creditors in good faith and without notice. In re Huxoll, 193 Fed. 851, 113 C. C. A. 637. Compare, however, Holt v. Crucible Steel Co., 224 U. S. 262, 56 L. ed. 756, 32 Sup. Ct. 414.

[63] LaCrosse Boot & Shoe Mfg. Co. v. Mons Anderson Co., 13 S. Dak. 301, 83 N. W. 331, revd. 14 S. Dak. 597, 86 N. W. 641; Andrews v. Jenkins, 39 Wis. 476.

[64] Loeser v. Jorgenson, 137 Mich. 220, 100 N. W. 450; McCandles v. Moore, 50 Mo. 511; Mendenhall v. Kratz, 14 Wash. 453, 44 Pac. 872; Roy v. Scott, 11 Wash. 399, 39 Pac. 679.

[65] John Caplice Co. v. Beauchamp, 22 Mont. 258, 56 Pac. 278.

[66] McKnight v. Gordon, 13 Rich. Eq. (S. Car.) 222, 94 Am. Dec. 164. Compare In re Huxoll, 193 Fed. 851, 113 C. C. A. 637.

[67] Dwight v. Scranton & Watson Lumber Co., 69 Mich. 127, 36 N. W. 752.

[68] Greither v. Alexander, 15 Iowa 470.

[69] Pope v. Porter, 33 Fed. 7; Kellogg v. Secord, 42 Mich. 318, 3 N. W. 868; Ludlum v. Rothchild, 41 Minn. 218, 43 N. W. 137; Tolbert v. Horton, 31 Minn. 518, 18 N. W. 647. Where a purchaser assumes a mortgage and gives his note to the mortgagee for the amount of it, there is ample consideration to support the note. Bernheimer v. Blumenthal, 42

been paid, or that it is absolutely void so that the holder of it could not recover anything notwithstanding the mortgagor's willingness to make it good.[70] A purchaser of property which is subject to a mortgage is not personally liable for the payment of the mortgage debt unless he expressly assumes such payment.[71] But a purchaser who has assumed and agreed to pay a mortgage debt upon the property sold is personally bound to the mortgagee for the payment of such debt.[72]

§ 4841. Rights of subsequent mortgages.—Under the registry laws, subsequent mortgages of the same property may be made, which will be valid against all but those claiming under prior mortgages, inasmuch as these laws dispense with the necessity of a formal delivery of the property, making the record of the mortgage equivalent to a delivery of the property.[73] A subsequent mortgage conveys only an equitable title in the property; and it conveys a title subject to all the existing rights and equities of the prior mortgagee.[74] A subsequent mortgagee acquires no rights as against his prior mortgagee by first taking possession of the mortgaged property.[75] A mortgagee is pro tanto a purchaser. He is entitled to rely upon the record in the same way that any purchaser may rely upon it. He is unaffected by any lien or encumbrance upon the property, such, for instance, as a prior mortgage or a vendor's lien for purchase-money, of which he has no actual notice, and no constructive notice by record.[76] A mortgagee is entitled to rely upon the mortgagor's possession the same as any purchaser may rely upon the possession of his vendor. He is unaffected by a prior verbal contract by his mortgagor to sell the property, although the purchaser has paid the

App. Div. (N. Y.) 193, 58 N. Y. S. 1003.

[70] Barry v. Bennett, 48 Mass. 354.

[71] Hamill v. Gillespie, 48 N. Y. 556.

[72] Pope v. Porter, 33 Fed. 7; Hartman v. Pistorius, 248 Ill. 568, 94 N. E. 131.

[73] Smith v. Smith, 24 Maine 555; Lyon v. Ballentine, 63 Mich. 97, 29 N. W. 837, 6 Am. St. 284.

[74] Cassidy v. Harrelson, 1 Colo. App. 458, 29 Pac. 525; Shoenberger v. Mount, 1 Handy (Ohio) 566, 12 Ohio Dec. 292.

[75] Bradley v. Gelkinson, 57 Iowa 300, 10 N. W. 743.

[76] Guaranty Trust Co. v. Galveston City R. Co., 107 Fed. 311, 46 C. C. A. 305; Manny & Co. v. Woods, 33 Iowa 265; Plaisted v. Holmes, 58 N. H. 619; Dornbrook v. M. Rumely Co., 120 Wis. 36, 97 N. W. 493. See also, Tips v. Gay (Tex. Civ. App.), 146 S. W. 306.

price, but has left the property in the vendor's possession.[77] Bare knowledge by a mortgagee that the mortgaged goods were manufactured for another is not sufficient to charge him with notice of his rights.[78] Although the mortgagor obtained possession of the mortgaged goods by means of fraudulent representations, his mortgagee, without notice of the fraud, is unaffected by it.[79] A senior mortgagee, having actual notice of a junior mortgage of a portion of the same property, cannot release that portion of the property not covered by his mortgage so as to throw the whole burden of his mortgage upon the property covered by the junior mortgage. The value of the part of the property so leased will be deducted from the amount due upon the senior mortgage before this can be charged upon the property covered by the junior mortgage.[80] One who takes a mortgage in terms made subject to a prior mortgage named acquires only a right to redeem the property from such prior mortgage, and though his mortgage be first recorded, it does not take precedence of such other mortgage.[81] The second mortgagee, in such case, stands in the place of the mortgagor, having the same rights and coming within the exception of a statute which provides that recorded mortgages "shall not be valid against any person other than the parties thereto." The legal effect of such a mortgage is the same as if it had been in terms the right of the mortgagor to redeem the first mortgage.[82] His right to redeem continues until the foreclosure of the first mortgage, unless defeated by some other paramount title.[83] A second mortgagee is entitled to possession according to the terms of his mortgage against all the world, except the first mortgagee whose debt remains unpaid, and he may maintain an action for possession as against any one else.[84]

[77] Hesser v. Wilson, 36 Iowa 152.
[78] Hesser v. Wilson, 36 Iowa 152.
[79] Kranert v. Simon, 65 Ill. 344.
[80] Loveland v. Cooley, 59 Minn. 259, 61 N. W. 138; Jordan v. Hamilton County Bank, 11 Nebr. 499, 9 N. W. 654; Guion v. Knapp, 6 Paige (N. Y.) 35, 29 Am. Dec. 741.
[81] Dwight v. Scranton & Watson Lumber Co., 69 Mich. 127, 36 N. W. 752; Pecker v. Silsby, 123 Mass. 108; Young v. Evans-Snyder-Buell Com. Co., 158 Mo. 395, 59 S. W. 113; Garrison v. Quick, 38 App. Div. (N. Y.) 93, 57 N. Y. S. 895; Hardwick v. Atkinson, 8 Okla. 608, 58 Pac. 747.
[82] Howard v. Chase, 104 Mass. 249. See also, Tuite v. Stevens, 98 Mass. 305.
[83] Treat v. Gilmore, 49 Maine 34.
[84] Treat v. Gilmore, 49 Maine 34; State Bank v. Keeney, 134 Mo. App. 74, 114 S. W. 553; Moore v. Prentiss Tool & Supply Co., 133 N. Y. 144, 30 N. E. 736; Kimball v. Farmers' & Mechanics' Bank, 43 N. Y. St.

§ 4842. Rights of assignees.—The assignee of a mortgage and the note secured by it is a purchaser in the same way that a mortgagee is a purchaser. The assignee without notice stands upon the same footing as a bona fide mortgagee. He is entitled to the same protection as any bona fide grantee without notice. He is entitled to rely upon the record, and when that discloses an unimpeachable title he receives the protection of the law as against unknown liens and encumbrances prior to the mortgage, and as against latent defects.[85] The legal effect of the assignment is to transfer the entire interest of the mortgagee in the property to the assignee, who thereupon, in place of the mortgagee, becomes the general owner. If the mortgagee was entitled to the possession of the property, the legal effect of his assignment is the same as if he had been in possession of the property, and had sold and delivered it to the assignee.[86] His assignee may recover possession in the same manner that the mortgagee himself might have recovered it.[87] If the mortgage and note are embodied in one instrument, an assignment of this passes the legal title to the mortgaged property, and the assignee may enforce it in his own name.[88] An assignment by a mortgagee of all his interest in a mortgage, and everything therein contained, with authority to the assignee to take all legal measures for the recovery to his own use and enjoyment of the assigned premises, is an assignment of the debt secured.[89] An assignment of the debt secured passes all the mortgagee's equitable interest in the mortgaged property, whether the assignment be before or after forfeiture.[90] The debt is the principal thing, and the mortgage

223, 16 N. Y. S. 838, revd. 138 N. Y. 500, 34 N. E. 337, 20 L. R. A. 497; Newman v. Tymeson, 13 Wis. 172, 80 Am. Dec. 735.

[85] Central Trust Co. v. Stepanek, 138 Iowa 131, 115 N. W. 891, 15 L. R. A. (N. S.) 1025n, 128 Am. St. 175; Pierce v. Faunce, 47 Maine 507; Mayer v. Soulier, 48 Mich. 411, 12 N. W. 632; Sanford v. Pettit, 83 Mich. 499, 47 N. W. 357; McNally v. Bailey, 65 N. H. 208, 18 Atl. 745; Gould v. Marsh, 1 Hun (N. Y.) 566, 4 Thomp. & C. (N. Y.) 128.

[86] Robinson v. Fitch, 26 Ohio St. 659; Moody v. Ellerbe, 4 S. Car. 21.

[87] Graham v. Newman, 21 Ala. 497; Russell v. Walker, 73 Ala. 315; Barbour v. White, 37 Ill. 164; Satterthwaite v. Ellis, 129 N. Car. 67, 39 S. E. 726.

[88] Gafford v. Lofton, 94 Ala. 333, 10 So. 505; Buell v. Underwood, 65 Ala. 285.

[89] Barbour v. White, 37 Ill. 164; Jones v. Huggeford, 3 Metc. (Mass.) 515.

[90] Tison v. People's Sav. & Loan Assn., 57 Ala. 323; Crocker v. Burns, 13 Colo. App. 54, 56 Pac. 199; Gaff v. Harding, 48 Ill. 148; Brass v. Green, 113 Ill. App. 58; Martindale v.

an incident only. If the debt be in the form of a negotiable promissory note, the assignee by indorsement takes the mortgage as he takes the note, free from any equities which existed in favor of third persons while it was held by the mortgagee.[91] If the debt be not a negotiable one, an equitable interest in it may be assigned by delivery without indorsement,[92] but the assignee must abide by the case of the original mortgagee, and take that as well as the mortgage subject to the equities.[93] If the debt be in the form of a negotiable note, but the assignee takes no indorsement of it, his interest is subject to existing equities; he acquires only an equitable interest.[94] A mortgage made without a note or other evidence of indebtedness may be assigned by parol, and in those states in which an assignee of a chose in action is authorized to sue and recover in his own name, such mortgage may be enforced by the assignee under such assignment in his own name.[95] An assignment of a mortgage without the debt secured by it is either a nullity or a transfer of the legal title in trust for the benefit of the holder of the debt.[96] Such an assignment does not give the assignee a title which will enable him to maintain replevin against the mortgagee for the mortgaged property of which he has taken

Burch, 57 Iowa 291, 10 N. W. 670; Ramsdell v. Tewksbury, 73 Maine 197; Prout v. Root, 116 Mass. 410; Crain v. Paine, 4 Cush. (Mass.) 483, 50 Am. Dec. 807; Tweto v. Horton, 90 Minn. 451, 97 N. W. 128; Lee v. Clark, 89 Mo. 553, 1 S. W. 142; Kingsland & Douglas Mfg. Co. v. Board, 60 Mo. App. 662; Campbell Printing Press & Mfg. Co. v. Roeder, 44 Mo. App. 324; Harman v. Barhydt, 20 Nebr. 625, 31 N. W. 488; Studebaker Mfg. Co. v. McCurgur, 20 Nebr. 500, 30 N. W. 686; Tilden v. Stilson, 49 Nebr. 382, 68 N. W. 478; Kavanaugh v. Brodball, 40 Nebr. 875, 59 N. W. 517; Langdon v. Buell, 9 Wend. (N. Y.) 80; Gould v. Marsh, 1 Hun (N. Y.) 566, 4 Thomp. & C. (N. Y.) 128; Johnson v. Hart, 3 Johns. Cas. (N. Y.) 322; National Live Stock Bank v. First Nat. Bank, 15 Okla. 194, 79 Pac. 1134, affd. 203 U. S. 296, 51 L. ed. 192, 27 Sup. Ct. 79; Ellett v. Butt, 1 Woods (U. S.) 214, Fed. Cas. No. 4384, affd. 19 Wall. (U. S.) 544, 22 L. ed. 183; Batchelder v. Jenness, 59 Vt. 103, 7 Atl. 279; Gilmore v. Roberts, 79 Wis. 450, 48 N. W. 522; Kelley v. Whitney, 45 Wis. 110, 30 Am. Rep. 697n; Woodruff v. King, 47 Wis. 261, 2 N. W. 452; Croft v. Bunster, 9 Wis. 503; Rice v. Cribb, 12 Wis. 179. In California it has been declared that the mortgage passes with the note as valid collateral to the indorsee who thus becomes vested quoad hoc with the rights of the mortgagee. Bank of Woodland v. Duncan, 117 Cal. 412, 49 Pac. 414.

[91] Gould v. Marsh, 1 Hun (N. Y.) 566, 4 Thomp. & C. (N. Y.) 128; Carpenter v. Longan, 16 Wall. (U. S.) 271, 21 L. ed. 313.

[92] Denno v. Nash, 60 Vt. 334, 14 Atl. 459.

[93] Batchelder v. Jenness, 59 Vt. 103, 7 Atl. 279.

[94] Nelson v. Ferris, 30 Mich. 497.

[95] Hyma v. Three Rivers Nat. Bank, 79 Mich. 167, 44 N. W. 427; Rice v. Davis, 99 Mo. App. 636, 74 S. W. 431.

[96] Polhemus v. Trainer, 30 Cal. 685; Lucas v. Harris, 20 Ill. 165; Shrieves v. Morris, 151 Mass. 310, 23 N. E.

possession.[97] But if it appear to have been the intention of the parties to transfer a beneficial interest in the mortgage, an assignment of the mortgage will generally be held to pass the mortgage debt as well.[98] This is in accordance with the maxim, that when a thing is granted, everything possessed by the grantor which is necessary to make the grant effectual passes as incident thereto.[99] A mortgage is incident to the debt secured and not to the note, which is merely evidence of the debt.[1]

§ 4843. **Rights of mortgagee after forfeiture.**—Upon default the title to the mortgaged property becomes absolute in the mortgagee.[2] This was the ancient rule in regard to mortgages of real property. Upon forfeiture the land was wholly lost to the mortgagor. But even after a right in equity to redeem had been established in respect to mortgages of real property, forfeiture upon default continued to be the rule in respect to mortgages of personal property.[3] Forfeiture upon default is still the rule in respect to chattel mortgages, in a manner that it is not in respect to real estate mortgages. In about half the states a mortgage of real property has come to be regarded as merely a lien, and not a conveyance of the legal title. But a chattel mortgage is a transfer of the title to the mortgaged property, and not a lien upon it, even in those states in which a mortgage of real property is regarded as merely a lien upon it, and not a title to it in the mortgagee. Since the title of a mortgagee to real estate only becomes absolute after a strict foreclosure, or after a conveyance to him upon a fore-

838; Earll v. Stumpf, 56 Wis. 50, 13 N. W. 701.

[97] Shrieves v. Morris, 151 Mass. 310, 23 N. E. 838.

[98] Hamilton v. Browning, 94 Ind. 242; Campbell v. Birch, 60 N. Y. 214; Earll v. Stumpf, 56 Wis. 50, 13 N. W. 701.

[99] Broome's Leg. Max. 464.

[1] Hill v. Beebe, 13 N. Y. 556.

[2] Kleinberger v. Brown, 30 N. Y. St. 246, 58 N. Y. Super. Ct. 4, 8 N. Y. S. 866; Champlin v. Johnson, 39 Barb. (N. Y.) 606; Judson v. Easton, 58 N. Y. 664; Sherman v. Slaback, 58 Hun (N. Y.) 255, 34 N. Y. St. 383, 12 N. Y. S. 291; Betsinger v. Schuyler, 46 Hun (N. Y.) 349, 12 N. Y. St. 377; Butler v. Miller, 1 N. Y. 496; Fox v. Burns, 12 Barb. (N. Y.) 677; Ackley v. Finch, 7 Cow. (N. Y.) 290; Brown v. Bement, 8 Johns. (N. Y.) 96; Langdon v. Buell, 9 Wend. (N. Y.) 80; Saratoga Holding Co. v. Washburn, 70 Misc. (N. Y.) 110, 127 N. Y. S. 1016; Schmidt v. Weeks, 142 App. Div. (N. Y.) 83, 127 N. Y. S. 39; Wilkes v. Southern R. Co., 85 S. Car. 346, 67 S. E. 292; James Music Co. v. Hankwitz, 137 Wis. 302, 118 N. W. 806.

[3] Byron v. May, 2 Pin. (Wis.) 443, 2 Chand. (Wis.) 103; Flanders v. Thomas, 12 Wis. 410.

closure sale, while his title to personal property becomes absolute upon the mortgagor's default, a mortgage of personal property is in this respect a higher security than a mortgage of land.[4] All legal claim on the part of the mortgagor is gone after forfeiture, and he cannot at law compel the mortgagee to receive the debt or restore the property.[5] Upon a breach of the condition of a chattel mortgage, an absolute title to the property thereupon vests at once without possession in the mortgagee,[6] though equity may

[4] Anderson v. Hunn, 5 Hun (N. Y.) 79; Fuller v. Acker, 1 Hill (N. Y.) 473.

[5] Horn v. Reitler, 12 Colo. 310, 21 Pac. 186; Metzler v. James, 12 Colo. 322, 19 Pac. 885; Dreyfus v. Cage, 62 Miss. 733; Turner v. Langdon, 85 Mo. 438; Porter v. Parmly, 34 N. Y. Super. Ct. 398, 43 How. Pr. (N. Y.) 445, 13 Abb. Pr. (N. S.) (N. Y.) 104, revd. 52 N. Y. 185, 14 Abb. Pr. (N. S.) (N. Y.) 116; Charter v. Stevens, 3 Denio (N. Y.) 33, 45 Am. Dec. 444n; Hulsen v. Walter, 34 How. Pr. (N. Y.) 385; Bunacleugh v. Poolman, 3 Daly (N. Y.) 236; Powell v. Patrick, 64 S. Car. 190, 41 S. E. 894; Reese v. Lyon, 20 S. Car. 17; Wood v. Dudley, 8 Vt. 430; Holtzhausen v. Parkhill, 85 Wis. 446, 55 N. W. 892.

[6] Brown v. Lipscomb, 9 Port. (Ala.) 472; Mervine v. White, 50 Ala. 388; Draper v. Walker, 98 Ala. 310, 13 So. 595; Heyland v. Badger, 35 Cal. 404; Moore v. Murdock, 26 Cal. 514; Wright v. Ross, 36 Cal. 414; Horn v. Reitler, 12 Colo. 310, 21 Pac. 186; Antrey v. Wright, 4 Colo. App. 179; Hammond v. Solliday, 8 Colo. 610, 9 Pac. 781; Rhines v. Phelps, 3 Gilm. (Ill.) 455; Larmon v. Carpenter, 70 Ill. 549; Constant v. Matteson, 22 Ill. 546; McConnell v. People, 84 Ill. 583; Simmons v. Jenkins, 76 Ill. 479; Durfee v. Grinnell, 69 Ill. 371; Pike v. Colvin, 67 Ill. 227; Fikes v. Manchester, 43 Ill. 379; Seaton v. Ruff, 29 Ill. App. 235; Whittemore v. Fisher, 132 Ill. 243, 24 N. E. 636; Bean v. Barney, 10 Iowa 498; Brown v. Phillips, 3 Bush (Ky.) 656; Winchester v. Ball, 54 Maine 558; Flanders v. Barstow, 18 Maine 357; Volney Stamps v. Gilman, 43 Miss. 456; Thornhill v. Gilmer, 12 Miss. 153; Illinois Cent. R. Co. v. Hawkins, 65 Miss. 200, 3 So. 410; Everman v. Robb, 52 Miss, 653, 24 Am. Rep. 682; Robinson v. Campbell, 8 Mo. 365; Bowens v. Benson, 57 Mo. 26; State v. Adams, 76 Mo. 605; State v. Carroll, 24 Mo App. 358; Jackson v. Cunningham, 28 Mo. App. 354; Lathrop v. Cheney, 29 Nebr. 454, 45 N. W. 617; Bryant v. Carson River Lumbering Co., 3 Nev. 313, 93 Am. Dec. 403; Leach v. Kimball, 34 N. H. 568; Hall v. Snowhill, 14 N. J. L. 8; Woodside v. Adams, 40 N. J. L. 417; Ackley v. Finch, 7 Cow. (N. Y.) 290; Langdon v. Buell, 9 Wend. (N. Y.) 80; Fuller v. Acker, 1 Hill (N. Y.) 473; Patchin v. Pierce, 12 Wend. (N. Y.) 61; Hulsen v. Walter, 34 How. Pr. (N. Y.) 385; Judson v. Easton, 58 N. Y. 664; Briggs v. Oliver, 68 N. Y. 336; Sherman v. Slayback, 58 Hun (N. Y.) 255, 34 N. Y. St. 383, 12 N. Y. S. 291; Parshall v. Eggart, 52 Barb. (N. Y.) 367, 54 N. Y. 18; Hamill v. Gillespie, 48 N. Y. 556; Baumann v. Cornez, 15 Daly (N. Y.) 450, 29 N. Y. St. 320, 8 N. Y. S. 480; Casserly v. Witherbee, 119 N. Y. 522, 526, 23 N. E. 1000; Leadbetter v. Leadbetter, 125 N. Y. 290, 26 N. E. 265, 21 Am. St. 738; Tremaine v. Mortimer, 128 N. Y. 1, 12, 27 N. E. 1060, affg. 28 N. Y. St. 584, 57 N. Y. Super. Ct. 340, 7 N. Y. S. 681; Moore v. Prentiss Tool & Supply Co., 133 N. Y. 144, 30 N. E. 736; St. Mary's Mach. Co. v. National Supply Co., 68 Ohio St. 535, 67 N. E. 1055, 64 L. R. A. 845, 96 Am. St. 677; Sayler v. Simpson, 45 Ohio St. 141, 150, 12 N. E. 181; Culver v. Randle, 45 Ore. 491, 78 Pac. 394; Mayes v. Stephens, 38 Ore. 512, 63 Pac. 760, 64 Pac. 319; Moody v. Haselden, 1 S. Car. 129; Wolff v. Farrell, 3 Brev. (S. Car.) 68, 1 Tread. Const. (S. Car.) 151; Trescott v.

interfere to compel a redemption. If the mortgage debt be payable in instalments, the title of the mortgagee usually becomes absolute upon default in payment of the instalment that first falls due,[7] and it is optional with the mortgagee to take possession on the first default or to await maturity of the entire debt.[8]

§ 4844. **Right of redemption.**—By the old common law, a mortgage of personal property gave an absolute title to the mortgagee on breach of the condition. No process of foreclosure was necessary, and there was no right of redemption.[9] It is true that some authorities held that the mortgagor might, within a reasonable time after forfeiture, maintain a bill in equity to redeem; but this right was neither clearly settled as a rule nor generally admitted; or, at least, it was not generally so admitted until after the equitable right to redeem mortgaged real estate had become fully established. But the same reasons that induced courts of equity to interfere to relieve a mortgagor of realty after forfeiture have operated to induce a like interference to relieve a mortgagor of chattels. The hardship and injustice of allowing the mortgagee to insist upon a forfeiture in the case of a mortgage of chattels are just as obvious as in the case of a mortgage of

Smyth, 1 McCord Eq. (S. Car.) 486; Reese v. Lyon, 20 S. Car. 17; McClendon v. Wells, 20 S. Car. 514; Nat. Exch. Bank v. Holman, 31 S. Car. 161, 9 S. E. 824; Straub v. Screven, 19 S. Car. 445; Ex parte Knobeloch, 26 S. Car. 331, 2 S. E. 612; Merchants' Nat. Bank v. McLaughlin, 1 McCrary (U. S.) 258, 2 Fed. 128; In re Haake, 2 Sawy. (U. S.) 231, Fed. Cas. No. 5883; Blodgett v. Blodgett, 48 Vt. 32; Nichols v. Webster, 2 Pin. (Wis.) 234, 1 Chand. (Wis.) 203; Smith v. Phillips, 47 Wis. 202, 2 N. W. 285; Musgat v. Pumpelly, 46 Wis. 660, 1 N. W. 410; Flanders v. Thomas, 12 Wis. 410; Smith v. Coolbaugh, 21 Wis. 427; Smith v. Konst, 50 Wis. 360, 7 N. W. 293; Lowe v. Wing, 56 Wis. 31, 13 N. W. 892; Klinkert v. Fulton Storage & Mercantile Co., 113 Wis. 493, 89 N. W. 507. The mortgagor's title is not extinguished by such recovery of possession, but continues till the lien is foreclosed and he is divested of title in the manner prescribed by law. Backhaus v. Buells, 43 Ore. 558, 72 Pac. 976, 73 Pac. 342.

[7] Burton v. Tannehill, 6 Blackf. (Ind.) 470; Flanders v. Barstow, 18 Maine 357; Murray v. Erskine, 109 Mass. 597; Halstead v. Swartz, 1 Thomp. & C. (N. Y.) 559, 46 How. Pr. (N. Y.) 289; Pulver v. Richardson, 3 Thomp. & C. (N. Y.) 436; Baumann v. Cornez, 15 Daly (N. Y.) 450, 29 N. Y. St. 320, 8 N. Y. S. 480; Robinson v. Wilcox, 2 N. Y. Leg. Obs. 160.

[8] Marseilles Manuf. Co. v. Rockford Plow Co., 26 Ill. App. 198.

[9] Taber v. Hamlin, 97 Mass. 489, 93 Am. Dec. 113; Burtis v. Bradford, 122 Mass. 129; Weeks v. Baker, 152 Mass. 20, 24 N. E. 905; Wendell v. New Hampshire Bank, 9 N. H. 404. See also, Woodward v. Wilcox, 27 Ind. 207; Trittipo v. Edwards, 35 Ind. 467; Blakemore v. Taber's Exr., 22 Ind. 466; Broadhead v. McKay, 46 Ind. 595.

real estate. The principles of equity, therefore, upon which the right of redemption should be allowed, are the same in both cases.[10] Not only the mortgagor, but any one holding his interest in the property, as for instance a judgment creditor, may redeem.[11] The mortgage vests the legal title to the property in the mortgagee, defeasible at law upon the performance of the condition; but upon default, the mortgage becomes indefeasible at law, and defeasible only in equity, where the mortgage is considered only as a security for the debt, and the mortgagor is permitted to redeem, notwithstanding his default.[12] But after default, and even after the mortgagee has taken possession of the property, the mortgagor has a beneficial interest in it, and the mortgagee practically holds it only as security for his debt. Yet the only right left to him is a right of redemption in equity, and he has no interest in the property which his creditors can seize upon execution.[13] A mortgagor cannot debar himself of his equitable right to redeem by an agreement in the mortgage deed to give up all claim to the mortgaged property upon his failure to pay the debt secured at maturity.[14] Neither can the mortgagor debar his personal representatives from their equitable right to redeem.[15] A delivery of the mortgaged property by the mortgagor to the mortgagee, in pursuance of a provision in the mortgage that upon default the mortgagor shall so deliver up the property, does not vest the absolute ownership of the property in the mortgagee, or free the property from the equity of redemption.[16] But after the mortgagee has taken possession of the mortgaged property with the consent of the mortgagor, the latter may make an oral release or gift to him of the equity of redemp-

[10] Davis v. Hubbard, 38 Ala. 185; Flanders v. Chamberlain, 24 Mich. 305. "In some of the states a subsequent equitable right of redemption in the mortgagor has been recognized; and in others the courts have been quick to lay hold of any facts from which the doctrine of waiver could be evoked to defeat the absolute right of the mortgagee." Weeks v. Baker, 152 Mass. 20, 24 N. E. 905.

[11] Lambert v. Miller, 38 N. J. Eq. 117.

[12] Evans v. Merriken, 8 Gill & J. (Md.) 39.

[13] Niccloy v. Treasure, 115 N. Y. S. 1030; Tremaine v. Mortimer, 128 N. Y. 1, 27 N. E. 1060, affg. 28 N. Y. St. 584, 57 N. Y. Super. Ct. 340, 7 N. Y. 681; Leadbetter v. Leadbetter, 125 N. Y. 290, 26 N. E. 265, 21 Am. St. 738.

[14] Bunacleugh v. Poolman, 3 Daly (N. Y.) 236; Lavigne v. Naramore, 52 Vt. 267.

[15] Hughes v. Harlam, 37 App. Div. (N. Y.) 528, 55 N. Y. S. 1106, affd. 166 N. Y. 427, 60 N. E. 22.

[16] Landers v. George, 49 Ind. 309.

tion. The mortgagor after such release or gift has no attachable interest.[17]

It is a general rule that the only right of the mortgagor after forfeiture is an equitable right to redeem. He has no legal right to redeem except where such a right is given by statute. A statute which converts the equitable right of the mortgagor into a legal right of course gives the mortgagor a remedy at law for an infringement of his rights. But this remedy at law must be sought agreeably to the ordinary rules affecting other actions at law.[18] The mortgagor cannot maintain trespass against the mortgagee in case he sells, disposes of, injures or destroys the mortgaged property in such a manner as to destroy or impair his right to redeem, because the mortgagor has neither the property nor any right of possession; but he may in such case maintain an action on the case, and in that form of action he would be entitled to recover damages justly proportionate to the injuries sustained.[19] It has been held by some courts, however, that a court of equity has jurisdiction after forfeiture to enjoin an action at law by the mortgagee for the mortgaged property when the mortgagor alleges that the debt has been paid, but it appears that the mortgagee has not accepted the payment and has not released his title.[20]

Generally the right to redeem is enforced in equity without the aid of any statute. The established equitable doctrine is, that although upon the breach of the condition of a mortgage the title at law becomes absolute in the mortgagee, the mortgagor may come into a court of equity to redeem within a reasonable time, if the mortgagee has not barred the equity of redemption by foreclosure or sale. This may be regarded as a settled rule

[17] Stone v. Jenks, 142 Mass. 519, 8 N. E. 403.

[18] Leapold v. McCartney, 14 Colo. App. 442, 60 Pac. 640; Metzler v. James, 12 Colo. 322, 19 Pac. 885; Kimball v. Farmers' & Mechanics' Nat. Bank, 138 N. Y. 500, 34 N. E. 337, 20 L. R. A. 497; Cartier v. Pabst Brew. Co., 112 App. Div. (N. Y.) 419, 98 N. Y. S. 516; Darrow v. Wendelstadt, 43 App. Div. (N. Y.) 426, 60 N. Y. S. 174; John O'Brien Lumber Co. v. Wilkinson, 123 Wis. 272, 101 N. W. 1050; Boyd v. Beaudin, 54 Wis. 193, 198, 11 N. W. 521. A tender of the mortgage debt after default does not give the mortgagor the right to maintain trover for the property. Alexander v. Meyenberg, 112 Ill. App. 223.

[19] Frankenthal v. Mayer, 54 Ill. App. 160; Leach v. Kimball, 34 N. H. 568.

[20] Davis v. Hubbard, 38 Ala. 185; Smith v. Quartz Mining Co., 14 Cal. 242.

in every state whose courts have full equity powers, and where redemption has not been specially provided for by statute.[21] A bill in equity to redeem a mortgage cannot ordinarily be maintained in states in which a different remedy is provided by statute.[22] Ordinarily, where the debt or duty of the mortgagor is ascertained and fixed, and the property mortgaged will pass by delivery, the statutory provisions furnish an effectual mode of protecting the rights of the mortgagor, and there is no occasion for the intervention of a court of equity.[23] The fact that the mortgage was given for a very much larger sum than was actually due, and was made to secure the property to the mortgagor in fraud of his creditors, may be availed of as effectually at law as in equity; and, indeed, if there be any remedy at all, it is at law, because a party cannot be heard to allege his own turpitude as ground for relief in equity.[24] When, however, it is impossible for the mortgagor to ascertain the amount due upon the mortgage, as he must at his peril tender a sufficient sum, the remedies provided by the statute may not afford the full relief to which he is entitled, and he may have the amount determined in equity.[25] When, moreover, the mortgaged property is of such a nature that the statutory provisions do not apply, resort to a bill in equity may be had to protect the mortgagor. Thus, if the property consist in part of an interest in patent rights, which is incorporeal property incapable of transfer by delivery, an action of replevin is inapplicable to it, and the mortgagor can only be reinstated in the possession of the

[21] Wilson v. Brannan, 27 Cal. 258; Heyland v. Badger, 35 Cal. 404; Metzler v. James, 12 Colo. 322, 19 Pac. 885; Dupuy v. Gibson, 36 Ill. 197; Hammers v. Dole, 61 Ill. 307; Wylder v. Crane, 53 Ill. 490; Waite v. Dennison, 51 Ill. 319; Flanders v. Barstow, 18 Maine 357; Van Brunt v. Wakelee, 11 Mich. 177; Tannahill v. Tuttle, 3 Mich. 104, 61 Am. Dec. 480; Flanders v. Chamberlain, 24 Mich. 305; Lambert v. Miller, 38 N. J. Eq. 117; West v. Crary, 47 N. Y. 423; Charter v. Stevens, 3 Denio (N. Y.) 33, 45 Am. Dec. 444n; Pratt v. Stiles, 17 How. Pr. (N. Y.) 211, 9 Abb. Pr. (N. Y.) 150; Stoddard v. Denison, 7 Abb. Pr. (N. Y.) 309, 38 How. Pr. (N. Y.) 296, 32 N. Y. Super. Ct. 54; Hinman v. Judson, 13 Barb. (N. Y.) 629; Patchin v. Pierce, 12 Wend. (N. Y.) 61; Bragelman v. Daue, 69 N. Y. 69; Blodgett v. Blodgett, 48 Vt. 32; Flanders v. Thomas, 12 Wis. 410; Smith v. Coolbaugh, 21 Wis. 427; Saxton v. Williams, 15 Wis. 292.

[22] Gordon v. Clapp, 111 Mass. 22.

[23] Boston & Fairhaven Iron Works v. Montague, 108 Mass. 248.

[24] Gordon v. Clapp, 111 Mass. 22.

[25] Bushnell v. Avery, 121 Mass. 148; Boston & Fairhaven Iron Works v. Montague, 108 Mass. 248.

property by a reconveyance, and this can be decreed only in equity.[26] In some states a right of redemption after forfeiture is provided for by statute, and, where that is the case, redemption must be made within the time so allowed, or the title of the mortgagee becomes absolute.[27] After a mortgage upon which anything was due has been legally foreclosed, the mortgagor has no right to bring a bill to redeem, and have the exact amount due on the mortgage determined.[28] A sale under a power in a prior mortgage bars and forecloses the equity of redemption of the mortgagor, and also of the mortgagee under a junior mortgage.[29]

§ 4845. Liability of mortgagor's interest to attachment and execution.—At common law a chattel pawned or mortgaged was not liable to attachment in an action against the pawnor or mortgagor. A mere equitable interest could not be taken and sold on execution; for where there is no legal right there is no legal remedy. This was settled with great deliberation by the Court of King's Bench,[30] and is supported by all the common-law authorities. It is only by statute that a creditor can reach such property at law.[31] Equities and rights to redeem are not subject to execution at common law, because where there is no legal right, and therefore no legal remedy, a creditor could reach such an interest of his debtor only by resorting to a court of equity, where he could be let in to redeem the encumbrance, unless, perhaps, he could first remove the encumbrance and then lay an attachment or levy an execution.[32] In many states, statutes have been enacted for the purpose of enabling creditors to reach, by attachment or execution, the rights of their debtors to redeem their mortgaged chattels. Where such statutes exist,

[26] Boston & Fairhaven Iron Works v. Montague, 108 Mass. 248.

[27] Winchester v. Ball, 54 Maine 558; Clapp v. Glidden, 39 Maine 448; Greene v. Dispeau, 14 R. I. 575.

[28] Burtis v. Bradford, 122 Mass. 129.

[29] Wylder v. Crane, 53 Ill. 490.

[30] Scott v. Scholey, 8 East 467; Metcalf v. Scholey, 2 B. & P. 461.

[31] Holbrook v. Baker, 5 Greenl. (Me.) 309, 17 Am. Dec. 236; Sawyer v. Mason, 19 Maine 49; Sargent v. Carr, 12 Maine 396; Deering v. Lord, 45 Maine 293; Melody v. Chandler, 12 Maine 282; Barrows v. Turner, 50 Maine 127; Wolfe v. Dorr, 24 Maine 104; Smith v. Smith, 24 Maine 555; Badlam v. Tucker, 18 Mass. 389, 11 Am. Dec. 202; Prout v. Root, 116 Mass. 410; Hunt v. Holton, 13 Pick. (Mass.) 216; Evans v. Warren, 122 Mass. 303; Cochrane v. Rich, 142 Mass. 15, 6 N. E. 781; Bacon v. Kimmell, 14 Mich. 201; Haven v. Low, 2 N. H. 13, 9 Am. Dec. 25; Marsh v. Lawrence, 4 Cow. (N. Y.) 461.

[32] Thornhill v. Gilmer, 12 Miss. 153.

they afford the only means by which an attachment can be made, or an execution levied upon such equities of redemption.[33] But this rule has been changed in many states through the adoption of equitable principles, under which the mortgagor is regarded as the real owner of the property mortgaged, except as against the mortgagee; and now in these states the interest of a mortgagor in possession of chattels, and entitled to possession for a definite period, may be seized and sold on execution.[34] If the debt be payable on demand, and the mortgage provides that the mortgagor shall remain in possession until default in payment, there is no default until demand of payment is made, and consequently until that time the mortgagor has an interest subject to execution and sale.[35] But generally, it is only when the mortgagor has a certain right of possession for a definite period that an execution can be levied upon his interest. A mere equity of redemption, or a mere permissive possession, which the mortgagee may terminate at his pleasure, whenever he considers it necessary for his security, is not the subject of a levy and sale, except by virtue of some statute.[36] After default, when the mortgagee or the trustee in a deed of trust has the right to take possession and sell, the mortgagor's interest cannot be levied upon, although only a portion of the demand is due, and the property greatly exceeds in value the amount then due and payable.[37]

[33] Poundstone v. Holt, 5 Colo. App. 66, 37 Pac. 35; Evans v. Warren, 122 Mass. 303.

[34] M'Gregor v. Hall, 3 Stew. & P. (Ala.) 397; Williams v. Jones, 2 Ala. 314; Magee v. Carpenter, 4 Ala. 469; Harbinson v. Harrell, 19 Ala. 753; Nelson v. Ferris, 30 Mich. 497; Doughten v. Gray, 10 N. J. Eq. 323; Hall v. Sampson, 35 N. Y. 274, 91 Am. Dec. 56; Hull v. Carnley, 11 N. Y. 501, 1 Abb. Pr. (N. Y.) 158, revg. 9 N. Y. Super. Ct. 99; Mattison v. Bancus, 1 N. Y. 295, 4 How. Pr. (N. Y.) 367; Randall v. Cook, 17 Wend. (N. Y.) 53; Otis v. Wood, 3 Wend. (N. Y.) 498; Fairbanks v. Bloomfield, 12 N. Y. Super. Ct. 434; Hamill v. Gillespie, 48 N. Y. 556; Gelhaar v. Ross, 1 Hilt. (N. Y.) 117; Curd v. Wunder, 5 Ohio St. 92.

[35] Livor v. Orser, 12 N. Y. Super. Ct. 501; Hull v. Carnley, 11 N. Y. 501, 1 Abb. Pr. (N. Y.) 158, revg. 9 N. Y. Super. Ct. 99; Wisser v. O'Brien, 44 How. Pr. (N. Y.) 209, 35 N. Y. Super. Ct. 149; Newsam v. Finch, 25 Barb. (N. Y.) 175. Contra, Howland v. Willett, 5 N. Y. Super. Ct. 607; Brown v. Cook, 3 E. D. Smith (N. Y.) 123.

[36] Hawkins v. May, 12 Ala. 673; Hopkins v. Scott, 20 Ala. 179; Perkins v. Mayfield, 5 Port. (Ala.) 182; Welch v. Whittemore, 25 Maine 86; Tannahill v. Tuttle, 3 Mich. 104, 61 Am. Dec. 480; Eggleston v. Mundy, 4 Mich. 295; Bacon v. Kimmel, 14 Mich. 201; Merchants' Nat. Bank v. Abernathy, 32 Mo. App. 211.

[37] Thompson v. Thornton, 21 Ala. 808; Metzler v. James, 12 Colo. 322, 19 Pac. 885; Prior v. White, 12 Ill. 261; Merritt v. Niles, 25 Ill. 282; Pike v. Colvin, 67 Ill. 227; Tannahill v. Tuttle, 3 Mich. 104, 61 Am. Dec.

After forfeiture there is not left in the mortgagor such a possessory right or interest as is capable of being seized and sold under execution against him;[38] and the rule is the same although the mortgagor be allowed to remain in possession after the default,[39] for in judgment of law he is in possession merely by sufferance, and as the bailee of the mortgagee.[40] In other states a mortgagor's equity of redemption may be levied upon in the usual modes prescribed by statute, until such equity be foreclosed.[41] After a mortgagee has taken possession by virtue of a power in the mortgage authorizing him to do so if he deems himself unsafe, or for other reasons, the mortgagor has no longer any interest in the property which can be seized upon execution, although the debt be not due.[42]

§ 4846. Liability of mortgagee's interest to attachment or execution.—A mortgagee's interest in personal property is not subject to attachment nor execution, so long, at least, as he holds this interest in good faith as security, and has not applied it to the satisfaction of his debt by foreclosure or otherwise.[43]

480; Peckinbaugh v. Quillin, 12 Nebr. 586, 12 N. W. 104.

[38] Eggleston v. Mundy, 4 Mich. 295; Leadbetter v. Leadbetter, 125 N. Y. 290, 26 N. E. 265, 21 Am. St. 738; Hull v. Carnley, 11 N. Y. 501, 1 Abb. Pr. (N. Y.) 158; Hall v. Sampson, 35 N. Y. 274, 91 Am. Dec. 56; Galen v. Brown, 22 N. Y. 37; Manchester v. Tibbetts, 121 N. Y. 219, 24 N. E. 304, 18 Am. Dec. 816; Kleinberger v. Brown, 30 N. Y. St. 246, 58 N. Y. Super. Ct. 4, 8 N. Y. S. 866; Baltes v. Ripp, 3 Keyes (N. Y.) 210, 1 Abb. Dec. (N. Y.) 78; Baxter v. Gilbert, 12 Abb. Pr. (N. Y.) 97; Ex parte Lorenz, 32 S. Car. 365, 11 S. E. 206, 17 Am. St. 862; Norris v. Sowles, 57 Vt. 360.

[39] Porter v. Parmly, 34 N. Y. Super. Ct. 398, 43 How. Pr. (N. Y.) 445, 13 Abb. Pr. (N. S.) (N. Y.) 104, revd. 52 N. Y. 185, 14 Abb. Pr. (N. S.) (N. Y.) 116.

[40] Peckinbaugh v. Quillin, 12 Nebr. 586, 12 N. W. 104; Stewart v. Slater, 13 N. Y. Super. Ct. 83; Champlin v. Johnson, 39 Barb. (N. Y.) 606.

[41] Hackleman v. Goodman, 75 Ind. 202; Sparks v. Compton, 70 Ind. 393; Emmons v. Hawn, 75 Ind. 356; Coe v. McBrown, 22 Ind. 252; Landers v. George, 49 Ind. 309; Olds v. Andrews, 66 Ind. 147; Raymond v. Parisho, 70 Ind. 256.

[42] Aldrich v. Higgins, 77 Conn. 370, 59 Atl. 498; Eggleston v. Mundy, 4 Mich. 295; Eddy v. Kenney, 5 Mont. 502, 6 Pac. 342; Nichols v. Mead, 2 Lans. (N. Y.) 222, affd. 47 N. Y. 653; Mattison v. Bancus, 1 N. Y. 295, 4 How. Pr. (N. Y.) 367; Galen v. Brown, 22 N. Y. 37; Hall v. Sampson, 35 N. Y. 274, 91 Am. Dec. 56; Tremaine v. Mortimer, 128 N. Y. 1, 27 N. E. 1060, affg. 28 N. Y. St. 584, 57 N. Y. Super. Ct. 340, 7 N. Y. S. 681; Gelhaar v. Ross, 1 Hilt. (N. Y.) 117; Ex parte Lorenz, 32 S. Car. 365, 11 S. E. 206, 17 Am. St. 862; First Nat. Bank v. North, 2 S. Dak. 480, 51 N. W. 96.

[43] Trapnall's Admx. v. State Bank, 18 Ark. 53; Thornton v. Wood, 42 Maine 282; Morton's Admr. v. Hodgdon, 32 Maine 127; Brown v. Bates, 55 Maine 520, 92 Am. Dec. 613; Murphy v. Galloupe, 143 Mass. 123,

It makes no difference in this respect whether there has been a breach of the condition or not. This is the rule as to mortgages of real estate; and equal if not stronger reasons exist for maintaining it as regards mortgages of personal property.[44] But after forfeiture, the title having become absolute in the mortgagee, the property may be levied upon by virtue of an execution against him, although it still remains in the hands of the mortgagor.[45]

8 N. E. 894; Prout v. Root, 116 Mass. 410; Glass v. Ellison, 9 N. H. 69; Chapman v. Hunt, 13 N. J. Eq. 370; Doughten v. Gray, 10 N. J. Eq. 323; Woodside v. Adams, 40 N. J. L. 417; Jackson v. Willard, 4 Johns. (N. Y.) 41. Such interest cannot be made attachable by joining the mortgagee and mortgagor as defendants in action upon a joint debt. Murphy v. Galloupe, 143 Mass. 123, 8 N. E. 894.

[44] Prout v. Root, 116 Mass. 410.

[45] Phillips v. Hawkins, 1 Fla. 262; Ferguson v. Lee, 9 Wend. (N. Y.) 258.

CHAPTER CXLVII.

SUBJECT-MATTER OF CHATTEL MORTGAGES.

§ 4860. In general.
4861. What present interest subject to mortgage.
4862. Mortgaging chattels sold conditionally.
4863. Mortgages by owners of chattels not in possession.
4864. Statutory limitations of the subject-matter of mortgages.
§ 4865. Mortgages of fixtures — In general.
4866. Mortgages of machinery.
4867. Mortgages of future personal property.
4868. Delivery and possession of mortgaged chattels.

§ 4860. In general.—In general any property which is capable of absolute sale may be mortgaged.[1] All claims growing out of and adhering to property, rights of action for damages ex contractu, and interests in actions pending and undetermined, may be the subject of a mortgage.[2] It does not matter that the property is exempt from attachment and from levy and sale upon execution, for such exemption is merely a privilege which the law confers upon a debtor, and not a limitation imposed upon his power to dispose of his own property as he may choose.[3] The mortgagee, however, must foreclose the mortgage in order to take advantage of the debtor's waiver of his privilege. If the creditor, instead of foreclosing, obtains judgment upon the mortgage debt, and levies upon the property mortgaged, the debtor

[1] Fountain v. Fountain, 7 Ga. App. 361, 66 S. E. 1020; Salabes v. J. Castelberg, 98 Md. 645, 57 Atl. 20, 64 L. R. A. 800; Dorsey v. Hall, 7 Nebr. 460; Kimball v. Sattley, 55 Vt. 285, 45 Am. Rep. 614.

[2] Pindell v. Grooms, 18 B. Mon. (Ky.) 501; White v. Quinlan, 30 Mo. App. 54; Smith v. Texas & N. O. R. Co. (Tex. Civ. App.), 105 S. W. 528.

[3] Love v. Blair, 72 Ind. 281; Lawrence v. McKenzie, 88 Iowa 432, 55 N. W. 505; Rice v. Nolan, 33 Kans. 28, 5 Pac. 437; Conway v. Wilson, 44 N. J. Eq. 457, 11 Atl. 734; Silberberg v. Trilling, 82 Tex. 523, 18 S. W. 591. Where a mortgagor reserved his "personal property exemption allowed by law and to be selected by him," it was held that the title to the whole of it passed to the mortgagee, and remained in him, until the exempted articles were legally set apart, and that a second mortgage of a part of the property is not a selection of such part as exempt. Norman v. Craft, 90 N. Car. 211.

may claim his exemption.[4] It is not necessary that the mortgagor shall have the absolute and entire title to property which is the subject-matter of his mortgage. A limited or special interest in property is sufficient to support a mortgage of it.[5]

§ 4861. What present interest subject to mortgage.—Mere possession of personal property of another, when no title or interest accompanies the possession, confers no power to mortgage the property, even in favor of one taking the mortgage for a valuable consideration without notice.[6] A mortgage alone is no evidence of the mortgagor's title or possession. But if the mortgagor's possession be proved, his making a mortgage is an act of dominion and some evidence of title.[7] A mortgagee for value and in good faith, of goods in possession of one who has obtained them by false pretenses, will hold them against the first vendor, provided the latter voluntarily parted with the possession, and intended to part with the title.[8] A mortgage executed by one in possession of the property as owner, although he holds possession under an agreement that the legal title was not to pass to him until the chattels were paid for, such contract of conditional sale not having been filed for record, will take precedence over the secret lien of the seller under his conditional sale.[9]

§ 4862. Mortgaging chattels sold conditionally.—An interest in property which one may perfect by fulfilling an executory contract, may in equity be the subject of a mortgage. Thus, there

[4] Low v. Tandy, 70 Tex. 745, 8 S. W. 620.

[5] In re Fulton, 18 Am. Bank 591; Jencks v. Smith, 1 Denio (N. Y.) 580, 1 N. Y. 90; Albright v. Meredith, 58 Ohio St. 194, 50 N. E. 719. In Davidson v. Osborn, 136 N. Y. S. 247, it is held that growing grass may be mortgaged as personal property by one who owns it, although he does not own the land.

[6] Glaze v. Blake, 56 Ala. 379; Waters v. Cox, 2 Bradw. (Ill.) 129; Jewell v. Simpson, 38 Kans. 362, 16 Pac. 450; Stanley v. Gaylord, 1 Cush. (Mass.) 536, 48 Am. Dec. 643; Neubauer v. Gabriel, 86 Wis. 200, 56 N. W. 733.

[7] Warner v. Wilson, 73 Iowa 719, 36 N. W. 719, 5 Am. St. 710; Eames v. Snell, 143 Mass. 165, 9 N. E. 522.

[8] Heenan v. Forest City Paint & Varnish Co., 138 Mich. 548, 101 N. W. 806; Malcom & Gaul v. Loveridge, 13 Barb. (N. Y.) 372; Lembeck & Betz Eagle Brew. Co. v. Sexton, 184 N. Y. 185, 96 App. Div. (N. Y.) 613, 88 N. Y. S. 1068, 77 N. E. 38.

[9] Moline Plow Co. v. Braden, 71 Iowa 141, 32 N. W. 247; Manning v. Cunningham, 21 Nebr. 288, 31 N. W. 933; Peters v. Parsons, 18 Nebr. 191, 24 N. W. 687.

may be such a mortgage of one's interest in a herd of cattle, which by contract he is to feed for a year, at the end of which time he is to have half of the herd for his trouble and expense.[10] So, also, one in possession of property under a conditional sale, may mortgage his interest, such as it is, and on payment of the price the mortgage will become valid.[11] Of course the mortgagee's title may be defeated by the prior encumbrance, or by the failure of the mortgagor to fulfil the condition of his purchase.[12] An agreement between a vendor and vendee, that the title to the property shall not pass until it is paid for, is valid and binding between the parties themselves, and no title vests in the vendee, though possession be delivered to him; and the vendor, upon the failure of the vendee to comply with the condition, may retake the property from the vendee, or from any one claiming through him, though he be a purchaser or mortgagee in good faith, and without notice of the condition.[13] A vendee under such a conditional sale, who has not taken possession of the property, has no interest in it which he can transfer by sale or mortgage.[14] On the other hand, a vendor who has sold chattels conditionally may mortgage his interest. Thus, if he has delivered them upon condition that the title shall not pass to the purchaser until paid for, he may, at any time before the price is wholly paid, mortgage them to another person, and the mortgagee will acquire a title superior to that of the conditional vendee.[15] It is not material that payments have been made toward a title before the recording of the mortgage, so long as the payments are not in full; and it matters not how near the purchaser comes to acquiring a title, so long as he

[10] Forman v. Proctor, 9 B. Mon. (Ky.) 124.

[11] Thornton v. Findlay, 97 Ark. 432, 134 S. W. 627, 33 L. R. A. (N. S.) 491n; Sunny South Lumber Co. v. A. J. Neimeyer &c. Co., 63 Ark. 268, 38 S. W. 902; Everett v. Hall, 67 Maine 497; Day v. Bassett, 102 Mass. 445; Crompton v. Pratt, 105 Mass. 255; Greenaway v. Fuller, 47 Mich. 557, 11 N. W. 384.

[12] Holman v. Lock's Admr., 51 Ala. 287; Rodney Hunt Machine Co. v. Stewart, 57 Hun (N. Y.) 545, 33 N. Y. St. 189, 11 N. Y. S. 448.

[13] Hart v. Carpenter, 24 Conn. 427; Thorpe Bros. & Co. v. Fowler, 57 Iowa 541, 11 N. W. 3; Coggill v. Hartford & New Haven R. Co., 3 Gray (Mass.) 545; Benner v. Puffer, 114 Mass. 376; Ballard v. Burgett, 40 N. Y. 314; Blackwell v. Walker Bros., 2 McCrary (U. S.) 33, 5 Fed. 419. See also, Sears v. Shrout, 24 Ind. App. 313, 56 N. E. 728; Lippincott v. Rich, 19 Utah 140, 56 Pac. 806; Johnston v. Wood, 19 Wash. 441, 53 Pac. 707.

[14] Doyle v. Mizner, 40 Mich. 160.

[15] Everett v. Hall, 67 Maine 497.

falls short of it.[16] The purchaser has no title so long as the condition remains unperformed. He might, under some circumstances, have a lien in equity for advances made before the recording of the mortgage, but a court of law could take no account of such a lien.[17]

§ 4863. Mortgages by owners of chattels not in possession.—The owner of a chattel not in possession may make a valid mortgage of it if the person in possession professedly holds under him, and has only a special property in the thing, such, for instance, as that conferred by a pledge,[18] a lien,[19] an execution,[20] an attachment[21] or a distress warrant.[22] Thus, a horse which had been taken from the mortgagor in a replevin suit may be mortgaged by him before final judgment, and while the property is subject to restitution. If the mortgagor obtains a judgment, not for the return of the horse, but for the value of it, the benefit of such judgment passes to the mortgagee. The mortgagee's equitable title is, moreover, paramount to any lien or claim upon the property arising subsequently to the mortgage.[23] A mortgage of personal property with the usual covenants given by one who has a vested interest therein without possession, subject to an estate for life in another, operates as an equitable assignment of such interest, which the mortgagee may enforce after the death of the life tenant.[24] The owner of a chattel has a mortgageable interest in it after default of a prior mortgage of the same, until foreclosure is completed. The junior mortgagee has, until that time, a right to redeem.[25]

§ 4864. Statutory limitations of the subject-matter of mortgages.—In a few states there are statutes which restrict the giving of chattel mortgages to specific articles or classes of

[16] Shepard's Touchstone, 118.
[17] Everett v. Hall, 67 Maine 497.
[18] Clare v. Agerter, 47 Kans. 604, 28 Pac. 694; M'Calla v. Bullock, 2 Bibb (Ky.) 288.
[19] Pindell v. Grooms, 18 B. Mon. (Ky.) 501.
[20] Gardner v. Bunn, 132 Ill. 403, 23 N. E. 1072, 7 L. R. A. 729.
[21] Appleton v. Bancroft, 10 Metc. (Mass.) 231.
[22] Hughes v. Stubblefield, 21 Ill. App. 216.
[23] Case v. Woleben, 52 Iowa 389, 3 N. W. 486; Pindell v. Grooms, 18 B. Mon. (Ky.) 501.
[24] Swett v. Thompson, 149 Mass. 302, 21 N. E. 382.
[25] White v. Quinlan, 30 Mo. App. 54; Smith v. Coolbaugh, 21 Wis. 427. Contra, Hulsen v. Walter, 34 How. Pr. (N. Y.) 385.

personal property. And where such a mortgage can be made only upon certain classes of property specifically mentioned by statute, to render a mortgage valid it must be shown that it embraces property specified by the statute. Thus, under a statute of the state of California authorizing mortgages of upholstery and furniture used in hotels, lodging or boarding houses, to secure the purchase-money, the mortgagee must allege and prove that the furniture and upholstery were actually used in a hotel, lodging or boarding house.[26] Under the statute of Connecticut authorizing the mortgaging of a dwelling-house, together with the household furniture belonging to its owner, and used therein by him in housekeeping, a mortgage of such furniture is valid, when shown to be so used by the mortgagor, although it also constitutes the furniture of a hotel kept by him.[27]

§ 4865. Mortgages of fixtures—In general.—A building erected by one person on the land of another may be mortgaged as personal property, if it was so erected under an understanding or agreement that it might be removed at any time.[28] Prima facie such a building would be a fixture, and would not be removable.[29] The legal effect of putting it on another's land is to make it part of the freehold; and to sustain a mortgage of it as personal property, an agreement of the parties controlling the legal effect of the transaction must be proved. If the mortgagor, after mortgaging such a building, removes it to other land which he subsequently purchases, and then mortgages the land to another with the buildings and fixtures thereon, but the latter mortgagee has full knowledge of the prior chattel mortgage, this will have priority over the mortgage of the land.[30] If the owner of the land purchase such building after it has been mortgaged, the

[26] Stringer v. Davis, 30 Cal. 318.

[27] Croswell v. Allis, 25 Conn. 301.

[28] Deering v. Ladd, 22 Fed. 575; Brown v. Corbin, 121 Ind. 455, 23 N. E. 276; Denham v. Sankey, 38 Iowa 269; Docking v. Frazell, 34 Kans. 29, 7 Pac. 618, 38 Kans. 420, 17 Pac. 160; Goodenow v. Allen, 68 Maine 308; Lanphere v. Lowe, 3 Nebr. 131; Holt County Bank v. Tootle, 25 Nebr. 408, 41 N. W. 291; Smith v. Benson, 1 Hill (N. Y.) 176.

[29] Price v. Malott, 85 Ind. 266; Docking v. Frazell, 34 Kans. 29, 7 Pac. 618, 38 Kans. 420, 17 Pac. 160.

[30] Horn v. Indianapolis Nat. Bank, 125 Ind. 381, 25 N. E. 558, 9 L. R. A. 676, 21 Am. St. 231; Burrill v. Wilcox Lumber Co., 65 Mich. 571, 32 N. W. 824; Simons v. Pierce, 16 Ohio St. 215.

lien is not thereupon extinguished.[31] A thing may be a fixture to a building which is personal property, just as if it were real property, and in such case a chattel mortgage of the building will cover the thing annexed to it, or used with it as a fixture.[32] Fixtures may become chattels by agreement of parties as between themselves. Many things ordinarily considered fixtures to the realty may become to all intents and purposes personal property, by agreement of all parties interested in both the realty and fixtures.[33] The owner of machinery or other things in the nature of fixtures may treat them as personal property, and by executing a chattel mortgage of them is estopped from asserting, as against such mortgage, that they are part of the real estate.[34] The holder of a subsequent chattel mortgage of such fixtures, after taking possession of them as personal property and removing them, is estopped to deny that they are personal property, as against one who claims them under a prior chattel mortgage.[35] There is said to be a limitation upon the right of parties to change the status of property by agreement, arising from the essential character of the property itself, and the mode of its annexation to the realty.[36] The courts of a few states, particularly those of New York and Illinois, accord very great efficacy to the mortgagor's agreement that fixtures shall remain chattels, so as to give effect to a chattel mortgage of them, as against subsequent purchasers and mortgagees of the land. They go even to the extent of holding that a chattel mortgage executed in view that the chattels are about to be annexed to the realty is sufficient evidence of the intention and agreement of the parties that they are to retain their character as personal property.[37]

[31] Denham v. Sankey, 38 Iowa 269.

[32] McGorrisk v. Dwyer, 78 Iowa 279, 43 N. W. 215, 5 L. R. A. 594, 16 Am. St. 440.

[33] Hensley v. Brodie, 16 Ark. 511; Cross v. Weare Commission Co., 153 Ill. 499, 38 N. E. 1038, 46 Am. St. 902; Docking v. Frazell, 34 Kans. 29, 7 Pac. 618, 38 Kans. 420, 17 Pac. 160; Gooding v. Riley, 50 N. H. 400; Ford v. Cobb, 20 N. Y. 344; Godard v. Gould, 14 Barb. (N. Y.) 662; Shell v. Haywood, 16 Pa. St. 523; Smith v. Waggoner, 50 Wis. 155, 6 N. W. 568.

[34] Gordon v. Miller, 28 Ind. App. 612, 63 N. E. 774; Corcoran v. Webster, 50 Wis. 125, 6 N. W. 513.

[35] Manwaring v. Jenison, 61 Mich. 117, 27 N. W. 899; Smith v. Waggoner, 50 Wis. 155, 6 N. W. 568.

[36] Fortman v. Goepper, 14 Ohio St. 558.

[37] Sword v. Low, 122 Ill. 487, 13 N. E. 826; Andrew v. Chandler, 27 Ill. App. 103; Eaves v. Estes, 10 Kans.

It is generally held that an agreement of parties will avail to make fixtures personal property as against creditors of the mortgagor, when it avails for this purpose between the parties themselves, for creditors levying upon the property, and others purchasing it upon execution sale, stand in a different position from bona fide purchasers without notice; they acquire only the rights which the judgment debtor had.[38] But whether, as against subsequent purchasers without notice, the character of property can be changed by agreement from realty to personalty, is a different question; and while the authorities are not in entire harmony, the better opinion is that such purchasers are not bound unless they have notice of the agreement before acquiring title. Ordinarily they are entitled to claim and hold everything which appears to be, and by its ordinary nature is, a part of the realty. To hold otherwise would contravene the policy of the laws requiring conveyances of interests in real estate to be recorded. It would seriously endanger the rights of purchasers, afford opportunities for frauds, and introduce uncertainty and confusion into land titles.[39] If the subsequent purchaser or mortgagee of the realty has actual knowledge of the existence of a chattel mortgage or articles attached to the realty, the lien of the chattel mortgage has priority.[40] It is not competent for an owner of real estate to bind existing mortgagees by any arrangement to treat as personalty annexations to the freehold. The legal character of such annexations is determined by the law to be real estate. Mortgagees, as well as other parties in interest, are entitled to the benefit of this rule of law, which can be taken from them only by their own waiver.[41] Thus, a prior mortgage of real estate, which in terms, or as a matter of law, embraces articles of machinery or other fixtures, is not

314, 15 Am. Rep. 345; Ford v. Cobb, 20 N. Y. 344; Sisson v. Hibbard, 10 Hun (N. Y.) 420, affd. 75 N. Y. 542; Mott v. Palmer, 1 N. Y. 564; Kinsey v. Bailey, 9 Hun (N. Y.) 452.

[38] Manwaring v. Jenison, 61 Mich. 117, 27 N. W. 899.

[39] Hunt v. Bay State Iron Co., 97 Mass. 279.

[40] Rowland v. West, 62 Hun (N. Y.) 583, 43 N. Y. St. 698, 17 N. Y. S. 330; Fryatt v. Sullivan Co., 5 Hill (N. Y.) 116, affd. 7 Hill (N. Y.) 529; San Antonio Brewing Assn. v. Arctic Ice-Machine Mfg. Co., 81 Tex. 99, 16 S. W. 797.

[41] Voorhees v. McGinnis, 46 Barb. (N. Y.) 242, revd. 48 N. Y. 278; Burnside v. Twitchell, 43 N. H. 390; Hunt v. Bay State Iron Co., 97 Mass. 279.

affected by a subsequent mortgage of such articles as chattels.[42] Personal property which is incorporated with the realty does not pass by a chattel mortgage as against a subsequent purchaser or mortgagee of the realty. Thus, as between a mortgagee of the machinery of a cotton-mill permanently attached to the realty and used with it, and a subsequent mortgagee of the realty, the title of the latter will prevail.[43] Property which has once become real estate, through annexation to the realty, cannot afterward be made personal property, by the mere agreement of the parties, so as to affect others who may be or may become interested in the realty.[44] Annexations to the realty made after a mortgage of it are different in effect from such annexations made before such mortgage. One already holding a mortgage of the realty has no equitable claim to chattels subsequently annexed to it. He has parted with nothing on the faith of such chattels. Therefore the title of a conditional vendor of such chattels, or of a mortgagee of them before or at the time they were attached to the realty, is usually just as good against the mortgagee of the realty as it is against the mortgagor.[45]

§ 4866. **Mortgages of machinery.**—A mortgage of machinery as personal property made after it has been set up, and so affixed to the realty as to become a part of it, although made to the manufacturer contemporaneously with the bill of sale from him to the owner of the land, passes no title to the machinery as against a subsequent purchaser of the real estate, although he purchase with actual knowledge of the mortgage. The annexation of the machinery to the freehold, de facto, renders it part of the realty; and although the annexation be consented to by the manufacturer under an agreement with the owner of the realty that he would give the former a mortgage of the machinery as personal property, such agreement is inoperative and void as

[42] Smith v. Waggoner, 50 Wis. 155, 6 N. W. 568; Frankland v. Moulton, 5 Wis. 1.

[43] Pierce v. George, 108 Mass. 78, 11 Am. Rep. 310; Smith v. Waggoner, 50 Wis. 155, 6 N. W. 568. Contra, Henry v. Von Brandenstein, 12 Daly (N. Y.) 480.

[44] Docking v. Frazell, 38 Kans. 420, 17 Pac. 160; Beckman v. Sikes, 35 Kans. 120, 10 Pac. 592.

[45] Cochran v. Flint, 57 N. H. 514; Tibbetts v. Horne, 65 N. H. 242, 23 Atl. 145, 15 L. R. A. 56, 23 Am. St. 31; Page v. Edwards, 64 Vt. 124, 23 Atl. 917; Davenport v. Shants, 43 Vt. 546; Buzzell v. Cummings, 61 Vt. 213, 18 Atl. 93.

against any one who afterward acquires title to the realty in fee.[46] Evidence of a general usage and custom between manufacturers and purchasers of such property to regard it as personal property is incompetent.[47] Machines may, however, remain chattels for all purposes, even though physically attached to the freehold by the owner, if the mode of attachment indicates that it is merely to steady them for their more convenient use, and not to make them an adjunct of the building or soil.[48] Machinery remains personal property until it is actually annexed to the realty, and a chattel mortgage placed upon it before it is attached to the realty is superior to a vendor's lien reserved upon the land for purchase-money.[49] Much less could a mortgagee of the realty claim such a fixture when his mortgage expressly excepts the fixture from its operation.[50] The purpose of the annexation as well as the mode of it determines the character of the property annexed.[51]

§ 4867. **Mortgages of future personal property.**—At common law, a mortgage can operate only on property actually in existence at the time of giving the mortgage, and then actually belonging to the mortgagor, or potentially belonging to him as an incident of other property then in existence and belonging to him. A mortgage of goods which the mortgagor does not own at the time of making the mortgage, though he may afterward acquire them, is void in respect to such goods as against subse-

[46] Richardson v. Copeland, 6 Gray (Mass.) 536, 66 Am. Dec. 424. A fortiori such a chattel mortgage would not be good against a prior mortgage of the realty. Fisk v. People's Nat. Bank, 14 Colo. App. 21, 59 Pac. 63.

[47] Richardson v. Copeland, 6 Gray (Mass.) 536, 66 Am. Dec. 424; Keeler v. Keeler, 31 N. J. Eq. 181, 8 Am. L. Rec. 670.

[48] Carpenter v. Walker, 140 Mass. 416, 5 N. E. 160; Carpenter v. Allen, 150 Mass. 281, 22 N. E. 900; McConnell v. Blood, 123 Mass. 47, 25 Am. Rep. 12; Hubbell v. East Cambridge Five Cents Sav. Bank, 132 Mass. 447, 42 Am. Rep. 446; Maguire v. Park, 140 Mass. 21, 1 N. E. 750; Case Mfg. Co. v. Garver, 45 Ohio St. 289, 13 N. E. 493.

[49] Miller v. Wilson, 71 Iowa 610, 33 N. W. 128. In this case the owner of mill property, subject to a lien for purchase-money, purchased an engine and machinery to be annexed to the mill, and the machinery had been delivered on the ground, and the owner intended to annex it to the realty, and had begun to erect a building in which to place it, though none of it was in place, when he executed a chattel mortgage of the machinery.

[50] Badger v. Batavia Paper Mfg. Co., 70 Ill. 302.

[51] Fortman v. Goepper, 14 Ohio St. 558; DeLaine v. Alderman, 31 S. Car. 267, 9 S. E. 950.

quent purchasers or attaching creditors.[52] Thus, if a mortgage be made of a stock in trade it is held that it will not at law cover additions afterward made to the stock though it be expressly framed to cover additions to the stock intended to be made to replace such as should be sold.[53] A mortgage upon merchandise or machinery, before it is manufactured, does not create a legal

[52] Wilson v. Seibert, 8 Am. L. Reg. (N. S.) 608; Alabama State Bank v. Barnes, 82 Ala. 607, 2 So. 349; Bank of Eutaw v. Alabama State Bank, 87 Ala. 163, 7 So. 91; Christian & Craft Grocery Co. v. Michael, 121 Ala. 84, 25 So. 571, 77 Am. St. 30; Grand Forks Nat. Bank v. Minneapolis & N. Elevator Co., 6 Dak. 357, 43 N. W. 806; In re Sentenne & Green Co., 120 Fed. 436; Chisolm v. Chittenden, 45 Ga. 213; Anderson v. Howard, 49 Ga. 313; Goodrich v. Williams, 50 Ga. 425; Wardlaw v. Mayer, 77 Ga. 620; Hunt v. Bullock, 23 Ill. 320; Tennis v. Midkiff, 55 Ill. App. 642; Standard Brewery v. Nudelman, 70 Ill. App. 356, affd. 172 Ill. 337, 50 N. E. 190; Roy v. Goings, 96 Ill. 361, 6 Bradw. (Ill.) 162, 36 Am. Rep. 151; Borden v. Croak, 131 Ill. 68, 22 N. E. 793, 19 Am. St. 23; Deering v. Washburn, 141 Ill. 153, 29 N. E. 558; Long v. Hines, 40 Kans. 216, 220, 16 Pac. 339, 19 Pac. 796, 10 Am. St. 189, 192; Head v. Goodwin, 37 Maine 181; Chapin v. Cram, 40 Maine 561; Griffith v. Douglass, 73 Maine 532, 40 Am. Rep. 395; Sawyer v. Long, 86 Maine 541, 30 Atl. 111; Hamilton v. Rogers, 8 Md. 301; Rose v. Bevan, 10 Md. 466, 69 Am. Dec. 170; Wilson v. Wilson, 37 Md. 1, 11 Am. Rep. 518; Crocker v. Hopps, 78 Md. 260, 28 Atl. 99; First Nat. Bank v. Lindenstruth, 79 Md. 136, 28 Atl. 807, 47 Am. St. 366; Barnard v. Eaton, 2 Cush. (Mass.) 294; Codman v. Freeman, 3 Cush. (Mass.) 306; Chesley v. Josselyn, 7 Gray (Mass.) 489; Bonsey v. Amee, 8 Pick. (Mass.) 236; Jones v. Richardson, 10 Metc. (Mass.) 481; Wasserman v. McDonnell, 190 Mass. 326, 76 N. E. 959; Ferguson v. Wilson, 122 Mich. 97, 80 N. W. 1006, 80 Am. St. 543; Wedgewood v. Citizens' Nat. Bank, 29 Nebr. 165, 45 N. W. 289; Godfrey & Sons Co. v. Citizens' Nat. Bank, 64 Nebr. 477, 90 N. W. 239; Pierce v. Emery, 32 N. H. 484; Looker v. Peckwell, 38 N. J. L. 253, affd. 39 N. J. L. 134; Comfort v. Kiersted, 26 Barb. (N. Y.) 472; Otis v. Sill, 8 Barb. (N. Y.) 102; Gardner v. McEwen, 19 N. Y. 123; Farmers' Loan & Trust Co. v. Long Beach Imp. Co., 27 Hun (N. Y.) 89; Brunswick-Balke-Collender Co. v. Stevenson, 51 Hun (N. Y.) 640, 21 N. Y. St. 862, 4 N. Y. S. 123. At law the right of a mortgagee to have subjected to the lien of his mortgage chattels which shall be acquired by the mortgagor subsequent to the execution of the mortgage depends upon the mortgagee taking possession of the after-acquired property. Medina Gas & Electric Light Co. v. Buffalo Loan, Trust & Safe Deposit Co., 119 App. Div. (N. Y.) 245, 104 N. Y. S. 625; Andrews v. Durant, 11 N. Y. 35, 62 Am. Dec. 55; Deeley v. Dwight, 132 N. Y. 59, 30 N. E. 258, 18 L. R. A. 298; McNeeley v. Welz, 166 N. Y. 124, 20 App. Div. (N. Y.) 566, 59 N. E. 697, 47 N. Y. S. 310; Zartman v. First Nat. Bank, 189 N. Y. 267, 82 N. E. 127, 12 L. R. A. (N. S.) 1083; Robson v. Dailey, 130 N. Y. S. 1036; Chapman v. Weimer, 4 Ohio St. 481; Williams v. Briggs, 11 R. I. 476, 23 Am. Rep. 518; Cook v. Corthell, 11 R. I. 482, 23 Am. Rep. 518; Parker v. Jacobs, 14 S. Car. 112, 37 Am. Rep. 724; Armour v. Ross, 75 S. Car. 201, 55 S. E. 315; Richardson v. Washington, 88 Tex. 339, 31 S. W. 614; Comstock v. Scales, 7 Wis. 159; Hunter v. Bosworth, 43 Wis. 583; Wagner v. Watts, 2 Cranch (U. S.) 169, Fed. Cas. No. 17040; Letourno v. Ringgold, 3 Cranch (U. S.) 103, Fed. Cas. No. 8282; Johnson v. Patterson, 2 Woods (U. S.) 443, Fed. Cas. No. 7403.

[53] Barnard v. Eaton, 2 Cush. (Mass.) 294; Gregory v. Tavenner, 38 Mo. App. 627, In re Allen's Estate, 65 Vt. 392, 26 Atl. 591.

lien upon the property.[54] Such a mortgage is, as to such property, only a contract to assign it to the mortgagee, and confers only an equitable title.[55] This is everywhere conceded to be the general rule at law.[56] But even when void as against creditors and subsequent purchasers, such a mortgage is valid as between the parties thereto,[57] and as to others who stand in the same or no better position.[58] And in equity, while such mortgage itself does not pass the title to such property, it creates in the mortgagee an equitable interest in it, which will prevail against judgment creditors and others, although the mortgagee has not taken possession of the property, and the mortgagor has done no new act to confirm the mortgage. The ground of the doctrine is, that the mortgage, though inoperative as a conveyance, is operative as an executory agreement, which attaches to the property when acquired, and in equity transfers the beneficial interest to the mortgagee, the mortgagor being regarded as trustee for him, in accordance with the familiar maxim that equity considers that done which ought to be done.[59]

§ 4868. Delivery and possession of mortgaged chattels.— At common law a mortgage valid against creditors could only be made by a delivery of the property. It was essential that the custody and possession of the goods should be delivered to and re-

[54] Deeley v. Dwight, 132 N. Y. 59, 30 N. E. 258, 18 L. R. A. 298.

[55] Joseph v. Lyons, 15 Q. B. Div. 280.

[56] But if property not belonging to the mortgagor be in the mortgagee's possession, and be included in the mortgage at the owner's request, the mortgage is effectual as to such property, as against the mortgagor and as against the owner. Berghoff v. McDonald, 87 Ind. 549; Griffith v. Douglass, 73 Maine 532, 40 Am. Rep. 395; Wright v. Bircher, 5 Mo. App. 322, affd. 72 Mo. 179, 37 Am. Rep. 433; France v. Thomas, 86 Mo. 80; Parker v. Jacobs, 14 S. Car. 112, 37 Am. Rep. 724.

[57] Ludwig v. Kipp, 20 Hun (N. Y.) 265; Zartman v. First Nat. Bank, 189 N. Y. 267, 82 N. E. 127, 12 L. R. A. (N. S.) 1083.

[58] Wisner v. Ocumpaugh, 71 N. Y. 113; Reynolds v. Ellis, 34 Hun (N. Y.) 47, affd. 103 N. Y. 115, 8 N. E. 392, 57 Am. Rep. 701; Nestell v. Hewitt, 19 Abb. N. Cas. (N. Y.) 282.

[59] Des Moines Nat. Bank v. Council Bluffs Sav. Bank, 150 Fed. 301, 80 C. C. A. 189; Thompson v. Foerstel, 10 Mo. App. 290; France v. Thomas, 86 Mo. 80; Collerd v. Tully, 77 N. J. Eq. 439, 77 Atl. 1079; Medina Gas & Electric Light Co. v. Buffalo Loan, Trust & Safe Deposit Co., 119 App. Div. (N. Y.) 245, 104 N. Y. S. 625; MacDonnell v. Buffalo Loan, Trust & Safe Deposit Co., 193 N. Y. 92, 85 N. E. 801; Flanagan Bank v. Graham, 42 Ore. 403, 71 Pac. 137, 790; Williams v. Briggs, 11 R. I. 476, 23 Am. Rep. 518; Speer v. Allen (Tex. Civ. App.), 135 S. W. 231; Barron v. San Angelo Nat. Bank (Tex. Civ. App.), 138 S. W. 142; Triumph Electric Co. v. Empire Fur-

tained by the mortgagee.[60] The intent of the statutes providing for the recording of mortgages of personal property was to do away with the necessity of any delivery of the property, and to enable mortgagors to hold possession until default. For this purpose registration is required as giving, perhaps, even greater notoriety to the transaction than delivery and retention of possession. Registration thus becomes a substitute, as well for delivery as for retaining possession of the property. No formal, symbolical or constructive delivery of the mortgaged property is necessary, where the execution, delivery and registration of the instrument of conveyance are duly proved, and where good faith in the transaction, adequate consideration, and other requisites of a valid mortgage are shown.[61] It is to be understood, however, that the articles mortgaged must be of such a nature and so situated as to be capable of being specifically designated and identified by written description. If they require to be weighed, measured, counted off, or otherwise separated from other and larger parcels or quantities, such requisites are not to be considered as dispensed with by registration.[62] As between the parties, delivery and possession, while essential to constitute a pledge, are not necessary to the validity of a mortgage. In this respect the common-law rule has not been changed by statute.[63] But at common law a mortgage might under some circumstances be valid as against third persons without immediate delivery and possession,[64] just as a sale might be valid without such delivery and possession. The statutes, however, relating to the recording or filing of mortgages, make them void as to third persons unless they be accompanied by delivery and possession, or they

niture Co., 70 W. Va. 164, 73 S. E. 325.

[60] Briggs v. Gelm, 106 N. Y. S. 693; Woodward v. Gates, 9 Vt. 358; Sturgis v. Warren, 11 Vt. 433; Russell v. Filmore, 15 Vt. 130; Symbolical delivery, George Walter Brewing Co. v. Lockery, 134 Wis. 81, 114 N. W. 120.

[61] Frank v. Miner, 50 Ill. 444; Bullock v. Williams, 16 Pick. (Mass.) 33; Forbes v. Parker, 16 Pick. (Mass.) 462; Shurtleff v. Willard, 36 Mass. 202; McCoy v. Lassiter, 95 N. Car. 88.

[62] Bullock v. Williams, 16 Pick. (Mass.) 33.

[63] McCoy v. Lassiter, 95 N. Car. 88. In Texas it is said that when the possession of mortgaged chattels is delivered to the mortgagee, the transaction becomes in effect a pledge. In that state a mortgage is held not to pass the legal title, but to confer merely a lien. Hudson v. Wilkinson, 61 Tex. 606.

[64] Morrow v. Turney's Admr., 35 Ala. 131; Homes v. Crane, 2 Pick. (Mass.) 607; Haven v. Low, 2 N. H. 13, 9 Am. Dec. 25.

be recorded or filed in the manner prescribed.[66] Under the recording acts generally in force, if there be a change of possession of the mortgaged property, there is no need of recording the mortgage or the bill of sale to make it valid against third persons. Possession by the mortgagee or vendee is equivalent to notice by registration.[67] Possession taken under an absolute bill of sale, though subsequent to its execution, is equivalent to the filing of the same in the proper office, and is notice of the nature and extent of the vendee's claim.[68]

[66] Read v. Horner, 90 Mich. 152, 51 N. W. 207; Baker v. Pottle, 48 Minn. 479, 51 N. W. 383; Carstens v. Moyer, 22 Wash. 61, 60 Pac. 51.

[67] Grice v. Haskins, 73 Ga. 700; Humphries v. Bartee, 10 Sm. & M. (Miss.) 282; Janvrin v. Fogg, 49 N. H. 340; Castleman v. Mayer, 168 N. Y. 354, 61 N. E. 282, affg. 55 App. Div. (N. Y.) 515, 67 N. Y. S. 229; Morrow v. Reed, 30 Wis. 81.

[68] First Nat. Bank v. Damm, 63 Wis. 249, 23 N. W. 497; Coe v. Manseau, 62 Wis. 81, 22 N. W. 155.

TITLE FOURTEEN

PARTNERSHIP.

CHAPTER CXLVIII.

PARTNERSHIP CONTRACTS—FIRM AS DISTINCT ENTITY—FIRM NAME.

§ 4875. Introductory.
4876. Firm as distinct entity.
4877. Firm name not essential.
§ 4878. Firm name — Choice, display, failure to choose.
4879. Use of firm name.

§ 4875. **Introductory.**—The nature of the partnership relation has been explained and a definition of the subject has been given in another volume of this work. So, the tests for determining when the relation exists, as well as who may be partners, how the relation is created, and the subject-matter and the scope of partnership, have already been considered in the same connection.[1] It remains more fully to explain the nature of a partnership as distinguished from its individual members, and the manner in which partnership property is held, and to consider liabilities of the partnership and the individual partners, the rights and duties of the latter both as between or among themselves and as to third persons, the termination and winding up of partnerships and the rights and duties of surviving partners, together with such incidental matters as may be properly connected with these phases of the general subject.

§ 4876. **Firm as distinct entity.**—In a number of jurisdictions it is declared that the common law does not recognize a partnership as a legal entity, separate and distinct from the several partners therein.[2] Thus, "the law recognizes no personality

[1] See ante, volume 1, ch. 16.

[2] In re Beauchamp, 1 Q. B. (1894) 1; Ex parte Corbett, L. R. 14 Ch. Div. (1880) 122; In re Wakeham, L. R. 13 Q. B. Div. 43; Jacaud v. French, 12 East 317; Phillips v. Holmes, 165

in a partnership other than that of the persons who compose it;"[3] "partnership is but a relation; it is not a person—it is not a legal being;"[4] "a partnership, as such, cannot take or hold the legal title to real estate. It is not a person, either natural or artificial, and when a deed is made to a partnership it passes the title to the individual members thereof as tenants in common."[5] So also "That citizenship cannot rightly be predicated of a copartnership as such * * * is well settled."[6] The fact that dissolution of a firm is worked by the death of a partner,[7] by the sale of one partner of his interest,[8] by the bankruptcy of a partner,[9] or by the marriage of a feme sole partner suggests the correctness of this position.[10] In England the separate-entity nature of a partnership has been denied, at least so far as recognizing a partner as debtor or creditor of the firm of which he himself is a member is concerned.[11] Opposed, however, to the courts adhering to this doctrine that a partnership is not a separate entity there are others which speak in unequivocal terms

Ala. 250, 51 So. 625; Spaulding Mfg. Co. v. Godbold, 92 Ark. 63, 121 S. W. 1063, 29 L. R. A. (N. S.) 282n, 135 Am. St. 168; Hallowell v. Blackstone Nat. Bank, 154 Mass. 359, 28 N. E. 281, 13 L. R. A. 315; Grimes v. Bowerman, 92 Mich. 258, 52 N. W. 751; Bank of Buffalo v. Thompson, 121 N. Y. 280, 24 N. E. 473; Jones v. Blun, 145 N. Y. 333, 39 N. E. 954; Strauss v. Frederick, 91 N. Car. 121; Williams Land Co. v. Crull (Tex. Civ. App.), 125 S. W. 339; State v. Cloudt (Tex. Civ. App.), 84 S. W. 415; Schneider v. Sellers, 98 Tex. 380, 84 S. W. 417.

[3] Wiggins v. Blackshear, 86 Tex. 665, 26 S. W. 939.

[4] Harris v. Visscher, 57 Ga. 229.

[5] Adams v. Church, 42 Ore. 270, 70 Pac. 1037, 59 L. R. A. 782, 95 Am. St. 740.

[6] Bruett v. F. C. Austin Drainage Excavator Co., 174 Fed. 668.

[7] Ruggles v. Buckley, 175 Fed. 57, 27 L. R. A. (N. S.) 541.

[8] Loy v. Alston, 172 Fed. 90, 96 C. C. A. 578.

[9] Riddle v. Whitehill, 135 U. S. 621, 34 L. ed. 283, 10 Sup. Ct. 924.

[10] Brown v. Chancellor, 61 Tex. 437. For further evidence in this connection see Bellairs v. Ebsworth, 3 Camp. 53; Cambridge University v. Baldwin, 5 Mees. & W. 580; Simson v. Cooke, 1 Bing. 452; Hollond v. Teed, 7 Hare 50; Strange v. Lee, 3 East 484; Weston v. Barton, 4 Taunt. 673; Dry v. Davy, 10 Adol. & E. 30; Wright v. Russel, 2 W. Bl. 934; Bank of Scotland v. Christie, 8 Clark & F. 214; Stevens v. Benning, 1 Kay & J. 168; Tasker v. Shepherd, 6 Hurl. & N. 575; De Mazar v. Pybus, 4 Ves. 644; Hole v. Bradbury, 12 Ch. Div. 886; Barron v. Fitzgerald, 6 Bing. N. Cas. 201; Fowler v. Reynal, 2 De G. & Sm. 749; Leak v. MacDowall, 3 New Reports 185; Pease v. Hirst, 10 B. & C. 122; Metcalf v. Bruin, 12 East 400, 2 Camp. 422; Backhouse v. Hall, 6 B. & S. 507; Dance v. Girdler, 1 Bos. & P. (N. R.) 34; Parham Sew. Mach. Co. v. Brock, 113 Mass. 194; White Sewing-Machine Co. v. Hines, 61 Mich. 423, 28 N. W. 157; Equitable Life Assur. Soc. v. Coats, 44 Mich. 260, 6 N. W. 648; Forst v. Kirkpatrick, 64 N. J. Eq. 578, 54 Atl. 554; Palmer v. Bagg, 56 N. Y. 523.

[11] Richardson v. Bank of England, 4 Mylne & C. 165. See further De Tastet v. Shaw, 1 Barn. & Ald. 664. And compare Crouch v. Bowman, 3 Humph. (Tenn.) 209.

to the contrary.[12] "There are two conceptions of a partnership, one springing from the agreement on which it is founded, that it is an aggregation of persons associated together to share its profits and losses, owning its property, and liable for its debts. The other that it is an artificial being, a distinct entity separate in estate, in rights, and in obligations from the partners who compose it. In most of its relations to persons and things the latter conception is the more accurate."[13] More emphatic than this statement is the declaration that "a partnership, * * * is just as distinct and palpable an entity, in the idea of the law, as distinguished from the individuals composing it, as is a corporation; and can contract as an individualized and unified party, with an individual person who is a member thereof, as effectually as a corporation can contract with one of its stockholders. * * * The only practical difference is a technical one, having reference to the forum and form of remedy."[14] These differences of opinion are not in fact

[12] Williams v. Hurley, 135 Ala. 319, 33 So. 159; Goldsmith v. Eichold, 94 Ala. 116, 10 So. 80, 33 Am. St. 97; Lacey v. Cowan, 162 Ala. 546, 50 So. 281; Teague v. Lindsey, 106 Ala. 266, 17 So. 538; Parker v. Parker, 25 Ky. L. 2193, 80 S. W. 209; Morris v. Owen (Tex. Civ. App.), 143 S. W. 227; Schreiner v. United States, 6 Ct. Cl. (U. S.) 359. For recognition of one firm as two distinct entities see West v. Valley Bank, 6 Ohio St. 168. But, as bearing upon the question as to the soundness of the decision in this case just cited, see Campbell v. Colorado Coal &c. Co., 9 Colo. 60, 10 Pac. 248; Adams v. May, 27 Fed. 907; Wright v. Hooker, 10 N. Y. 51, Seld. Notes 216. In Second Nat. Bank v. Burt, 93 N. Y. 233, a group of partners had been transacting business in different localities under different firm names and Ch. J. Ruger speaking for the court said: "So far as the liability of such firms is concerned they each constitute legal entities, assuming and performing their respective obligations, and each holding exclusive funds to effect the objects of its association." Further in this connection see, In re Haines, 176 Pa. St. 354, 35 Atl. 237. The civil law, as administered by the courts of Louisiana, regards a partnership once formed and put into action as "a moral being, distinct from the persons who compose it. It is a civil person which has its peculiar rights and attributes. * * * The ideal being, thus recognized by a fiction of law, is the owner" of the partnership property. Succession of Pilcher, 39 La. Ann. 362, 1 So. 929, quoting Smith v. McMicken, 3 La. Ann. 319. See also, In re Arick's Succession, 22 La. Ann. 501; Sherwood v. His Creditors, 42 La. Ann. 103, 7 So. 79; Newman v. Eldridge, 107 La. 315, 31 So. 688; Stothart v. William T. Hardie & Co., 110 La. 696, 34 So. 740; Liverpool, B. & R. P. Nav. Co. v. Agar, 4 Woods (U. S.) 201, 14 Fed. 615.

[13] In re Bertenshaw, 157 Fed. 363, 85 C. C. A. 61, 17 L. R. A. (N. S.) 886.

[14] Walker v. Wait, 50 Vt. 668. "Partnerships, in courts of law or in courts of equity, are entities separate and distinct from that of the individuals who compose it, as much as the individuals themselves are separate and distinct persons." Lacey v. Cowan, 162 Ala. 546, 50 So. 281. "A partnership is a legal entity as

as radical as they appear, for to each unqualified assertion there should be added the modification that "for certain purposes this fiction [that of a separate entity, for which the nontechnical nomenclature of the mercantile world is originally responsible] may be very properly indulged."[15] The Supreme Court of Indiana has declared that, "Expressions to that effect [a partnership is a legal entity] are not infrequently found in the cases; but it appears clear to us that in thus speaking the courts have referred to partnerships as legal entities merely as a term of accommodation, where there was under consideration some question as to the rights of the partners inter se, or of the derivative rights of creditors growing out of the equities of the partners. Such statements cannot be accepted as affording a sufficient foundation for the view that a partnership is not composed of its individual members."[16] The separate-entity theory is, in-

well as a corporation, except in a more limited sense." Duquesne Distributing Co. v. Greenbaum, 135 Ky. 182, 121 S. W. 1026, 24 L. R. A. (N. S.) 955. It is Justice Cooley who, in delivering the opinion of the court, in Robertson v. Corsett, 39 Mich. 777, declares that: "The partnership for most legal purposes is a distinct entity;—having its own property, capable of contracting separate debts, having the right to sue in equity its several members, and to be protected against their conduct to the same extent that it might be against the conduct of strangers." In Curtis v. Hollingshead, 14 N. J. Law 402, it is said: "A partnership is considered in law as an artificial person or being, distinct from the individuals composing it. It is treated as such in law, and in equity. Its property is first to be appropriated to the payment of its debts. The individual partners are indeed liable and bound to the extent of their separate property for the partnership debts. They may therefore be called debtors, but they are only constructively, or rather consequentially, so." So also, in Allen v. Davids, 70 S. Car. 260, 49 S. E. 846, the court says: "We must always remember that the partnership is a new entity, and binds everybody who is a party to it, whether known as a party to it at the time or not." Again in Richards v. Leveille, 44 Nebr. 38, 62 N. W. 304, it is said: "A partnership is a distinct entity, having its own property, debts, and credits. For the purposes for which it was created, it is a person, and as such is recognized by the law."

[15] Jones v. Blun, 145 N. Y. 333, 39 N. E. 954. Continuing, Bartlett, J., speaking for the court says: "In keeping partnership accounts, and in marshaling the assets of an insolvent or liquidating firm, this is constantly done. It cannot be invoked, however, to shield the individual partner * * * from the effect of a statute forbidding a preference, or to enable him to do as a partner that which the law prohibits him from doing as an individual."

[16] State v. Krasher, 170 Ind. 43, 83 N. E. 498. In line with this compromise idea the United States Supreme Court in Meehan v. Valentine, 145 U. S. 611, 36 L. ed. 835, 12 Sup. Ct. 972, affg. 29 Fed. 276, cites approvingly the holding in Bank of Buffalo v. Thompson, 121 N. Y. 280, 24 N. E. 473, to the effect that "a partnership, though not strictly a legal entity as distinct from the persons composing it, yet being commonly so regarded by men of business, might be so treated in interpreting a commercial contract," and quotes

creasingly, being given statutory utterance; legislation is more and more providing, at least by implication, that for the accomplishment of certain ends, for instance, the bringing of suits against partnerships, the latter are to be deemed separate entities.[17]

Sir George Jessel who, in Pooley v. Driver, L. R. 5 Ch. Div. 458, says: "You cannot grasp the notion of agency, properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners; a notion which was well grasped by the old Roman lawyers, and which was partly understood in the courts of equity." Likewise the court in Faulkner v. Hyman, 142 Mass. 33, 6 N. E. 846, takes the intermediate position that, "A partnership is not a legal entity, having as such a domicile, although for purposes of taxation and for other purposes it may be treated by statute as having a locality." See also, Warner v. Smith, 1 De Gex, J. & S. 337; Nichol v. Stewart, 36 Ark. 612; Meyer v. Wilson, 166 Ind. 651, 76 N. E. 748; Henry v. Anderson, 77 Ind. 361; Tuller v. Leaverton, 143 Iowa 162, 121 N. W. 515, 136 Am. St. 756; Hosmer v. Burke, 26 Iowa 353; Johnson v. Smith, Morris (Iowa) 105; Fitzgerald v. Grimmell, 64 Iowa 261, 20 N. W. 179; Cross v. Burlington Nat. Bank, 17 Kans. 336; Victor v. Spalding, 202 Mass. 234, 88 N. E. 846; Chaffee v. Jones, 19 Pick. (Mass.) 260; Robertson v. Corsett, 39 Mich. 777; Hubbardston Lumber Co. v. Covert, 35 Mich. 254; Roop v. Herron, 15 Nebr. 73, 17 N. W. 353; Rosebaum v. Hayden, 22 Nebr. 744, 36 N. W. 147; Curtis v. Hollingshead, 14 N. J. L. 402; Good v. Red River Valley Co., 12 N. Mex. 245, 78 Pac. 46; Napier v. Spielmann, 127 App. Div. (N. Y.) 567, 111 N. Y. S. 983; In re Haines, 176 Pa. St. 354, 35 Atl. 237; Meily v. Wood, 71 Pa. St. 488, 10 Am. Rep. 719; In re Nims, 16 Blatchf. (U. S.) 439, Fed. Cas. No. 10269; Wheatley's Heirs v. Calhoun, 12 Leigh (Va.) 264, 37 Am. Dec. 654.

[17] Atlantic Glass Co. v. Paulk, 83 Ala. 404, 3 So. 800; Opelika v. Daniel, 59 Ala. 211; Sims v. Jacobson, 51 Ala. 186; Williams v. Hurley, 135 Ala. 319, 33 So. 159; Gilman v. Cosgrove, 22 Cal. 356; King v. Randlett, 33 Cal. 318; Harrison v. McCormick, 69 Cal. 616, 11 Pac. 456; Phelps Mfg. Co. v. Enz, 19 Conn. 58; Manson v. Williams, 153 Fed. 525, 82 C. C. A. 475; In re Bertenshaw, 157 Fed. 363, 85 C. C. A. 61, 17 L. R. A. (N. S.) 886; Mills v. Fisher, 159 Fed. 897, 87 C. C. A. 77, 16 L. R. A. (N. S.) 656n; Bruett v. F. C. Austin Drainage Excavator Co., 174 Fed. 668; In re Perley, 138 Fed. 927; Drucker v. Wellhouse, 82 Ga. 129, 8 S. E. 40, 2 L. R. A. 328; McDonough v. Carter, 98 Ga. 703, 25 S. E. 938; United States Exp. Co. v. Bedbury, 34 Ill. 459; Sweet v. Ervin, 54 Iowa 101, 6 N. W. 156; Newlon v. Heaton, 42 Iowa 593; Fitzgerald v. Grimmell, 64 Iowa 261, 20 N. W. 179; Anderson v. Wilson, 142 Iowa 158, 120 N. W. 677; Ruthven v. Beckwith, 84 Iowa 715, 45 N. W. 1073, 51 N. W. 153; Stockwell v. Brewer, 59 Maine 286; Faneuil Hall Nat. Bank v. Meloon, 183 Mass. 66, 66 N. E. 410, 97 Am. St. 416; Hoadley v. Essex County, 105 Mass. 519; Hubbardston Lumber Co. v. Covert, 35 Mich. 254; McCoy v. Anderson, 47 Mich. 502, 11 N. W. 290; Barber v. Smith, 41 Mich. 138, 1 N. W. 992; Williams v. Saginaw, 51 Mich. 120, 16 N. W. 260; Dimond v. Minnesota Sav. Bank, 70 Minn. 298, 73 N. W. 182; Gale v. Townsend, 45 Minn. 357, 47 N. W. 1064; Rosenbaum v. Hayden, 22 Nebr. 744, 36 N. W. 147; Leach v. Milburn Wagon Co., 14 Nebr. 106, 15 N. W. 232; Burlington & Mo. River R. Co. v. Dick, 7 Nebr. 242; Martin v. District Court of First Dist., 13 Nev. 85; Gillig v. Lake Bigler Road Co., 2 Nev. 214; Good v. Red River Valley Co., 12 N. Mex. 245, 78 Pac. 46; Robinson v. Ward, 13 Ohio St. 293; Abernathy v. Latimore, 19 Ohio 286; Haskins v. Alcott, 13 Ohio St. 210; Beers v. Gurney, 7 Ohio C. D. 411; Rice v. Sum-

§ 4877. **Firm name not essential.**—A symbolical firm name, although desirable almost to the point of necessity,[18] is not one of the essentials of a partnership,[19] since the firm may, on occasion, be bound by the employment by one partner, either of his individual name alone,[20] or of it and the names of his

mers, 2 Pa. Dist. 31; Frank v. Tatum, 87 Texas 204, 25 S. W. 409; State v. Cloudt (Tex. Civ. App.), 84 S. W. 415; Schweppe v. Wellauer, 76 Wis. 19, 45 N. W. 17; O'Brien v. Foglesong, 3 Wyo. 57, 31 Pac. 1047. And compare Williams Land Co. v. Crull (Tex. Civ. App.), 125 S. W. 339. The present Bankruptcy Act (U. S. Comp. Stat. 1901, p. 3424), "treats the copartnership as a legal entity, irrespective of the status or the separate rights of the individual copartners. It deals with the copartnership as a person for the purpose of subjecting the partnership property to the satisfaction of copartnership liabilities. * * * And so it has been held that a copartnership may be adjudged a bankrupt after the death of one partner, upon an act of bankruptcy committed by the surviving partner, and that the adjudication of bankruptcy of a copartnership does not necessarily draw into the proceedings the estate of every individual member." In re Stein, 127 Fed. 547, 62 C. C. A. 272. See also, British Partnership Act, 1890, § 4.

[18] A firm name is "simply a convenient abbreviation of their two names, and when used had the same effect as if no firm name had been adopted and the name of each partner had been signed in full as a partner; and it bound each only because he had adopted it as his name, and authorized its use for the purposes for which it was used." Haskins v. D'Este, 133 Mass. 356. See further, Kelley v. Bourne, 15 Ore. 476, 16 Pac. 40.

[19] Pursley v. Ramsey, 31 Ga. 403; Kitner v. Whitlock, 88 Ill. 513; Johnson v. Carter, 120 Iowa 355, 94 N. W. 850; Robertson v. De Lizardi, 4 Rob. (La.) 300; Getchell v. Foster, 106 Mass. 42; Haskins v. D'Este, 133 Mass. 356; Meriden Nat. Bank v. Gallaudet, 120 N. Y. 298, 24 N. E. 994; Ontario Bank v. Hennessey, 48 N. Y. 545; Wright v. Hooker, 10 N. Y. 51, Seld. Notes (N. Y.) 216; Le Roy v. Johnson, 2 Pet. (U. S.) 186, 7 L. ed. 391. See Stickney v. Smith, 5 Gil. (Minn.) 390. See also, McGregor v. Cleveland, 5 Wend. (N. Y.) 475; Austin v. Williams, 2 Ohio 61.

[20] Willet v. Chambers, Cowp. 814; Tomlins v. Lawrence, 3 M. & P. 555; Horton v. Miller, 84 Ala. 537, 4 So. 370; Snead v. Barringer, 1 Stew. (Ala.) 134; Brown v. Lawrence, 5 Conn. 397; Dougal v. Cowles, 5 Day (Conn.) 511; Byington v. Gaff, 44 Ill. 510; Bisel v. Hobbs, 6 Blackf. (Ind.) 479; Caldwell v. Sithens, 5 Blackf. (Ind.) 99; Theilen v. Hann, 27 Kans. 778; Faris v. Cook, 110 Ky. 867, 23 Ky. L. 328, 62 S. W. 1043, 63 S. W. 600; Hermann v. Louisiana State Ins. Co., 8 La. 285; Getchel v. Foster, 106 Mass. 42; Beckwith v. Mace, 140 Mich. 157, 103 N. W. 559; Gilroy v. Loftus, 21 Misc. (N. Y.) 317, 47 N. Y. S. 138; Hardin v. Dolge, 46 App. Div. (N. Y.) 416, 61 N. Y. S. 753; National Bank v. Ingraham, 58 Barb. (N. Y.) 290; Ontario Bank v. Hennessey, 48 N. Y. 545; Sage v. Sherman, 2 N. Y. 417; Graeff v. Hitchman, 5 Watts (Pa.) 454; Puckett v. Stokes, 2 Baxt. (Tenn.) 442; Gavin v. Walker, 14 Lea (Tenn.) 643; Dockery v. Faulkner (Tex. Civ. App.), 101 S. W. 501; Sloo v. Powell, Dal. Dig. (Tex.) 467; Burnley v. Rice, 18 Tex. 481; Van Reimsdyk v. Kane, 1 Gall. (U. S.) 630, Fed. Cas. No. 16872; Salt Lake Brewing Co. v. Hawke, 24 Utah 199, 66 Pac. 1058; Kyle v. Connelly, 3 Leigh (Va.) 719. See also, Mifflin v. Smith, 17 Serg. & R. (Pa.) 165. Likewise an individual partner's name to which is added the suffix "& Co." may be effective to bind the firm. Drake v. Elwyn, 1 Caines (N. Y.) 184; Aspinwall v. Williams, 1 Ohio 84; Austin v. Williams, 2 Ohio 61. See in this connection Baring v. Crafts, 9 Metc.

copartners.[21] "The adoption of a firm name is largely for convenience in making contracts binding on all the members by its use, thus obviating the necessity of securing the individual assent of and execution by each of the partners, which, when the members are numerous, might not only be inconvenient, but sometimes impracticable."[22] Further, a single firm may have more than one name, which, when used, will have a binding effect.[23]

§ 4878. Firm name—Choice, display, failure to choose.—The power of a partnership to choose a name, although comprehensive, is not altogether unlimited. While the name is entirely a matter of convention,[24] and, generally speaking may be whatever the partners may choose to make it,[25] wholly

(Mass.) 380; Crum v. Abbott, 2 McLean (U. S.) 233, Fed. Cas. No. 3454. This is also true of a partner's name and the suffix "as trustee." Morse v. Richmond, 97 Ill. 303. See also, Mick v. Howard, 1 Ind. 250, Smith (Ind.) 160. But see Fair v. Citizens' State Bank, 9 Kans. App. 779, 59 Pac. 43; Clark v. Houghton, 12 Gray (Mass.) 38; Reevs v. Hardy, 7 Mo. 348; Farmers' Bank v. Bayless, 35 Mo. 428; Marvin v. Buchanan, 62 Barb. (N. Y.) 468; Dickinson v. Legare, 1 Desaus. (S. Car.) 537; Smith v. Hoffman, 2 Cranch C. C. (U. S.) 651, Fed. Cas. No. 13061; Jones v. Anderson, 7 Leigh (Va.) 308.

[21] "There is an established principle that any partner may execute a valid mortgage of partnership goods as security for a partnership debt by signing the firm name or the individual names of the members of the firm, and it is immaterial whether he sign the name of each copartner separately or sign the firm name, and the addition of a seal to the individual names does not invalidate the mortgage, because a seal is unnecessary. Jones on Chattel Mortgage, § 46. The learned author, in the further discussion of this principle, lays it down that, although one partner signs the names of the several individuals composing the firm, the acquiescence of the other partners in such a transaction would place the validity of it beyond question, and it does not matter whether the acquiescence be given at the time of the transaction or subsequently." Davis v. Turner, 120 Fed. 605, 56 C. C. A. 669. See further, per Maule, J., in Norton v. Seymour, 3 C. B. 792; Kitner v. Whitlock, 88 Ill. 513; Iddings v. Pierson, 100 Ind. 418; Mick v. Howard, 1 Ind. 250, Smith (Ind.) 160; Getchell v. Foster, 106 Mass. 42; Patch v. Wheatland, 8 Allen (Mass.) 102; Holden v. Bloxum, 35 Miss. 381; Richardson v. Huggins, 23 N. H. 106; McGregor v. Cleveland, 5 Wend. (N. Y.) 475; Walker v. Dickerson, 3 N. Car. 23; Crozier, Rhea & Co. v. Kirker, 4 Tex. 252, 51 Am. Dec. 724. And compare Gay v. Johnson, 45 N. H. 587; Crouch v. Bowman, 3 Humph. (Tenn.) 209.

[22] Meier v. First Nat. Bank, 55 Ohio St. 446, 45 N. E. 907.

[23] Hunt v. Semonin, 79 Ky. 270, 2 Ky. L. 334; Moffat v. McKissick, 8 Baxt. (Tenn.) 517; Michael v. Workman, 5 W. Va. 391. See also, Holland v. Long, 57 Ga. 36; McGregor v. Cleveland, 5 Wend. (N. Y.) 475; Brown v. Pickard, 4 Utah 292, 9 Pac. 573, 11 Pac. 512.

[24] Edgerton v. Preston, 15 Ill. App. 23.

[25] Maugham v. Sharpe, 17 C. B. (N. S.) 443, 112 E. C. L. 443; Haskins v. D'Este, 133 Mass. 356; Holbrook v. St. Paul Fire & Marine Ins. Co., 25 Minn. 229; Manhattan Brass & Mfg. Co. v. Sears, 45 N. Y. 797, 6 Am. Rep. 177, revg. 31 N. Y. Super. Ct. 426; Nichols v. White, 41 Hun (N. Y.) 152, 3 N. Y. St. 784, affd. 114 N. Y.

fanciful,[26] in form appropriate to a corporation,[27] inclusive of the names of none, some or all of the members of the firm,[28] or constituted of the name of a single partner,[29] of an agent,[30] or of a deceased person,[31] the power of choice must invariably be exercised in such a way that neither the owner of any other trade name nor the public can afterward complain of fraud,[32] and also, in compliance with regulative statutes.[33] Further in connection with this latter, there are some states which require a partnership,

639, 21 N. E. 1120; Walker v. Miller, 139 N. Car. 448, 52 S. E. 125, 1 L. R. A. (N. S.) 157, 111 Am. St. 805; Kelley v. Bourne, 15 Ore. 476, 16 Pac. 40. And see, Union Brewing Co. v. Inter State Bank & Trust Co., 240 Ill. 454, 88 N. E. 997.

[26] Kahn v. Thomson, 113 Ga. 957, 39 S. E. 322; Lauferty v. Wheeler, 11 Daly (N. Y.) 194, 63 How. Pr. (N. Y.) 488; Gay v. Seibold, 97 N. Y. 472, 49 Am. Rep. 533.

[27] Whitt v. Blount, 124 Ga. 671, 53 S. E. 205; Carico v. Moore, 4 Ind. App. 20, 29 N. E. 928.

[28] Shain v. DuJardin, 105 Cal. XVII, 38 Pac. 529; Crawford v. Collins, 45 Barb. (N. Y.) 269, 30 How. Pr. (N. Y.) 398.

[29] "The firm name is such as the copartners choose to adopt. It may disclose the names of all the partners or of none of them, or the name of but one of them may be used as the firm name." Daugherty v. Heckard, 189 Ill. 239, 59 N. E. 569. See also, Kirk v. Blurton, 9 M. & W. 284; Manufacturers' & Mechanics' Bank v. Winship, 5 Pick. (Mass.) 11, 16 Am. Dec. 369; Wright v. Hooker, 10 N. Y. 51, Seld. Notes (N. Y.) 216; Palmer v. Stephens, 1 Den. (N. Y.) 471; Oliphant v. Mathews, 16 Barb. (N. Y.) 608; Williams v. Gillies, 53 How. Pr. (N. Y.) 429, affd. 13 Hun (N. Y.) 422, and revd. 75 N. Y. 197; Martin v. Johnson, 8 Daly (N. Y.) 541. See also, Masters v. Brooks, 132 App. Div. (N. Y.) 874, 117 N. Y. S. 585; Winship v. Bank of United States, 5 Pet. (U. S.) 529, 8 L. ed. 216.

[30] Rochester Bank v. Monteath, 1 Den. (N. Y.) 402, 43 Am. Dec. 681.

[31] "Partnerships are sometimes carried on under the name of persons who are dead, but who, in their lifetime, had established an extensive business and a high reputation for integrity and fidelity in trade." Oppenheimer v. Clemmons, 18 Fed. 886.

[32] Merchant Banking Co. of London v. Merchants' Joint Stock Bank, 9 Ch. Div. 560; Holloway v. Holloway, 13 Beav. 209; Lee v. Haley, L. R. 5 Ch. 155; Croft v. Day, 7 Beav. 84; L. E. Waterman Co. v. Modern Pen Co., 193 Fed. 242; Frazer v. Frazer Lubricator Co., 121 Ill. 147, 13 N. E. 639, 2 Am. St. 73; Bininger v. Clark, 60 Barb. (N. Y.) 113, 10 Abb. Pr. (N. S.) (N. Y.) 264; Adams v. Brown, 16 Ohio St. 75. But see Burgess v. Burgess, 3 De Gex, M. & G. 896; Lawson v. Bank of London, 18 C. B. 84, 25 L. J. C. P. 188; Levy v. Walker, 10 Ch. Div. 436; Rogers v. Rogers, 53 Conn. 121, 1 Atl. 807, 5 Atl. 675, 55 Am. Rep. 78; Russia Cement Co. v. La Page, 147 Mass. 206, 17 N. E. 304, 9 Am. St. 685; Williams v. Farrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161; Meneely v. Meneely, 62 N. Y. 427, 20 Am. Rep. 489; MacDonald v. Trojan Button Fastener Co., 9 N. Y. S. 383, 29 N. Y. St. 867, affd. 56 Hun (N. Y.) 648, 31 N. Y. St. 374, 10 N. Y. S. 91.

[33] For example: Georgia Code, 1911, vol. 1, § 3165: "No partnership may lawfully insert in their firm name or style the name of any individual not actually a copartner, nor continue in such firm name or style the name of a retired partner. And each member of the firm violating this provision shall forfeit the sum of $100 for every day's violation, to be recovered by any person who may prosecute for the same." Hurd's Rev. Stat. (Ill.), 1908, p. 756, § 220, penalizes assumption of corporate name by an unincorporated association.

upon the choice of a fictitious name to which is added the suffix "and company" or "& Co.", to file and publish a certificate containing the full individual names of the separate members of the

Const. & Rev. Laws of La., 1904, vol. 2, p. 1218, §§ 2668, 2669: "Hereafter no person shall transact business in the name of a partner not interested in his firm, and when the designation 'and Company' or '& Co.' is used, it shall represent an actual partner or partners." "Any person offending against the provisions of the foregoing section, shall, upon conviction thereof, be deemed guilty of a misdemeanor and be punished by a fine not exceeding one thousand dollars, recoverable before any court of competent jurisdiction." See Wolfe v. Joubert, 45 La. Ann. 1100, 13 So. 806, 21 L. R. A. 772; Kent v. Mojonier, 36 La. Ann. 259; In the matter of the Pelican Ins. Co., 47 La. Ann. 935, 17 So. 427. Rev. Laws of Mass., 1902, vol. 1, p. 620, § 5: "A person who carries on business in this commonwealth shall not assume or continue to use in his business the name of a person formerly connected with him in partnership or the name of any other person, either alone or in connection with his own or with any other name or designation, without the consent in writing of such person or of his legal representatives." See Bowman v. Floyd, 3 Allen (Mass.) 76, 80 Am. Dec. 55; Morse v. Hall, 109 Mass. 409; Hallett v. Cumston, 110 Mass. 29; Lodge v. Weld, 139 Mass. 499, 2 N. E. 95; Martin v. Bowker, 163 Mass. 461, 40 N. E. 766; Lawrence v. Hull, 169 Mass. 250, 47 N. E. 1001; Rogers v. Taintor, 97 Mass. 291. Consol. Laws of New York, 1909, p. 3734, § 22: "No person shall hereafter transact business in the name of a partner not interested in his firm, and when the designation 'and company' or '& Co.' is used, it shall represent an actual partner; but a violation of this section shall not be a defense in an action or proceeding brought by an assignee for the benefit of creditors or by a receiver of the property of or by an executor or administrator of a person who has violated the same." Page 3903, § 924: "A person who transacts business, using the name, as partner, of one not interested with him as partner, or using the designation 'and company' or '& Co.' when no actual partner is represented thereby is guilty of a misdemeanor. But this section does not apply to any case where it is specially prescribed by statute that a partnership name may be continued in use by a successor, survivor, or other person." See Kennedy v. Budd, 5 App. Div. (N. Y.) 140, 39 N. Y. S. 81; Loeb v. Firemen's Ins. Co., 78 App. Div. (N. Y.) 113, 79 N. Y. S. 510, 12 N. Y. Ann. Cas. 343; Donlon v. English, 89 Hun (N. Y.) 67, 37 N. Y. S. 82; Vandergriff v. Bertrom, 83 App. Div. (N. Y.) 548, 82 N. Y. S. 153; Rosenheim v. Rosenfield, 59 Hun (N. Y.) 625, 37 N. Y. St. 550, 13 N. Y. S. 720; Cahn v. Gottschalk, 14 Daly (N. Y.) 542, 16 N. Y. St. 818, 2 N. Y. S. 13; Sinnott v. German-American Bank, 164 N. Y. 386, 58 N. E. 286; Cody v. Dempsey, 86 App. Div. (N. Y.) 335, 83 N. Y. S. 899; McArdle v. Thames Iron Works, 96 App. Div. (N. Y.) 139, 89 N. Y. S. 485; Slater v. Slater, 78 App. Div. (N. Y.) 449, 80 N. Y. S. 363; Zimmerman v. Erhard, 83 N. Y. 74, 60 How. Pr. (N. Y.) 163, 38 Am. Rep. 396; Castle v. Graham, 180 N. Y. 553, 73 N. E. 1120; Jenner v. Shope, 67 Misc. (N. Y.) 159, 121 N. Y. S. 599; Gay v. Seibold, 97 N. Y. 472, 49 Am. Rep. 533; Lane v. Arnold. 11 Daly (N. Y.) 293, 13 Abb. N. Cas. (N. Y.) 73, revd. 99 N. Y. 648; Stoddart v. Key, 62 How. Pr. (N. Y.) 137; O'Toole v. Garvin, 1 Hun (N. Y.) 92, 3 Thomp. & C. (N. Y.) 118. Okla. Compiled Laws (1909), p. 645, § 2444: "Every person transacting business in the name of a person as a partner who is not interested in his firm, or transacting business under a firm name in which the designation 'and company' or '& Co.' is used without representing an actual partner except in the cases in which the continued use of a copartnership name is authorized by law, is guilty of a misdemeanor."

[34] For example: Cal. Civil Code (1906), §§ 2466, 2467. See Davis v.

firm,[34] and others which make necessary for specified purposes the display of a sign divulging the identity of those having an interest in the business.[35] Even when a firm name has not been provided for in the articles of association, it still may exist as the result of either a subsequent agreement or acquiescence,[36] or the custom of the partnership and the latter's manner of conducting the business.[37] "It is not necessary that a firm name should be inserted in the articles of partnership. The name in which their business is done, and by which they are generally known, becomes legitimately the firm name."[38] It has been held, however, that if a name has been selected as the one in which the business of the firm is to be conducted, it is not subject to change except with the consent of all the partners.[39]

§ 4879. **Use of firm name.**—In opposition to the doctrine that the name formally adopted as that of the firm must be used in order that the partnership may be bound,[40] the proposition

Lezinsky, 93 Cal. 126, 28 Pac. 811; Gray v. Wells, 118 Cal. 11, 50 Pac. 23; North v. Moore, 135 Cal. 621, 67 Pac. 1037; Cook v. Fowler, 101 Cal. 89, 35 Pac. 431; 25 Del. Laws, ch. 146; State v. Ferschke (Del.), 81 Atl. 401; Supp. to Rev. Laws of Mass., 1902-1908, pp. 575, 576; Cobbey's Ann. Stat. of Nebr. (1911), § 9700; Consol. Laws of New York (1909), p. 3733, § 21; Rev. Codes of N. Dak. (1905), §§ 5858, 5859; Rev. St. Ohio, §§ 3170-6; Cincinnati Traction Co. v. Hulvershorn, 31 Ohio C. C. 444; Compiled Laws of Okla. (1909), p. 1132, §§ 5023, 5024; Rem & Bal. Code Wash., §§ 8369, 8372; Hale v. City Cab, Carriage & Transfer Co., 66 Wash. 459, 119 Pac. 837. See Swope v. Burnham, 6 Okla. 736, 52 Pac. 924; Rev. Code of S. Dak. (1903) p. 802, §§ 1762, 1763. See Bovee v. De Jong, 22 S. Dak. 163, 116 N. W. 83; and Gen. Code of Ohio (1910), §§ 8099-8105. See also, Cobble v. Farmers' Bank, 63 Ohio St. 528, 59 N. E. 221.

[35] For example: Mississippi Code of 1892, § 4234. See Dale v. Harrahan, 85 Miss. 49, 37 So. 458; Rev. Stat. of S. Car. (1893), § 1432; Kaufman v. Carter, 67 S. Car. 312, 45 S. E. 211.

[36] Wright v. Hooker, 10 N. Y. 51, Seld. Notes (N. Y.) 216; McGregor v. Cleveland, 5 Wend. (N. Y.) 475.

[37] Le Roy v. Johnson, 2 Pet. (U. S.) 186, 7 L. ed. 391.

[38] Pursley v. Ramsey, 31 Ga. 403.

[39] Palmer v. Stephens, 1 Den. (N. Y.) 471; Tilford v. Ramsay, 37 Mo. 563; Tams v. Hitner, 9 Pa. St. 441; Moffat v. McKissick, 8 Baxt. (Tenn.) 517; Le Roy v. Johnson, 2 Pet. (U. S.) 186, 7 L. ed. 391.

[40] "A partnership does not create the partners agents to bind the other partners, except by acts done in the firm name." Crouch v. Bowman, 3 Humph. (Tenn.) 209. See Patch v. Wheatland, 8 Allen (Mass.) 102. In this case it was held that one partner could execute a bill of sale of firm personalty by signing the name of the firm or the name of each copartner separately. But, "A very different question would arise if one copartner should undertake to sign the separate names of his copartners to any contract, promise or agreement, by which a separate or individual or a new and additional liability might be created or assumed." (Question undecided.) Kirk v. Blurton, 9 M. & W. 284; Royal Ca-

that such symbolical name may be displaced by an effective substitute when the intention of the parties is to bind the firm and the partnership appropriates the consideration, has found favor with a number of courts.[41] So far as the conveyance of real estate to or from a firm is concerned, the rule seems to be that a deed to or by a partnership in the firm name, the full name of no one of the partners being given, does not pass a legal title, but may pass an equitable one.[42] But "where the partnership name thus employed [to designate the grantee or mortgagee] contains the name or names of one or more of the partners the instrument will have legal effect as a conveyance or mortgage to the partner

nadian Bank v. Wilson, 24 U. C. C. P. 362; Wood v. Martin, 115 Ga. 147, 41 S. E. 490; Gordon v. Bankard, 37 Ill. 147; Ostrom v. Jacobs, 9 Metc. (Mass.) 454; Heenan v. Nash, 8 Gil. (Minn.) 363, 83 Am. Dec. 790; Tilford v. Ramsey, 37 Mo. 563; Haskell v. Champion, 30 Mo. 136; Mershon v. Hobensack, 22 N. J. L. 372, affd. 23 N. J. L. 580; Drake v. Elwyn, 1 Caines (N. Y.) 184; Palmer v. Stephens, 1 Denio (N. Y.) 471; Kirby v. Hewitt, 26 Barb. (N. Y.) 607; Masterson v. Mansfield, 25 Tex. Civ. App. 262, 61 S. W. 505. See Sullivan v. Visconti, 68 N. J. L. 543, 53 Atl. 598, affd. 69 N. J. L. 452, 55 Atl. 1133, and Camp v. S. W. Bacon Fruit Co., 117 Ga. 149, 43 S. E. 425.

[41] "Partners may bind themselves by other than such prescribed firm name, if they choose to adopt for convenience, or to prevent confusion, a different mode of executing their obligations or contracts from the one prescribed by their original agreement." Moffat v. McKissick, 8 Baxt. (Tenn.) 517. See Smith v. Collins, 115 Mass. 388; Hardin v. Dolge, 46 App. Div. (N. Y.) 416, 61 N. Y. S. 753; Gilroy v. Loftus, 21 Misc. (N. Y.) 317, 47 N. Y. S. 138; Salt Lake City Brew. Co. v. Hawke, 24 Utah 199, 66 Pac. 1058; McCoy v. Jack, 47 W. Va. 201, 34 S. E. 991. This apparently does not hold good as regards a nontrading partnership. McPherson v. Bristol, 115 Mich. 258, 73 N. W. 236.

[42] "It is the general rule that a conveyance to a partnership by its firm name which does not include the name of any of the partners does not vest in it any legal title because the partnership is not recognized in law as a person. Because the deed is void at law, it by no means follows that the same rule applies in equity. The appellees allege in their amended complaint that the individual members of the firm were the purchasers of the land at the execution sale, and that by mistake of the draftsman the name of the firm, instead of the names of the persons who composed the firm, was written in the deed. It is a fundamental principle of equity that it regards and treats that as done which in good conscience ought to be done, * * * and it would be inequitable to deny appellees the relief prayed for [reformation]." Spaulding Mfg. Co. v. Godbold, 92 Ark. 63, 121 S. W. 1063, 29 L. R. A. (N. S.) 282n, 135 Am. St. 168; Emmet v. Dekle, 132 Ga. 593, 64 S. E. 682; Frost v. Wolf, 77 Tex. 455, 14 S. W. 440, 19 Am. St. 761; Harris v. Bryson, 34 Tex. Civ. App. 532, 80 S. W. 105. See also, Stambaugh v. Smith, 23 Ohio St. 584; New Vienna Bank v. Johnson, 47 Ohio St. 306, 24 N. E. 503, 8 L. R. A. 614; Kelley v. Bourne, 15 Ore. 476, 16 Pac. 40. A firm may, as agent, execute a deed to realty in its partnership name. McCulloch County Land & Cattle Co. v. Whiteford, 21 Tex. Civ. App. 314, 50 S. W. 1042; Townshend v. Goodfellow, 40 Minn. 312, 41 N. W. 1056, 3 L. R. A. 739n, 12 Am. St. 736; Walker v. Miller, 139 N. Car. 448, 52 S. E. 125, 1 L. R. A. (N. S.) 157, 111 Am. St. 805. See further, Tuller v. Leaverton,

or partners thus named,"[43] who will hold the title in trust for the entire firm membership.[44] This impotence of the partnership name likewise extends, under the common law, to the bringing of actions by or against the firm,[45] but not, apparently, to

143 Iowa 162, 121 N. W. 515, 136 Am. St. 756. And compare Grant v. Bannister, 160 Cal. 774, 118 Pac. 253.

[43] Menage v. Burke, 43 Minn. 211, 45 N. W. 155, 19 Am. St. 235. See also, Cole v. Mettee, 65 Ark. 503, 47 S. W. 407, 67 Am. St. 945; Woodward v. McAdam, 101 Cal. 438, 35 Pac. 1016; Bernstein v. Hobelman, 70 Md. 29, 16 Atl. 374; Schumpert v. Dillard, Pinson & Co., 55 Miss. 348; Walker v. Miller, 139 N. Car. 448, 52 S. E. 125, 1 L. R. A. (N. S.) 157, 111 Am. St. 805; Holmes v. Jarrett, 7 Heisk. (Tenn.) 506; Moreau v. Saffarans, 3 Sneed (Tenn.) 595, 67 Am. Dec. 582; Sherry v. Gilmore, 58 Wis. 324, 17 N. W. 252.

[44] Schumpert v. Dillard, Pinson & Co., 55 Miss. 348. See further in this connection, Chicago Lumber Co. v. Ashworth, 26 Kans. 212.

[45] "That a partnership cannot sue or be sued in its partnership name in a circuit court of the United States without alleging the citizenship of its individual members is well settled." Bruett v. F. C. Austin Drainage Excavator Co., 174 Fed. 668. "It is elementary that in suits at law, by or against a copartnership, all the partners must be named as plaintiffs or defendants, as the case may be." As to this proposition, "the authorities (where, as in this state the common law obtains) are practically unanimous." Kalamazoo Trust Co. v. Merrill, 159 Mich. 649, 124 N. W. 597. "It is well settled by the authorities that in a suit to collect a debt due a partnership firm all the partners in interest, except dormant partners, are necessary parties plaintiff." Allen v. Fleck, 54 Tex. Civ. App. 507, 118 S. W. 176. See further, Reid v. McLeod, 20 Ala. 576; Phillips v. Holmes, 165 Ala. 250, 51 So. 625; Simmons v. Titche, 102 Ala. 317, 14 So. 786; Moore v. Burns, 60 Ala. 269; Tompkins v. Levy, 87 Ala. 263, 6 So. 346, 13 Am. St. 31; Leola Lumber Co. v. Bozarth, 91 Ark. 10, 120 S. W. 152; Ingham Lumber Co. v. Ingersoll, 93 Ark. 447, 125 S. W. 139; Gilman v. Cosgrove, 22 Cal. 356; Harrison v. McCormick, 69 Cal. 616, 11 Pac. 456; Roberts v. Rowan, 2 Harr. (Del.) 314; Metal Stamping Co. v. Crandall, Fed. Cas. No. 9493c; Richardson v. Smith, 21 Fla. 336; Jones v. Watson, 63 Ga. 679; DeLeon v. Heller, 77 Ga. 740; Page v. Brant, 18 Ill. 38; Ives v. Muhlenburg, 135 Ill. App. 517; Davis v. Hubbard, 4 Blackf. (Ind.) 50; Hughes v. Walker, 4 Blackf. (Ind.) 50; Holland v. Butler, 5 Blackf. (Ind.) 255; Livingston v. Harvey, 10 Ind. 218; Pollock v. Dunning, 54 Ind. 115; Armstrong v. Robinson, 5 Gill & J. (Md.) 412; Barber v. Smith, 41 Mich. 138, 1 N. W. 992; Smith v. Canfield, 8 Mich. 493; Blackwell v. Reid, 41 Miss. 102; Lewis v. Cline (Miss.), 5 So. 112; McCartey v. Kittrell, 55 Miss. 253; Mitchell v. Railton, 45 Mo. App. 273; Conrades & Co. v. Spink, 38 Mo. App. 309; Revis v. Lamme, 2 Mo. 207; Wilson v. Yegen Bros., 38 Mont. 504, 100 Pac. 613; Crandall v. Denny, 2 N. J. L. 128; Seely v. Schenck, 2 N. J. L. 75; Burns v. Hall, 3 N. J. L. 539; Tomlinson v. Burke, 10 N. J. L. 295; M'Credy v. Vanneman, 3 N. J. L. 435; Faulkner v. Whitaker, 15 N. J. L. 438; Crawford v. Collins, 45 Barb. (N. Y.) 269, 30 How. Pr. (N. Y.) 398; Bentley v. Smith, 3 Caines (N. Y.) 170; Union Wine Co. v. Green, 62 Misc. (N. Y.) 551, 115 N. Y. S. 921; Smith v. Hoover, 39 Ohio St. 249; Haskins v. Alcott, 13 Ohio St. 210; Kamm v. Harker, 3 Ore. 208; Dunham v. Shindler, 17 Ore. 256, 20 Pac. 326; Porter v. Cresson, 10 Serg. & R. (Pa.) 257; Martin v. Kelly, Cheves L. (S. Car.) 215; Marshall v. Hill, 8 Yerg. (Tenn.) 101; Frank v. Tatum, 87 Tex. 204, 25 S. W. 409; Behan v. Long (Tex. Civ. App.), 30 S. W. 380; Houghton v. Puryear, 10 Tex. Civ. App. 383, 30 S. W. 583; Tunstall v. Wormley, 54 Tex. 476; Burden v. Cross, 33 Tex. 685; Amarillo Commercial Co. v. Chicago &c. R. Co. (Tex. Civ. App.), 140 S. W. 377; Pate v. Bacon, 6 Munf. (Va.) 219; Scott & Co. v. Dunlop, Pollok

transfers of personalty,[46] nor fully to judgments by or against the partnership.[47] Further the use of the firm name is, ordinarily, prima facie evidence of the existence of a partnership and that the transaction is had in its behalf.[48] It has been held, however, that there is no presumption that the firm name includes more than one.[49]

& Co., 2 Munf. (Va.) 349; Olson v. Veazie, 9 Wash. 481, 37 Pac. 677, 43 Am. St. 855. Contra, Johnson v. Smith, Morris (Iowa) 105. And compare Spaulding v. Godbold, 92 Ark. 63, 121 S. W. 1063, 29 L. R. A. (N. S.) 282n, 135 Am. St. 168; Clayburg v. Ford, 3 Ill. App. 543; Cook v. Canney, 96 Mich. 398, 55 N. W. 987; Carpenter v. Greenop, 74 Mich. 664, 42 N. W. 276, 4 L. R. A. 241, 16 Am. St. 662; Davis v. Kline, 76 Mo. 310; Frisk v. Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. 198. It has been held that a firm may sue in its partnership name where the defendant does not object that the individuals composing the firm are not parties. Daniels v. Roanoke R. &c. Co., 158 N. Car. 418, 74 S. E. 331. See also, Brewer v. Abernathy (N. Car.), 74 S. E. 1025.

[46] "A partnership, as such, can at law be the vendee in a bill of sale or other conveyance of personal property." Hendren v. Wing, 60 Ark. 561, 31 S. W. 149, 46 Am. St. 218. See also, Brunson v. Morgan, 76 Ala. 593; Chicago Lumber Co. v. Ashworth, 26 Kans. 212; Byam v. Bickford, 140 Mass. 31, 2 N. E. 687; Kellogg v. Olson, 34 Minn. 103, 24 N. W. 364.

[47] "Bringing the action in the firm name does not render the judgment void, but is a mere defect or irregularity which is waived, unless due objection be made thereto before judgment." Frisk v. Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. 198. See further, Spaulding Mfg. Co. v. Godbold, 92 Ark. 63, 121 S. W. 1063, 29 L. R. A. (N. S.) 282n, 135 Am St. 168; DeLeon v. Heller, 77 Ga. 740; Clayburg v. Ford, 3 Ill. App. 543; Ives v. Muhlenburg, 135 Ill. App. 517; Anderson v. Wilson, 142 Iowa 158, 120 N. W. 677; Davis v. Kline, 76 Mo. 310; Conrades & Co. v. Spink, 38 Mo. App. 309. And compare Crandall v. Denny, 2 N. J. L. 128; Scott & Co. v. Dunlop, Pollok & Co., 2 Munf. (Va.) 349.

[48] Fuller v. Scott, 8 Kans. 25; Mitchell v. Whaley, 29 Ky. L. 125, 92 S. W. 556; Evans v. Watts, 192 Pa. St. 112, 44 Wkly. Notes Cas. 185, 43 Atl. 464; Richardson v. Erckens, 53 App. Div. (N. Y.) 127, 65 N. Y. S. 872, affd. 169 N. Y. 588, 62 N. E. 1100. And see Armstrong v. Robinson, 5 Gill & J. (Md.) 412; People v. Croton Aqueduct Board, 5 Abb. Pr. (N. Y.) 316, 6 Abb. Pr. (N. Y.) 42, 26 Barb. (N. Y.) 240; Welsh v. Morris, 81 Tex. 159, 16 S. W. 744, 26 Am. St. 801. "No such presumption operates in a partnership of the nontrading class." Schele v. Wagner, 163 Ind. 20, 71 N. E. 127. Nor apparently does such presumption exist in the case of a promissory note indorsed in the partnership name by one of the members of a firm of attorneys. Worster v. Forbush, 171 Mass. 423, 50 N. E. 936.

[49] Robinson v. Magarity, 28 Ill. 423. But see Fulton v. Maccracken, 18 Md. 528, 81 Am. Dec. 620.

CHAPTER CXLIX.

PARTNERSHIP CAPITAL AND PROPERTY.

§ 4890. Definition of "capital" and "property".
4891. Interest of partner in firm property.
§ 4892. Proportionate shares of partners.
4893. Conversion of realty into personalty.

§ 4890. Definition of "capital" and "property."—The capital of a partnership is the sum fixed by the agreement of the partners to be contributed by them for the purpose of commencing and carrying on the partnership business,[1] and while it is always part and parcel of the firm "property,"[2] the latter is not limited to such capital alone but includes everything having a money value, which belongs to the firm. Partnership "capital" is, therefore, a constant quantity; partnership "property," a variable.[3] In keeping with this doctrine, the consent of all of the partners is a condition precedent to either the increase or diminution of such capital.[4] In general the agreement of the partners alone determines of what their capital shall consist, and what

[1] Lindl. Partn., *320; Topping v. Paddock, 92 Ill. 92; Taft v. Schwamb, 80 Ill. 289. See further, Ball v. Farley, 81 Ala. 288, 1 So. 253; Stafford v. Fargo, 35 Ill. 481; Taylor v. Coffing, 18 Ill. 422; Evans v. Hanson, 42 Ill. 234; Sexton v. Lamb, 27 Kans. 426; Raymond v. Putnam, 44 N. H. 160; Matter of Talmage, 161 N. Y. 643, 57 N. E. 1126; Procter v. Procter, 1 Ohio S. & C. P. Dec. 651, 1 Ohio N. P. 44; Mathers' Exr. v. Patterson, 33 Pa. St. 485; Brann's Appeal, 105 Pa. St. 414; Shea v. Donahue, 15 Lea (Tenn.) 160, 54 Am. Rep. 407; Dean v. Dean, 54 Wis. 23.

[2] "The expressions partnership property, partnership stock, partnership assets, joint stock, and joint estate, are used indiscriminately to denote everything to which the firm, or in other words all the partners composing it, can be considered to be entitled as such." Lindl. Partn., *322.

[3] Lindl. Partn., *320; Hill v. Miller, 78 Cal. 149, 20 Pac. 304; Malley v. Atlantic Fire &c. Ins. Co., 51 Conn. 222; Taft v. Schwamb, 80 Ill. 289; Whitcomb v. Converse, 119 Mass. 38, 20 Am. Rep. 311; Nutting v. Ashcroft, 101 Mass. 300; Whitcomb v. Converse, 119 Mass. 38, 20 Am. Rep. 311; Clements v. Jessup, 36 N. J. Eq. 569; Smith v. Small, 54 Barb. (N. Y.) 223; Hiscock v. Phelps, 49 N. Y. 97; Clark's Appeal, 72 Pa. St. 142.

[4] Heslin v. Fay, 15 L. R. Ir. 431; Dicta of Lord Bramwell in Bouch v. Sproule, 12 App. Cas. 385; Crawshay v. Collins, 15 Ves. Jr. 218; Coldren v. Clark, 93 Iowa 352, 61 N. W. 1045; Stevens v. Yeatman, 19 Md. 480; Ful-

shall be the character[5] and amount of each partner's contribution thereto.[6] Further than this the question of what belongs to the firm or, in other words, of what is firm property, does not ordinarily turn upon any predetermination of the partners, for what-

mer's Appeal, 90 Pa. St. 143; Cock v. Evans' Heirs, 9 Yerg. (Tenn.) 287.

[5] Hill v. Miller, 78 Cal. 149, 20 Pac. 304; Flagg v. Stowe, 85 Ill. 164; Wild v. Erath, 27 La. Ann. 171; Whiting v. Leakin, 66 Md. 255, 7 Atl. 688; Citizens' Fire &c. Co. v. Doll, 35 Md. 89, 6 Am. Rep. 360; Murphy v. Warren, 55 Nebr. 215, 75 N. W. 573; Dunnell v. Henderson, 23 N. J. Eq. 174; Ruckman v. Decker, 23 N. J. Eq. 283, revd. 28 N. J. Eq. 614; Clements v. Jessup, 36 N. J. Eq. 569; Uhler v. Semple, 20 N. J. Eq. 288; Jones v. Butler, 87 N. Y. 613; Goldman v. Rosenberg, 116 N. Y. 78, 22 N. E. 259; Van Voorhis v. Webster, 85 Hun (N. Y.) 591, 66 N. Y. St. 793, 33 N. Y. S. 121; Ward v. Thompson, 22 How. (U. S.) 330, 16 L. ed. 249; Richmond v. Voorhees, 10 Wash. 316, 38 Pac. 1014; Calder v. Crowley, 74 Wis. 157, 42 N. W. 266. See also, Rapier v. Gulf City Paper Co., 64 Ala. 330; Harper v. Lamping, 36 Cal. 641; Logan v. Bond, 13 Ga. 192; Griffin v. Cooper, 50 Ill. App. 257; Lee v. Lashbrooke, 8 Dana (Ky.) 214; Owens v. Davis, 15 La. Ann. 22; Walker v. Schindel, 58 Md. 360. The sounder doctrine seems to be that when partners agree that one or more of their number shall contribute time, skill, or labor to the business of the firm, the contribution of such partner or partners may properly be regarded as a part of the "capital" of the partnership. Story on Partnership (7th ed.), § 15; Peacock v. Peacock, 16 Ves. Jr. 49; Reid v. Hollinshead, 4 B. & C. 867; Meyer v. Sharpe, 5 Taunt. 74; Waugh v. Carver, 2 H. Bl. 235; Dale v. Hamilton, 5 Hare 369; Perry v. Butt, 14 Ga. 699; Dob v. Halsey, 16 Johns. (N. Y.) 34, 8 Am. Dec. 293. The contrary view, as stated in 22 Am. & Eng. Encyc. of Law 86 (citing Lovett's Admr. v. Perry, 98 Va. 604; Shea v. Donahue, 15 Lea (Tenn.) 160, 54 Am. Rep. 407), is based upon the ground that such contribution gives to the contributing partner or partners "no rights in the final distribution of the firm capital." This conclusion, however, cannot be accepted as valid until it can be said with equal force, in the most general terms, that no contribution whose earning potentiality will be temporarily exhausted in the interest of the partnership can be designated "capital," which latter position will, in effect, abolish altogether the use of the word "capital" as now understood. But see Johnson v. Jackson, 130 Ky. 751, 114 S. W. 260.

[6] Moley v. Brine, 120 Mass. 324; Dunnell v. Henderson, 23 N. J. Eq. 174; Jones v. Butler, 23 Hun (N. Y.) 367, affd. 87 N. Y. 613; Johnston v. Ballard, 83 Tex. 486, 18 S. W. 686. See also, Taylor v. Coffing, 18 Ill. 422; Robertson v. DeLizardi, 4 Rob. (La.) 300; Juilliard v. Orem's Exrs., 70 Maine 465, 17 Atl. 333; Pierce v. Ten Eyck, 9 Mont. 349, 23 Pac. 423; Uhler v. Semple, 20 N. J. Eq. 288; Guccione v. Scott, 33 App. Div. (N. Y.) 214, 53 N. Y. S. 462; Lovett's Admr. v. Perry, 98 Va. 604. A rebuttable presumption exists that each partner contributed an equal amount to the firm capital. Peacock v. Peacock, 16 Ves. Jr. 49; Copland v. Toulmin, 7 Cl. & F. 350; Robinson v. Anderson, 20 Beav. 98, 7 De G. M. & G. 239; Jackson v. Crapp, 32 Ind. 422. But see Taylor v. Coffing, 18 Ill. 422; Livingston v. Blanchard, 130 Mass. 341; Whitcomb v. Converse, 119 Mass. 38, 20 Am. Rep. 311; Raymond v. Putnam, 44 N. H. 160; Marquand v. New York Mfg. Co., 17 Johns. (N. Y.) 525; Conroy v. Campbell, 45 N. Y. Super. Ct. 326; Shea v. Donahue, 15 Lea (Tenn.) 160, 54 Am. Rep. 407. In ascertaining the amount actually contributed by any one partner, allowance must be made for any lien or encumbrance upon his contribution. Nichol v. Stewart, 36 Ark. 612; Sexton v. Lamb, 27 Kans. 426; Dunnell v. Henderson, 23 N. J. Eq. 174. "A contribution to the capital of a firm by a partner does not constitute a loan to the other partner." Armstrong v. Hollen, 58 Ore. 534, 115 Pac. 423.

ever, following the acquisition of the capital, is in any manner added to or obtained by means of, the common stock, belongs to the partnership and is partnership property to the same extent as its capital itself.[7] The controlling consideration in deciding

[7] "The property of a partnership consists of all that is contributed to the common stock at the formation of the partnership, and of all that is subsequently acquired thereby." McPherson v. Swift, 22 S. Dak. 165, 116 N. W. 76, 133 Am. St. 907. See further, Wade v. Martin, 157 Ala. 215, 47 So. 340; Lewis v. Buford, 93 Ark. 57, 124 S. W. 244; Hill v. Miller, 78 Cal. 149, 20 Pac. 304; Scutt v. Robertson (Ill.), 17 N. E. 14; Laswell v. Robbins, 39 Ill. 210; Booher v. Perrill, 140 Ind. 529, 40 N. E. 36; Fairfield v. Phillips, 83 Iowa 571, 49 N. W. 1025; Phillips v. Purington, 15 Maine 425; Scott v. McKinney, 98 Mass. 344; Person v. Wilson, 25 Minn. 189; Priest v. Chouteau, 12 Mo. App. 252, affd. 85 Mo. 398, 55 Am. Rep. 373; Stoughton v. Lynch, 2 Johns. Ch. (N. Y.) 209; Thursby v. Lidgerwood, 69 N. Y. 198; Ryder v. Gilbert, 16 Hun (N. Y.) 163; Robinson v. Gilfillan, 15 Hun (N. Y.) 267; Le Roy v. Mathewson, 47 N. Y. Super. Ct. 389; McCullough v. Barr, 145 Pa. St. 459, 22 Atl. 962; Brock v. Brock, 116 Pa. St. 109, 9 Atl. 486; Jones v. Smith, 31 S. Car. 527, 10 S. E. 340; Wright v. Market Bank (Tenn.), 60 S. W. 623; Glasscock v. Glasscock's Admr., 17 Tex. 480; Rogers v. Nichols, 20 Tex. 719; Lyman v. Lyman, 2 Paine (U. S.) 11, Fed. Cas. No. 8628; Hoxie v. Carr, 1 Sumn. (U. S.) 173, Fed. Cas. No. 6802; Brooke v. Washington, 8 Grat. (Va.) 248, 56 Am. Dec. 142; Strong v. Hoskin, 85 Wis. 497, 55 N. W. 852; Swift v. Dean, 6 Johns. (N. Y.) 523. And compare Hatchett v. Blanton, 72 Ala. 423. But see Crawshay v. Maule, 1 Swanst. 495; Fereday v. Wightwick, Tamlyn 250; Waterer v. Waterer, L. R. 15 Eq. 402; Jackson v. Jackson, 9 Ves. Jr. 591; Davies v. Games, 12 Ch. D. 813; Brown v. Oakshot, 24 Beav. 254; Davis v. Davis (1894), 1 Ch. 393; Steward v. Blakeway, L. R. 4 Ch. 603; Patterson v. Ware, 10 Ala. 444; Caldwell v. Leiber, 7 Paige (N. Y.) 483. This holds good both as to realty and personalty. "While only a qualified citizen can by location, or filing, initiate a right to a tract of the public land, from which there can, by compliance with the requirements of law, be perfected a complete and valid title in fee, the rights thus initiated by the qualified citizen become and are recognized as property susceptible of sale and transfer, and that such sale and transfer may be made to persons not possessing the qualifications that would enable them to initiate such property rights and interests [in this case, a partnership]; * * * [and] the incapacity of such persons to initiate such right, or subsequently to perfect such title, can be called in question only by the sovereign, and cannot be invoked to attack their right to be protected in the possession and enjoyment of their property, or to attack the validity of their conveyance of the same to subsequent grantees." Neal v. Kayser, 12 Ariz. 118, 100 Pac. 439. See further, Causler v. Wharton, 62 Ala. 358; Rovelsky v. Brown, 92 Ala. 522, 9 So. 182, 25 Am. St. 83; Murphy v. Abrams, 50 Ala. 293; Little v. Snedecor, 52 Ala. 167; Goldthwaite v. Janney, 102 Ala. 431, 15 So. 560, 28 L. R. A. 161, 48 Am. St. 56; Caldwell v. Parmer's Admr., 56 Ala. 405; Brewer v. Browne, 68 Ala. 210; Roberts v. Eldred, 73 Cal. 394, 15 Pac. 16; Quinn v. Quinn, 81 Cal. 14, 22 Pac. 264; Kayser v. Maugham, 8 Colo. 339, 7 Pac. 286; Sigourney v. Munn, 7 Conn. 11; Robertson v. Baker, 11 Fla. 192; Winstanley v. Gleyre, 146 Ill. 27, 34 N. E. 628; Alkire v. Kahla, 123 Ill. 496, 17 N. E. 693, 5 Am. St. 540; Indiana Pottery Co. v. Bates, 14 Ind. 8; Paige v. Paige, 71 Iowa 318, 32 N. W. 360, 60 Am. Rep. 799; Drake v. Moore, 66 Iowa 58, 23 N. W. 263; Sherley v. Thomasson's Exr., 8 Ky. L. (abstract) 351, 1 S. W. 530; Seeley v. Mitchell's Assignee, 85 Ky. 508, 9 Ky. L. 86, 4 S. W. 190; Bryant v. Hunter, 6 Bush (Ky.) 75; May v. New Orleans &c. R. Co., 44 La. Ann.

of what the firm as such has thus become possessed is usually, in

444, 10 So. 769; Lane v. Tyler, 49 Maine 252; Blake v. Nutter, 19 Maine 16; Fall River Whaling Co. v. Borden, 10 Cush. (Mass.) 458; Dyer v. Clark, 5 Metc. (Mass.) 562, 30 Am. Dec. 697; Lindsay v. Race, 103 Mich. 28, 61 N. W. 271; Killefer v. McLain, 70 Mich. 508, 38 N. W. 455; Godfrey v. White, 43 Mich. 171, 5 N. W. 243; Thayer v. Lane, Walk. Ch. (Mich.) 200; Dunlap v. Byers, 110 Mich. 109, 67 N. W. 1067; Hardin v. Jamison, 60 Minn. 348, 62 N. W. 394; Brown v. Morrill, 45 Minn. 483, 48 N. W. 328; Alexander v. Kimbro, 49 Miss. 529; Carlisle's Admrs. v. Mulhern, 19 Mo. 56; Rockefeller v. Dellinger, 22 Mont. 418, 74 Am. St. 613; Smith v. Jones, 18 Nebr. 481, 25 N. W. 624; Harney v. First Nat. Bank, 52 N. J. Eq. 697, 29 Atl. 221; Deveney v. Mahoney, 23 N. J. Eq. 247; Hogle v. Lowe, 12 Nev. 286; Jarvis v. Brooks, 27 N. H. 37, 59 Am. Dec. 359; Smith v. Small, 54 Barb. (N. Y.) 223; Kendall v. Rider, 35 Barb. (N. Y.) 100; Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; Buckley v. Buckley, 11 Barb. (N. Y.) 43; Smith v. Danvers, 7 N. Y. Super. Ct. 669; Dawson v. Parsons, 10 Misc. (N. Y.) 428, 31 N. Y. S. 78, 68 N. Y. St. 320, affd. 11 App. Div. (N. Y.) 632, 41 N. Y. S. 1111, 75 N. Y. St. 1479; Morton v. Ostrom, 33 Barb. (N. Y.) 256; Averill v. Loucks, 6 Barb. (N. Y.) 19; McCaskill v. Lancashire, 83 N. Car. 393; Donaldson v. Cape Fear Bank, 1 Dev. Eq. (N. Car.) 103, 18 Am. Dec. 577; Sumner v. Hampson, 8 Ohio St. 329, 32 Am. Dec. 722; Page v. Thomas, 43 Ohio St. 38, 1 N. E. 79, 54 Am. Rep. 788; Norwalk Nat. Bank v. Sawyer, 38 Ohio St. 339; Church v. Adams, 37 Ore. 355, 61 Pac. 639; Williams's Appeal, 122 Pa. St. 472, 15 Atl. 912; Lacy v. Hall, 37 Pa. St. 360; Hayes v. Treat, 178 Pa. St. 310, 35 Atl. 987; Meason v. Kaine, 63 Pa. St. 335; In re Grubb's Appeal, 66 Pa. St. 117; Black v. Seipt, 12 Phila. (Pa.) 360, 34 Leg. Int. (Pa.) 66; In re Abbott's Appeal, 50 Pa. St. 234; Boyers v. Elliott, 7 Humph. (Tenn.) 204; Murrell v. Mandelbaum, 85 Tex. 22, 19 S. W. 880, 34 Am. St. 777; Baldwin v. Richardson, 33 Tex. 16; Hammond v. Hopkins, 143 U. S. 224, 36 L. ed. 134, 12 Sup. Ct. 418; Willis v. Freeman, 35 Vt. 44, 82 Am. Dec. 619; Rice v. Barnard, 20 Vt. 479, 50 Am. Dec. 54; Dewey v. Dewey, 35 Vt. 555; Wheatley's Heirs v. Calhoun, 12 Leigh (Va.) 264, 37 Am. Dec. 654; Bird v. Morrison, 12 Wis. 138; Riedeburg v. Schmitt, 71 Wis. 644, 38 N. W. 336; Daniels v. McCormick, 87 Wis. 255, 58 N. W. 406. And compare Hatchett v. Blanton, 72 Ala. 423; McGrath v. Sinclair, 55 Miss. 89; Cox v. McBurney, 2 Sandf. (N. Y.) 561; Coder v. Huling, 27 Pa. St. 84; Richards v. Maynard, 61 Ill. App. 336, affd. 166 Ill. 466, 46 N. E. 1138, 57 Am. Rep. 145; Wiltse v. Fifield, 143 Iowa 332, 121 N. W. 1086; Gillisse v. Gibson, 6 La. Ann. 125; Phillips v. Purington, 15 Maine 425; Merry v. Hoopes, 111 N. Y. 415, 18 N. E. 714; Baumert v. Daeschler, 65 Misc. (N. Y.) 526, 120 N. Y. S. 957; Hazard v. Caswell, 93 N. Y. 259, 45 Am. Rep. 198; McCoy v. Crosfield, 54 Ore. 591, 104 Pac. 423; Dusenberry v. Horning, 56 Ore. 210, 106 Pac. 1019; Blood v. Ludlow Carbon Black Co., 150 Pa. St. 1, 24 Atl. 348, 30 Wkly. Notes Cas. (Pa.) 253; Filkins v. Blackman, 13 Blatchf. (U. S.) 440, 9 Fed. Cas. No. 4786; Newell v. Humphrey, 37 Vt. 265; Whitcomb v. Whitcomb (Vt.), 81 Atl. 97; Jennings v. Jennings, L. R. (1898) 1 Ch. 378, 67 L. J. Ch. 190; Page v. Ratliffe, 76 L. T. (N. S.) 63; Kellogg v. Totten, 16 Abb. Pr. (N. Y.) 35; Dayton v. Wilkes, 17 How. Pr. (N. Y.) 510; Bininger v. Clark, 60 Barb. (N. Y.) 113, 10 Abb. Pr. (N. S.) (N. Y.) 264. But see Arundell v. Bell, 52 L. J. Ch. 537, 49 L. T. (N. S.) 345, 19 Eng. Rul. Cas. 657; Hines v. Driver, 72 Ind. 125; Auten v. Ellingwood, 51 How. Pr. (N. Y.) 359.

a sense at least, one of the intent,[8] express[9] or implied, which prompted the partner or partners to act.[10] As a general thing when partnership funds have been used in purchasing property, it is presumed that such property was intended to belong to the firm,[11] and this, though the title thereto has been made to a part-

[8] "The true method of determining, as between the partners themselves, whether land standing in the name of the individuals is or is not to be treated as partnership property, is to ascertain from their conduct and course of dealing the understanding and intention of the partners themselves, which, when ascertained, should unquestionably control." Johnson v. Hogan, 158 Mich. 635, 123 N. W. 891; McKinnon v. McKinnon, 56 Fed. 409, 5 C. C. A. 530; New York Commercial Co. v. Francis, 101 Fed. 16, 41 C. C. A. 167; Bopp v. Fox, 63 Ill. 540; Baxter v. Rollins, 90 Iowa 217, 57 N. W. 838, 48 Am. St. 432; Hill v. Cornwall's Assignee, 95 Ky. 512, 16 Ky. L. 97, 26 S. W. 540; Frey v. Eisenhardt, 116 Mich. 160, 74 N. W. 501; Rockefeller v. Dellinger, 22 Mont. 418, 74 Am. St. 613; Brown v. O'Brien, 4 Nebr. 195; Dawson v. Parsons, 10 Misc. (N. Y.) 428, 63 N. Y. St. 320, 31 N. Y. S. 78, affd. 11 App. Div. (N. Y.) 632, 75 N. Y. St. 1479, 41 N. Y. S. 1111; Barry v. Kennedy, 11 Abb. Pr. (N. S.) (N. Y.) 421; Meridian Nat. Bank v. McConica, 4 Ohio Cir. Dec. 106, 8 Ohio C. C. 442; Wilson v. Black, 164 Pa. St. 555, 30 Atl. 488; Maybin v. Moorman, 21 S. Car. 346; Boyers v. Elliott, 7 Humph. (Tenn.) 204; Hunt v. Benson, 2 Humph. (Tenn.) 459; Richmond v. Voorhees, 10 Wash. 316, 38 Pac. 1014. See also, Pomeroy v. Benton, 57 Mo. 531, and Morris v. Barrett, 3 Y. & J. 384.

[9] Robinson Bank v. Miller, 153 Ill. 244, 38 N. E. 1078, 27 L. R. A. 449, 46 Am. St. 883; Lucas v. Cooper, 15 Ky. L. 642, 23 S. W. 959; Lindsay v. Race, 103 Mich. 28, 61 N. W. 271; Johnson v. Hogan, 158 Mich. 635, 123 N. W. 891; Schlicher v. Whyte, 74 N. J. Eq. 839, 71 Atl. 337; Fairchild v. Fairchild, 64 N. Y. 477; Le Roy v. Mathewson, 47 N. Y. Super. Ct. 389; Van Voorhis v. Webster, 85 Hun (N. Y.) 591, 66 N. Y. St. 793, 33 N. Y. S. 121; Auten v. Ellingwood, 51 How. Pr. (N. Y.) 359; Sumner v. Hampson, 8 Ohio 328, 32 Am. Dec. 722; McCullough v. Barr, 145 Pa. St. 459, 22 Atl. 962; In re Lefevre's Appeal, 69 Pa. St. 219, 8 Am. Rep. 229; Murrell v. Mandelbaum, 85 Tex. 22, 19 S. W. 880, 34 Am. St. 777; Brooke v. Washington, 8 Grat. (Va.) 248, 56 Am. Dec. 142.

[10] Crawshay v. Maule, 1 Swanst. 495; In re Strang, 166 Fed. 779; Robinson Bank v. Miller, 153 Ill. 244, 38 N. E. 1078, 27 L. R. A. 449, 46 Am. St. 883; Booher v. Perrill, 140 Ind. 529, 40 N. E. 36; Lindsay v. Race, 103 Mich. 28, 61 N. W. 271; Johnson v. Hogan, 158 Mich. 635, 123 N. W. 891; Chappell v. Chappell, 125 App. Div. (N. Y.) 127, 109 N. Y. S. 648; Fairchild v. Fairchild, 64 N. Y. 471; Brayton v. Sherman, 45 App. Div. (N. Y.) 58, 60 N. Y. S. 1118, affd. 166 N. Y. 610, 59 N. E. 1119; Page v. Thomas, 43 Ohio St. 38, 1 N. E. 79, 54 Am. Rep. 788; Sumner v. Hampson, 8 Ohio 328, 32 Am. Dec. 722; Collner v. Grieg, 137 Pa. St. 606, 20 Atl. 938, 21 Am. St. 899; In re Shafer's Appeal, 106 Pa. St. 49; Winslow v. Chiffelle, Harp. Eq. (S. Car.) 25; Murrell v. Mandelbaum, 85 Tex. 32, 19 S. W. 880, 34 Am. St. 777; Brooke v. Washington, 8 Grat. (Va.) 248, 56 Am. Dec. 142; Wheatley's Heirs v. Calhoun, 12 Leigh (Va.) 264, 37 Am. Dec. 654. See further, Ames v. Ames, 37 Fed. 30; Lincoln v. White, 30 Maine 291.

[11] Ex parte Hinds, 3 De G. & Sm. 613; Allen v. Hawley, 6 Fla. 142, 63 Am. Dec. 198; Loubat v. Nourse, 5 Fla. 350; Alkire v. Kahla, 123 Ill. 496, 17 N. E. 693, 5 Am. St. 540; Pepper v. Pepper, 24 Ill. App. 316; Bradbury v. Smith, 21 Maine 117; Scott v. McKinney, 98 Mass. 344; Catron v. Shepherd, 8 Nebr. 308, 1 N. W. 204; Dawson v. Parsons, 10 Misc. (N. Y.) 428, 63 N. Y. St. 320, 31 N. Y. S. 71, affd. 11 App. Div. (N. Y.) 632, 75 N. Y. St. 1479, 41 N. Y. S. 1111; Thursby v. Lidgerwood, 69 N. Y. 198;

ner or partners individually.[12] This presumption is, of course, rebuttable[13] as is likewise the one that the partnership owns the property employed in its business.[14]

§ 4891. Interest of partner in firm property.—But of whatever the firm property may consist, it is not subject as such to the assertion of present ownership and immediate possession by the partners as individuals,[15] and in making plain what interest an individual partner has in the common property, description will be more effective than attempted definition.[16] Thus it may

Smith v. Tarlton, 2 Barb. Ch. (N. Y.) 336; Swift v. Dean, 6 Johns. (N. Y.) 523; Hunt v. Benson, 2 Humph. (Tenn.) 459; Deming v. Moss (Utah), 121 Pac. 971.

[12] Smith v. Smith, 5 Ves. Jr. 189; Ferguson v. Hanauer, 56 Ark. 179, 19 S. W. 749; Lewis v. Buford, 93 Ark. 57, 124 S. W. 244; Bopp v. Fox, 63 Ill. 540; Holmes v. Stix, 104 Ky. 351, 20 Ky. L. 593, 47 S. W. 243; Davis v. Davis, 60 Miss. 615; Quinn v. Quinn, 22 Mont. 403, 56 Pac. 824; Partridge v. Wells, 30 N. J. Eq. 176; Leary v. Boggs, 41 Hun (N. Y.) 643, 1 N. Y. St. 571; Williams v. Gillies, 13 Hun (N. Y.) 422, revd. 75 N. Y. 197; Traphagen v. Burt, 67 N. Y. 30; Kruschke v. Stefan, 83 Wis. 373, 53 N. W. 679. See further, Johnson v. Hogan, 158 Mich. 635, 123 N. W. 891; Deming v. Moss (Utah), 121 Pac. 971; Scott v. Dixie (W. Va.), 74 S. E. 659; Richtman v. Watson (Wis.), 136 N. W. 797.

[13] Price v. Hicks, 14 Fla. 565; Chandler v. Jessup, 132 Ind. 351, 31 N. E. 1109; Goodwin v. Richardson, 11 Mass. 469; Pitts v. Waugh, 4 Mass. 424; Dyer v. Clark, 5 Metc. (Mass.) 562, 30 Am. Dec. 697; In re Lefevre's Appeal, 69 Pa. St. 219, 8 Am. Rep. 229; McCormick's Appeal, 57 Pa. St. 54, 98 Am. Dec. 191; Hoxie v. Carr, 1 Sumn. (U. S.) 173, Fed. Cas. No. 6802; Bosworth v. Hopkins, 85 Wis. 50, 55 N. W. 424.

[14] Ex parte Owen, 4 De G. & Sm. 351; Ex parte Smith, 3 Madd. 63; Burdon v. Barkus, 4 De G. F. & J. 42; Flagg v. Stow, 85 Ill. 164; Pearce v. Pearce, 77 Ill. 284; Murphy v. Warren, 55 Nebr. 215, 75 N. W. 573; Champion v. Bostwick, 18 Wend. (N. Y.) 175, 31 Am. Dec. 376; Van Voorhis v. Webster, 85 Hun (N. Y.) 591, 66 N. Y. St. 793, 33 N. Y. S. 121; Richmond v. Voorhees, 10 Wash. 316, 38 Pac. 1014. See further Ashton v. Robinson, L. R. 20 Eq. 25; Ware v. Owens, 42 Ala. 212, 94 Am. Dec. 672. And compare Grant v. Bannister, 160 Cal. 774, 118 Pac. 253; Greenwood v. Marvin, 111 N. Y. 423, 19 N. E. 228; Thompson v. Bowman, 6 Wall. (U. S.) 316, 18 L. ed. 736.

[15] "Neither partner separately owns, nor has the exclusive right of possession of, any particular articles of partnership property or aliquot part thereof. The real ownership and legal title are vested in the firm." Tuller v. Leaverton, 143 Iowa 162, 121 N. W. 515. And see Sloan v. Wilson, 117 Ala. 583, 23 So. 145; Ingraham v. Mariner, 194 Ill. 269, 62 N. E. 609; Taft v. Schwamb, 80 Ill. 289; Taylor v. Farmer (Ill.), 4 N. E. 370; Trowbridge v. Cross, 117 Ill. 109, 7 N. E. 347; Robinson v. Winn, 4 Ky. L. (abst.) 54; Ward v. Brandt, 11 Mart. (O. S.) (La.) 331, 13 Am. Dec. 352; United States v. Baulos' Exr., 5 Mart. (N. S.) (La.) 567; Purdy v. Hood, 5 Mart. (N. S.) (La.) 626; Claiborne v. Their Creditors, 18 La. 501; Stockwell v. Brewer, 59 Maine 286; Day v. Stafford, 128 Mo. App. 438, 107 S. W. 433; Spurr v. Russell, 59 N. H. 338; Daniel v. Crowell, 125 N. Car. 519, 34 S. E. 684; Doner v. Stauffer, 1 Pen. & W. (Pa.) 198, 21 Am. Dec. 370; Liberty Sav. Bank v. Campbell, 75 Va. 534.

[16] "In the absence of a special

be stated that each member of the firm has an interest in the firm property which is hardly more than a chose in action,[17]

agreement to that effect, all the members of an ordinary partnership are interested in the whole of the partnership property; but it is not quite clear whether they are interested therein as tenants in common, or as joint tenants without benefit of survivorship, if indeed there is any difference between the two. It follows from this community of interest, that no partner has a right to take any portion of partnership property, and to say that it is his exclusively. No partner has any such right, either during the existence of the partnership or after it has been dissolved." Lindl. Partn., *339. And see Milligan v. Mackinlay, 209 Ill. 358, 70 N. E. 685; Needham v. Wright, 140 Ind. 190, 39 N. E. 510; Pilcher's Succession, 39 La. Ann. 362, 1 So. 929; Smith v. McMicken, 3 La. Ann. 319; Lambert v. Griffith, 50 Mich. 286, 15 N. W. 458; Hutchinson v. Dubois, 45 Mich. 143, 7 N. W. 714; Hubbardston Lumber Co. v. Covert, 35 Mich. 254; Gaines v. Coney, 51 Miss. 323; Williams v. Gage, 49 Miss. 777; Whitmore v. Shiverick, 3 Nev. 288; Preston v. Fitch, 137 N. Y. 41, 33 N. E. 77; Strauss v. Frederick, 91 N. Car. 121; Ludlow's Heirs v. Cooper's Devisees, 4 Ohio St. 1; Sweeney v. Horn, 7 Pa. Dist. 391; Kramer v. Arthurs, 7 Pa. St. 165; Hines v. Dean, 1 White & W. (Tex.) Civ. App. Cas. Ct. App., § 690; Kruschke v. Stefan, 83 Wis. 373, 53 N. W. 679.

[17] "The interest of each member of a partnership extends to every portion of its property." McPherson v. Swift, 22 S. Dak. 165, 116 N. W. 76, 133 Am. St. 907. "The interest of a partner in the partnership estate only attaches after dissolution of the partnership in the residuum for the payment and satisfaction of partnership liabilities." Blake v. Sargent, 152 Fed. 263. "The interest of each partner in the partnership property is his share of the surplus after payment of all partnership debts and settlement of all accounts between himself and his partners." Jones v. Way, 78 Kans. 535, 97 Pac. 437, 18 L. R. A. (N. S.) 1180n. "A partner cannot commit larceny of the funds or property of the partnership of which he is a member because the interest or ownership of such partner extends to every portion of its property. Rev. Codes, § 5469." State v. Brown, 38 Mont. 309, 99 Pac. 954. To the same effect, Ringo v. Wing, 49 Ark. 457, 5 S. W. 787; Lewis v. Buford, 93 Ark. 57, 124 S. W. 244; Filley v. Phelps, 18 Conn. 294; In re Rice, 164 Fed. 509; Taft v. Schwamb, 80 Ill. 289; Taylor v. Farmer (Ill.), 4 N. E. 370; Trowbridge v. Cross, 117 Ill. 109, 7 N. E. 347; Null v. Parsons, 145 Ill. App. 436; Matlock v. Matlock, 5 Ind. 403; Meridian Nat. Bank v. Brandt, 51 Ind. 56; Henry v. Anderson, 77 Ind. 361; Deeters v. Sellers, 102 Ind. 458, 1 N. E. 854; Meyer v. Garber, 53 Iowa 689, 6 N. W. 63; Tuller v. Leaverton, 143 Iowa 162, 121 N. W. 515; Ward v. Brandt, 11 Mart. (O. S.) (La.) 331, 13 Am. Dec. 352; United States v. Baulos' Exr., 5 Mart. (N. S.) (La.) 567; Claiborne v. Their Creditors, 18 La. 501; Purdy v. Hood, 5 Mart. (N. S.) (La.) 626; Millaudon v. New Orleans &c. R. Co., 3 Rob. (La.) 488; Douglas v. Winslow, 20 Maine 89, 2 Appleton (Maine) 89; Gay v. Ray, 195 Mass. 8, 80 N. E. 693; Schalck Fenske v. Harmon, 6 Gil. (Minn.) 176; Arnold v. Wainwright, 6 Gil. (Minn.) 241, 80 Am. Dec. 448; Staats v. Bristow, 73 N. Y. 264; Nicoll v. Mumford, 4 Johns. Ch. (N. Y.) 522, revd. 20 Johns. (N. Y.) 611; Hauptmann v. Hauptmann, 91 App. Div. (N. Y.) 197, 86 N. Y. S. 427; Allison v. Davidson, 17 N. Car. 79; Place v. Sweetzer, 16 Ohio 142; Nixon v. Nash, 12 Ohio St. 647, 80 Am. Dec. 390; McManus v. Cash, 101 Tex. 261, 108 S. W. 800; Fourth Nat. Bank v. Carrollton R. Co., 11 Wall. (U. S.) 624, 20 L. ed. 82; Warren v. Wheelock, 21 Vt. 323; Lellman v. Mills, 15 Wyo. 149, 87 Pac. 985. But see Stevens v. Stevens, 39 Conn. 474; Hewitt v. Rankin, 41 Iowa 35; Whitmore v. Shiverick, 3 Nev. 288; Geortner v. Canajoharie, 2 Bart. (N. Y.) 625; Berry v. Kelly, 27 N. Y. Super. Ct. 106; Appeal of Baker, 21 Pa. St. 76, 59 Am. Dec. 752; Boyce

an interest of uncertain value,[18] subject to attachment or execution for his individual debt,[19] to his mortgage,[20] to a me-

v. Coster's Exrs., 4 Strob. Eq. (S. Car.) 25.

[18] This, by reason of the fact that the amount and value of firm property at any given future time is uncertain. See Lellman v. Mills, 15 Wyo. 149, 87 Pac. 985, wherein it is stated that "until that occurs, [the payment of partnership debts and the settlement of partnership accounts] it is impossible to determine the extent of his interest."

[19] Stevens v. Stevens, 39 Conn. 474; Rice v. McMartin, 39 Conn. 573; Witter v. Richards, 10 Conn. 37; Hurlbut v. Johnson, 74 Ill. 64; Weber v. Hertz, 188 Ill. 68, 58 N. E. 676; Burgess v. Atkins, 5 Blackf. (Ind.) 337; Williams v. Lewis, 115 Ind. 45, 17 N. E. 262, 7 Am. St. 403; State v. Emmons, 99 Ind. 452; Aldrich v. Wallace, 8 Dana (Ky.) 287, 33 Am. Dec. 495; White v. Woodward, 8 B. Mon. (Ky.) 484; Bank of Louisville v. Hall, 8 Bush (Ky.) 672; Williams v. Smith, 4 Bush (Ky.) 540; Lee v. Bullard, 3 La. Ann. 462; Cunningham v. Gushee, 73 Maine 417; Fogg v. Lawry, 68 Maine 78, 28 Am. Rep. 19; Crabtree v. Clapham, 67 Maine 326; Hacker v. Johnson, 66 Maine 21; Crooker v. Crooker, 46 Maine 250; Bradbury v. Smith, 21 Maine 117; Commercial Bank v. Wilkins, 9 Greenl. (Maine) 28; Russell v. Cole, 167 Mass. 6, 44 N. E. 1057, 57 Am. St. 432; Breck v. Blair, 129 Mass. 127; Davis v. Werden, 13 Gray (Mass.) 305; Peck v. Fisher, 7 Cush. (Mass.) 386; Lord v. Baldwin, 6 Pick. (Mass.) 348; Haynes v. Knowles, 36 Mich. 407; Day v. McQuillan, 13 Gil. (Minn.) 192; Fleisher v. Hinde (Mo.), 93 S. W. 1126, affd. 122 Mo. App. 218, 99 S. W. 25; Clinton First Nat. Bank v. Brenneisen, 97 Mo. 145, 10 S. W. 884; Lester v. Givens, 74 Mo. App. 395; Deickmann v. St. Louis, 9 Mo. App. 9; Carillon v. Thomas, 6 Mo. App. 574; Richards v. Leville, 44 Nebr. 38, 62 N. W. 304; Newman v. Bean, 21 N. H. 93; Curran v. Kendall Boot &c. Co., 8 N. Mex. 417; Staats v. Bristow, 73 N. Y. 264; Sterrett v. Buffalo Third Nat. Bank, 46 Hun (N. Y.) 22; Ryder v. Carpenter, 8 N. Y. Wkly. Dig. 25; Davis v. Delaware &c. Canal Co., 109 N. Y. 47, 15 N. E. 873, 4 Am. St. 418; Blevins v. Baker, 33 N. Car. 291; Jarvis v. Hyer, 15 N. Car. 367; Watt v. Johnson, 49 N. Car. 190; Latham v. Simmons, 48 N. Car. 27; Flanner v. Moore, 47 N. Car. 120; Vann v. Hussey, 46 N. Car. 381; McPherson v. Pemberton, 46 N. Car. 378; Sellew v. Chrisfield, 1 Handy (Ohio) 86, 12 Ohio Dec. 41; Buchanan v. Mitchell, 8 Ohio Dec. 437, 8 Cin. L. Bul. 8; Adams v. James L. Leeds Co., 195 Pa. St. 70, 45 Atl. 666; Sweeney v. Girolo, 154 Pa. St. 609, 26 Atl. 600; Lothrop v. Wightman, 41 Pa. St. 297; Cooper's Appeal, 26 Pa. St. 262; In re Brown's Appeal, 17 Pa. St. 480; Knox v. Summers, 4 Yeates (Pa.) 477; Wood v. Witherow, 8 Phila. (Pa.) 517; Roop v. Rodgers, 5 Watts (Pa.) 193; Morgan v. Watmough, 5 Whart. (Pa.) 125; Crowningshield v. Strobel, 2 Brew. (S. Car.) 80; Knox v. Schepler, 2 Hill (S. Car.) 595; McHaney v. Cawthorn, 4 Heisk. (Tenn.) 508; Grant v. Williams, 1 White & W. Civ. Cas. Ct. App. (Tex.), § 363; Schley v. Hale, 1 White & W. Civ. Cas. Ct. App. (Tex.), § 930; Fourth Nat. Bank v. Carrollton R. Co., 11 Wall. (U. S.) 624, 20 L. ed. 82; Johnson v. Rogers, 15 Nat. Bankr. Reg. 2, 13 Fed. Cas. No. 7408; Skavdale v. Moyer, 21 Wash. 10, 56 Pac. 841, 46 L. R. A. 481; Bolin v. Metcalf, 6 Wyo. 1, 42 Pac. 12, 44 Pac. 694, 71 Am. St. 898. See further, Green v. Pyne, 1 Ala. 235; Johnson v. Sanford, 13 Conn. 461; Green v. Ross, 24 Ga. 613; Lester v. Givens, 74 Mo. App. 395; Wiles v. Maddox, 26 Mo. 77; Hill v. Bell, 111 Mo. 35, 19 S. W. 959; In re Kelly's Appeal, 16 Pa. St. 59; Brady v. Conway, 3 Wkly. Notes Cas. (Pa.) 110; Peck v. Schultze, 1 Holmes (U. S.) 28, Fed. Cas. No. 10895; Powers v. Large, 69 Wis. 621, 2 Am. St. 767, 35 N. W 53. And compare Edwards v. Hughes, 20 Mich. 289; Cook v. Arthur, 33 N. Car. 407.

[20] Lellman v. Mills, 15 Wyo. 149, 87 Pac. 985.

chanic's lien,[21] to injunction at the suit of his personal creditor,[22] and to sale by him either to a copartner,[23] or a third person.[24] But no single partner can transfer an undivided interest in any

[21] "As a partner he was liable to creditors of the firm for all its debts —the entire debt, not a portion of it, and his title in the firm's realty must be taken to be a fee simple absolute to the whole, though he share his interest with another; and, whatever that may be worth, it is subject to the lien granted by the statute, in obedience to the express command of the Constitution, for the improvements placed thereon by his consent, and when the proper steps have been taken the lien attaches to the rem as against subsequent purchasers." De Soto Nat. Bank v. Arcadia Elec. Light &c. Co., 57 Fla. 391, 48 So. 745.

[22] Rev. Laws of Mass. ch. 159, § 3, cl. 7; Gay v. Ray, 195 Mass. 8, 80 N. E. 693. Partners whose interests have been jeopardized by the sale of a copartner's interest under execution may enjoin a further disposition of the property by the purchaser thereof. White v. Woodward, 8 B. Mon. (Ky.) 484. Compare Williams v. Smith, 4 Bush (Ky.) 540.

[23] Bradbury v. Barnes, 19 Cal. 120; Gondolfo v. Garbarino, 8 Cal. App. 546, 97 Pac. 203; Van Aken v. Clark, 82 Iowa 256, 48 N. W. 73; Christen v. Ruhlman, 22 La. Ann. 570; Richardson v. Davis, 70 Miss. 219, 11 So. 790; Love v. Van Every, 18 Mo. App. 196; Bigham v. Tinsley, 149 Mo. App. 467, 130 S. W. 506 (opinion adopted in Bigham v. Tinsley, 160 Mo. App. 605, 140 S. W. 1193); Reese v. Kinkead, 18 Nev. 126, 1 Pac. 667; Wright v. Duke, 91 Hun (N. Y.) 409, 72 N. Y. St. 375, 36 N. Y. S. 853; In re Weir, 59 Misc. (N. Y.) 320, 112 N. Y. S. 278; Kelly v. Delaney, 136 App. Div. (N. Y.) 604, 121 N. Y. S. 241; Kaufmann v. Kaufmann, 222 Pa. 58, 70 Atl. 956; Yost v. Critcher, 112 Va. 870, 72 S. E. 594. See further, Warden v. Marcus, 45 Cal. 594; Chandler v. Sherman, 16 Fla. 99; Lantz v. Ryman, 102 Iowa 348, 71 N. W. 212; Comstock v. McDonald, 126 Mich. 142, 85 N. W. 579, 7 Detroit Leg. N. 761; Howe v. Bristow, 65 Mo. App. 624; Abbe v. Clark, 31 Barb. (N. Y.) 238; White v. Reed, 124 N. Y. 468, 26 N. E. 1037; Jarecki v. Hays, 161 Pa. St. 613, 29 Atl. 118; Norris & Bro. v. Vernon, 8 Rich. L. (S. Car.) 13; Smith v. Smith, 30 Vt. 139; Fisher v. Vaughn, 75 Wis. 609, 44 N. W. 831.

[24] Simmons v. Rowe, 4 Cal. App. 752, 89 Pac. 621; Union Brewing Co. v. Inter-State Bank & Trust Co., 240 Ill. 454, 88 N. E. 997; Tuller v. Leaverton, 143 Iowa 162, 121 N. W. 515; Givens v. Berry, 21 Ky. L. 680, 52 S. W. 942; Van Rensselaer v. Emery, 9 How. Pr. (N. Y.) 135; Savage v. Putnam, 32 Barb. (N. Y.) 420, affd. 32 N. Y. 501; Fourth Nat. Bank v. New Orleans & Carrollton R. Co., 11 Wall. (U. S.) 624, 20 L. ed. 82. See also, Schurtz v. Romer, 82 Cal. 474, 23 Pac. 118; Jackson v. Stanford, 19 Ga. 14; Union Brewing Co. v. Inter-State Bank & Trust Co., 240 Ill. 454, 88 N. E. 997; Thompson v. Lowe, 111 Ind. 272, 12 N. E. 476; Tuller v. Leaverton, 143 Iowa 162, 121 N. W. 515; Cook v. Gilchrist, 82 Iowa 277, 48 N. W. 84; Glynn v. Phetteplace, 26 Mich. 383; Day v. Stafford, 128 Mo. App. 438, 107 S. W. 433; Treadwell v. Williams, 9 Bosw. (N. Y.) 649; Mills v. Pearson, 2 Hilt. (N. Y.) 16; Carlisle Gas &c. Co. v. Carlisle Borough, 218 Pa. 554, 67 Atl. 844; Swoope v. Wakefield, 10 Pa. Super. Ct. 342; McGlensey v. Cox, 1 Phila. (Pa.) 387; Seibert v. Seibert, 1 Brews. (Pa.) 531; Kanawha Hardwood Co. v. Evans, 65 W. Va. 622, 64 S. E. 917; Rommerdahl v. Jackson, 102 Wis. 444, 78 N. W. 742. "It is conceded by the parties to the suit that purchasers of the share of an individual partner can only take his interest, and that interest consists in the vendor's share of the surplus, which remains after the payment of the partnership debts and the settlement of accounts between the partners. * * * This is the law, and it follows that where one partner transfers his interest in the partnership to a third person, such purchase does not make the buyer a partner in the firm without the concurrence of the other partners, and the pur-

particular piece of firm property[25] nor, so it seems, will the offer, in attachment or execution against an individual partner, of title to the whole of specific firm articles, be valid.[26] The defendant's intangible "interest"[27] is alone amenable to such judicial process,[28] though possibly it may be proper to confine the

chaser has only a right of accounting." Bloodworth v. Booser, 99 Ark. 238, 138 S. W. 457; Reece v. Hoyt, 4 Ind. 169; Merrick v. Brainard, 38 Barb. (N. Y.) 574; Sherrod v. Mayo, 156 N. Car. 144, 72 S. E. 216. A partner disposing of his right, title and interest in and to partnership property divests himself, but not the firm, of title thereto. Kanawha Hardwood Co. v. Evans, 65 W. Va. 622, 64 S. E. 917.

[25] Nichol v. Stewart, 36 Ark. 612; Simmons v. Rowe, 4 Cal. App. 752, 89 Pac. 621; Noonan v. Nunan, 76 Cal. 44, 18 Pac. 98; Dickinson v. Matheson Motor Car Co., 161 Fed. 874; Pratt v. McGuinness, 173 Mass. 170, 53 N. E. 380; Ewart v. Nave-McCord Mercantile Co., 130 Mo. 112, 31 S. W. 1041; Strauss v. Frederick, 91 N. Car. 121; Gilbert v. Howard Automatic Mach. Co., 147 N. Car. 308, 61 S. E. 176; Kenneweg v. Schilansky, 45 W. Va. 521, 31 S. E. 949. But compare Gross v. Gross, 128 App. Div. (N. Y.) 429, 112 N. Y. S. 790.

[26] Heydon v. Heydon, 1 Salk. 392; Daniel v. Owens, 70 Ala. 297; Church v. Knox, 2 Conn. 514; Gerard v. Bates, 124 Ill. 150, 16 N. E. 258, 7 Am. St. 350; Williams v. Lewis, 115 Ind 45, 17 N. E. 262, 7 Am. St. 403; Stumph v. Bauer, 76 Ind. 157; Branch v. Wiseman, 51 Ind. 1; Ferguson v. Day, 6 Ind. App. 138, 33 N. E. 213; Pittman v. Robicheau, 14 La. Ann. 108; Marston v. Dewberry, 21 La. Ann. 518; Levy v. Cowan, 27 La. Ann. 556; Carvin v. Bates, 10 La. Ann. 756; Smith v. McMicken, 3 La. Ann. 319; Tennessee Bank v. McKeage, 11 Rob. (La.) 130; Allen v. Wells, 22 Pick. (Mass.) 450, 33 Am. Dec. 757; Sirrine v. Briggs, 31 Mich. 443; Blumenfeld v. Seward, 71 Miss. 342, 14 So. 442; Sanders v. Young, 31 Miss. 111; Morrison v. Blodgett, 8 N. H. 238, 29 Am. Dec. 653; Gibson v. Stevens, 7 N. H. 352; Shaver v. White, 6 Munf. (Va.) 110, 8 Am. Dec. 730; Wayt v. Peck, 9 Leigh (Va.) 434. See further, Bachurst v. Clinkard, 1 Show. 173; Eddie v. Davidson, 2 Doug. 650; Felt v. Cleghorn, 2 Colo. App. 4, 29 Pac. 813; Brewster v. Hammet, 4 Conn. 540; Spalding v. Black, 22 Kans. 55; Moore v. Pennell, 52 Maine 162, 83 Am. Dec. 500; Haynes v. Knowles, 36 Mich. 407; Hutchinson v. Dubois, 45 Mich. 143, 7 N. W. 714; Lester v. Givens, 74 Mo. App. 395; Wiles v. Maddox, 26 Mo. 77; Wright v. Radcliffe, 61 Mo. App. 257; Tappan v. Blaisdell, 5 N. H. 190; Treadwell v. Brown, 43 N. H. 290; Matter of Peter S. Smith, 16 Johns. (N. Y.) 102; Waddell v. Cook, 2 Hill (N. Y.) 47, 37 Am. Dec. 372; Atkins v. Saxton, 77 N. Y. 195; Jarvis v. Hyer, 15 N. Car. 367; Skavdale v. Moyer, 21 Wash. 10, 56 Pac. 841, 46 L. R. A. 481.

[27] See ante, note 17.

[28] Bachurst v. Clinkard, 1 Show. 173; Clagett v. Kilbourne, 1 Black (U. S.) 346, 17 L. ed. 213; Winston v. Ewing, 1 Ala. 129, 34 Am. Dec. 768; Brewster v. Hammet, 4 Conn. 540; White v. Jones, 38 Ill. 159; Edgar v. Caldwell, 1 Morr. (Iowa) 434; Moore v. Pennell, 52 Maine 162, 83 Am. Dec. 500; Allen v. Wells, 22 Pick. (Mass.) 450, 33 Am. Dec. 757; Hutchinson v. Dubois, 45 Mich. 143, 7 N. W. 714; Sanders v. Young, 31 Miss. 111; Wiles v. Maddox, 26 Mo. 77; Atkins v. Saxton, 77 N. Y. 195; Matter of Peter S. Smith, 16 Johns. (N. Y.) 102; Waddell v. Cook, 2 Hill (N. Y.) 47, 37 Am. Dec. 372; Nixon v. Nash, 12 Ohio St. 647, 80 Am. Dec. 390; Doner v. Stauffer, 1 P. & W. (Pa.) 198, 21 Am. Dec. 370; See further, United States v. Williams, 4 McLean (U. S.) 236; Vandike v. Rosskam, 67 Pa. St. 330; Conniff v. Doyle, 8 Phila. (Pa.) 630; Deal v. Bogue, 20 Pa. St. 228, 57 Am. Dec. 702. See Cox v. Russell, 44 Iowa 556; Hacker v. Johnson, 66 Maine 21; Kunze v. Cox, 113 Mich.

sale to this interest as embodied in particularized property.[29]

§ 4892. Proportionate shares of partners.—In the absence of any agreement between the partners whereby it is provided in what proportion each member of the firm shall be deemed to be interested in the partnership property, there exists a rebuttable presumption that the interests of the several members of the firm are equal.[30] Unless this presumption is overthrown by evidence it will control in the distribution of firm profits.[31] But where a partner abandons his contract, this presumption fails altogether.[32] Again it will not be indulged so as to confer upon a partner the right to share in fees received by his copartner for services as administrator, notwithstanding the fact that the latter "intended" that the amount which he thus earned should be divided between himself and his associate.[33] Moreover under no circumstances, is this presumption to militate against the right of

546, 71 N. W. 864, 67 Am. St. 480; Lucas v. Laws, 27 Pa. St. 211; Snell v. Crowe, 3 Utah 26, 5 Pac. 522.

[29] Dutton v. Morrison, 17 Ves. Jr. 193; Waters v. Taylor, 2 Ves. & B. 299; Felt v. Cleghorn, 2 Colo. App. 4, 29 Pac. 813; Hershfield v. Claflin, 25 Kans. 166, 37 Am. Rep. 237; Morrison v. Blodgett, 8 N. H. 238, 29 Am. Dec. 653; Phillips v. Cook, 24 Wend. (N. Y.) 389. See further, Lester v. Givens, 74 Mo. App. 395.

[30] "Where there is no specific agreement between partners as to their respective interests in the profits and losses of the firm, the law presumes them to be equal, unless, from the facts and circumstances of the case, it is apparent to the court that some other division was intended by the members of the firm." Safe Deposit & Trust Co. v. Turner, 98 Md. 22, 55 Atl. 1023, citing Fleischmann v. Gottschalk, 70 Md. 523, 17 Atl. 384. See also, Stein v. Robertson, 30 Ala. 286; Wallace v. Hull, 28 Ga. 68; Roach v. Perry, 16 Ill. 37; Farr v. Johnson, 25 Ill. 522; Moore v. Bare, 11 Iowa 198; Commonwealth v. Bracken, 17 Ky. L. 785, 32 S. W. 609; Crabtree v. Clapham, 67 Maine 326; Randle v. Richardson, 53 Miss. 176; Ryder v. Gilbert, 16 Hun (N. Y.) 163; Worthy v. Brower, 93 N. Car. 344; In re Richards' Estate, 1 Woodw. Dec. (Pa.) 362; Logan v. Dixon, 73 Wis. 533, 41 N. W. 713. See also, Demain v. Huston (W. (Va.), 73 S. E. 923.

[31] Turnipseed v. Goodwin, 9 Ala. 372; Donelson's Admr. v. Posey, 13 Ala. 752; Griggs v. Clarke, 23 Cal. 427; Honore v. Colmesnil, 1 J. J. Marsh. (Ky.) 506; Avritt v. Russell, 22 Ky. L. 752, 58 S. W. 811; Wolfe v. Gilmer, 7 La. Ann. 583; Harris v. Carter, 147 Mass. 313, 17 N. E. 649; Wingarden v. Verhage, 68 Mich. 14, 35 N. W. 801; Burgess v. Deierling, 113 Mo. App. 383, 88 S. W. 770; Miller v. Hale, 96 Mo. App. 427, 70 S. W. 258; Ratzer v. Ratzer, 28 N. J. Eq. 136; Taylor v. Taylor, 6 N. Car. 70; Jones v. Jones, 36 N. Car. 332; Keys v. Baldwin, 10 Ohio Dec. 271, 19 Wkly. L. Bull. (Ohio) 376; Frazer v. Linton, 183 Pa. St. 186, 38 Atl. 589; Pearce v. Ham, 113 U. S. 585, 28 L. ed. 1067, 5 Sup. Ct. 676; Broadfoot v. Fraser, 73 Vt. 313, 50 Atl. 1054. Compare Towner v. Lane's Admr., 9 Leigh (Va.) 262.

[32] Miller v. Hale, 96 Mo. App. 427, 70 S. W. 258; Denver v. Roane, 99 U. S. 355, 25 L. ed. 476.

[33] King v Whiton, 15 Wis. 684. See also, Metcalfe v. Bradshaw, 145 Ill. 124, 33 N. E. 1116, 36 Am. St. 478.

those entering into a partnership agreement, to make whatever express provisions they may choose in regard to the distribution of profits resulting from their association.[34]

§ 4893. **Conversion of realty into personalty.**—Further the equitable conversion of partnership realty into personalty, otherwise than by agreement express or implied,[35] is not carried as far in the United States as in England,[36] it being here extended only to such a point as is required in order to satisfy the firm obligations and to make an equitable distribution among the several partners themselves.[37] Thus the general rule in this country

[34] Dumont v. Ruepprecht, 38 Ala. 175; Pond v. Clark, 24 Conn. 370; Plunkett v. Dillon, 4 Houst. (Del.) 338; Appeal of McIntire, 118 Pa. St. 421, 11 Atl. 784.

[35] Davis v. Smith, 82 Ala. 198; Lowe v. Lowe, 13 Bush (Ky.) 688; Maddock v. Astbury, 32 N. J. Eq. 181; Miller v. Ferguson, 107 Va. 249, 57 S. E. 649, 122 Am. St. 840. See further, Holmes v. Self, 79 Ky. 297, 2 Ky. L. (abstract) 322, 2 Ky. L. 380; Buck v. Winn, 11 B. Mon. (Ky.) 320; Divine v. Mitchum, 4 B. Mon. (Ky.) 488, 41 Am. Dec. 241; Bank of Louisville v. Hall, 8 Bush (Ky.) 672; Wilhite's Admr. v. Boulware, 88 Ky. 169, 11 Ky. L. 59, 10 S. W. 629; Fall River Whaling Co. v. Borden, 10 Cush. (Mass.) 458; Darrow v. Calkins, 154 N. Y. 503, 49 N. E. 61, 48 L. R. A. 299, 61 Am. St. 637; Coster v. Clark, 3 Edw. Ch. (N. Y.) 428. See Robinson Bank v. Miller, 153 Ill. 244, 38 N. E. 1078, 27 L. R. A. 449, and note; Collumb v. Read, 24 N. Y. 505; Ludlow's Heirs v. Cooper's Devisees, 4 Ohio St. 1; Greene v. Greene, 1 Ohio 535, 13 Am. Dec. 642; Mallory v. Russell, 71 Ohio 63, 32 N. W. 102, 60 Am. Rep. 776; Rammelsberg v. Mitchell, 29 Ohio St. 22; In re Welles, 4 Lack. Leg. N. (Pa.) 135; In re Leaf's Appeal, 105 Pa. St. 505.

[36] "The English rule seems to be that when lands are acquired in the partnership name, with partnership funds, and for partnership purposes, equity will treat them as personalty for all purposes; but the better considered American cases hold that the lands thus acquired must be treated as personalty until the purposes of the partnership are accomplished, and then as realty with the attributes of a tenancy in common." Whisenant v. Hybart, 160 Ala. 271, 49 So. 760. See further, English Partn. Act, 1890 (53 & 54 Vic. ch. 39), §§ 20, 22; Selkrig v. Davies, 2 Dow. 230; Sanborn v. Sanborn, 11 Grant's Ch. (Can.) 359; Broom v. Broom, 3 Myl. & K. 443; Phillips v. Phillips, 1 Myl. & K. 649; Crawshay v. Maule, 1 Swanst. 495; Attorney-General v. Hubbuck, 13 Q. B. Div. 275; Houghton v. Houghton, 11 Sim. 491; Holroyd v. Holroyd, 28 L. J. Ch. 902; Essex v. Essex, 20 Beav. 442; Waterer v. Waterer, L. R. 15 Eq. 402; Murtagh v. Costello, L. R. 7 Ir. 428; Ripley v. Waterworth, 7 Ves. 425; Darby v. Darby, 3 Drew 495; Schleissner v. Goldsticker, 135 App. Div. (N. Y.) 435, 120 N. Y. S. 333; Darrow v. Calkins, 154 N. Y. 503, 49 N. E. 61, 48 L. R. A. 299, 61 Am. St. 637. And compare, Custance v. Bradshaw, 9 Jur. 486; Ashworth v. Munn, 15 Ch. Div. 363; Thornton v. Dixon, 3 Bro. C. C. 199; Bell v. Phyn, 7 Ves. Jr. 453, 458; Balmain v. Shore, 9 Ves. 500; Gray v. Smith, 43 Ch. Div. 208; Cookson v. Cookson, 8 Sim. 529; Randall v. Randall, 7 Sim. 271; Ex parte M'Kenna, 3 De G. F. & J. 645; Berry v. Folkes, 60 Miss. 576. See also, 8 Columbia Law Rev. 208.

[37] Andrews' Heirs v. Brown's Admr., 21 Ala. 437, 56 Am. Dec. 252; Lang's Heirs v. Waring, 25 Ala. 625, 60 Am. Dec. 533; Long v. Slade, 121 Ala. 267, 26 So. 31; Causler v. Wharton, 62 Ala. 358; Brewer v. Browne, 68 Ala. 210; Davis v. Smith, 82 Ala.

198, 2 So. 897; Whisenant v. Hybart, 160 Ala. 271, 49 So. 760; Percifull v. Platt, 36 Ark. 456; Lenow v. Fones, 48 Ark. 557, 4 S. W. 56; Beecher v. Stevens, 43 Conn. 587; Frink v. Branch, 16 Conn. 260; In re Codding, 9 Fed. 849; Logan v. Greenlaw, 25 Fed. 299; Schlichter Jute Cordage Co. v. Mulqueen, 142 Fed. 583; Logan v. Greenlaw, 25 Fed. 299; Price v. Hicks, 14 Fla. 565; Null v. Parsons, 145 Ill. App. 436; Robinson Bank v. Miller, 153 Ill. 244, 38 N. E. 1078, 27 L. R. A. 449, 46 Am. St. 883; Galbraith v. Tracy, 153 Ill. 54, 38 N. E. 937, 28 L. R. A. 129, 46 Am. St. 867; Nicoll v. Ogden, 29 Ill. 323, 81 Am. Dec. 311; Mauck v. Mauck, 54 Ill. 281; Morrill v. Colehour, 82 Ill. 618; Faulds v. Yates, 57 Ill. 416, 11 Am. Rep. 24; Matlock v. Matlock, 5 Ind. 403; Dickey v. Shirk, 128 Ind. 278, 27 N. E. 733; Walling v. Burgess, 122 Ind. 299, 22 N. E. 419, 23 N. E. 1076, 7 L. R. A. 481; Paton v. Baker, 62 Iowa 704, 15 N. W. 586; Hewitt v. Rankin, 41 Iowa 35; Paige v. Paige, 71 Iowa 318, 32 N. W. 360, 60 Am. Rep. 799; Mallory v. Russell, 71 Iowa 63, 32 N. W. 102, 60 Am. Rep. 776; Hewitt v. Rankin, 41 Iowa 35; Sternberg v. Larkin, 58 Kans. 201, 48 Pac. 861, 37 L. R. A. 195; Duncan v. Duncan, 93 Ky. 37, 13 Ky. L. 917, 18 S. W. 1022, 40 Am. St. 159; Divine v. Mitchum, 4 B. Mon. (Ky.) 488, 41 Am. Dec. 241; Spalding v. Wilson, 80 Ky. 589, 4 Ky. L. 575; Flanagan v. Shuck, 82 Ky. 617, 6 Ky. L. 699; Galbraith v. Gedge, 16 B. Mon. (Ky.) 631; Lowe v. Lowe, 13 Bush (Ky.) 688; Long v. Watts, 7 Ky. L. (abstract) 375; Graves v. Hardin, 21 Ky. L. 1499, 55 S. W. 679; Casky v. Casky, 5 Ky. L. (abstract) 775; Buffum v. Buffum, 49 Maine 108, 77 Am. Dec. 249; Dyer v. Clark, 5 Metc. (Mass.) 562, 39 Am. Dec. 697; Wesson v. Washburn Iron Co., 13 Allen (Mass.) 95, 90 Am. Dec. 181; Harris v. Harris, 153 Mass. 439, 26 N. E. 1117; Shearer v. Shearer, 98 Mass. 107; Godfrey v. White, 43 Mich. 171, 5 N. W. 243; Comstock v. McDonald, 126 Mich. 142, 85 N. W. 579 (with which compare Dunlap v. Byers, 110 Mich. 109, 67 N. W. 1067); Arnold v. Wainwright, 6 Gil. (Minn.) 241, 80 Am. Dec. 448; Scruggs v. Blair, 44 Miss. 406; Whitney v. Cotten, 53 Miss. 689; Priest v. Chouteau, 85 Mo. 398, 55 Am. Rep. 373; Lindley v. Davis, 7 Mont. 206, 14 Pac. 717; Hogle v. Lowe, 12 Nev. 286; Campbell v. Campbell, 30 N. J. Eq. 415; Hill v. Beach, 12 N. J. Eq. 31; Darrow v. Calkins, 154 N. Y. 503, 49 N. E. 61, 48 L. R. A. 299, 61 Am. St. 637; Collumb v. Read, 24 N. Y. 505; Tarbel v. Bradley, 7 Abb. N. Cas. (N. Y.) 273, affd. 86 N. Y. 280; Rank v. Grote, 50 N. Y. Super. Ct. 275, affd. 110 N. Y. 12, 17 N. E. 665; Greenwood v. Marvin, 111 N. Y. 423, 19 N. E. 228; Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; Hauptmann v. Hauptmann, 91 App. Div. (N. Y.) 197, 86 N. Y. S. 427; Greene v. Greene, 1 Ohio 535, 13 Am. Dec. 642; Sumner v. Hampson, 8 Ohio 328, 32 Am. Dec. 722; Ludlow's Heirs v. Cooper's Devisees, 4 Ohio St. 1; Moderville v. Mullison, 21 Pa St. 257; In re Welles, 191 Pa. St. 239, 43 Atl. 207; Meily v. Wood, 71 Pa. St. 488, 10 Am. Rep. 719; Brown v. Beecher, 120 Pa. St. 590, 15 Atl. 608; Moore v. Wood, 171 Pa. St. 365, 33 Atl. 63; West Hickory Min. Assn. v. Reed, 80 Pa. St. 38; Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510; Boyce v. Coster's Exrs., 4 Strob. Eq. (S. Car.) 25; Williamson v. Fontain, 7 Baxt. (Tenn.) 212; Lyman v. Lyman, 2 Paine (U. S.) 11, Fed. Cas. No. 8628; Hoxie v. Carr, 1 Sumn. (U. S.) 173, Fed. Cas. No. 6802; Riddle v. Whitehill, 135 U. S. 621, 34 L. ed. 283, 10 Sup. Ct. 924; Marrett v. Murphy, Fed. Cas. No. 9103; Kleine v. Shanks, 3 Cent. L. J. 799, 14 Fed. Cas. No. 7870, affd. 104 U. S. 18, 26 L. ed. 635; Hiscock v. Jaycox, 12 Nat. Bankr. Reg. 507, 12 Fed. Cas. No. 6531; Rice v. Barnard, 20 Va. 479, 50 Am. Dec. 54; Diggs v. Brown, 78 Va. 292; Martin v. Morris, 62 Wis. 418, 22 N. W. 525. And compare, Spurlock v. Wilson, 160 Mo. App. 14, 142 S. W. 363; Smith v. Jackson, 2 Edw. Ch. (N. Y.) 28; Ludlow's Heirs v. Cooper's Devisees, 4 Ohio St. 1; Rosenbaum v. New York, 59 Misc. (N. Y.) 30, 109 N. Y. S. 775; Lauffer v. Cavett, 87 Pa. St. 479; McPherson v. Swift, 22 S. Dak. 165, 116 N. W. 76, 133 Am. St. 907; Pitts v. Spotts, 86 Va. 71, 9 S. E. 501.

is that dower rights,[38] and rights of inheritance may be distinguished, subject to the meeting of such requirements, in real property contributed by a deceased partner.[39] Likewise the as-

[38] Brewer v. Browne, 68 Ala. 210; Lenow v. Fones, 48 Ark. 557, 4 S. W. 56; Hunnicutt v. Summey, 63 Ga. 586; Pepper v. Pepper, 24 Ill. App. 316; Bopp v. Fox, 63 Ill. 540; Simpson v. Leech, 86 Ill. 286; Strong v. Lord, 107 Ill. 25; Trowbridge v. Cross, 117 Ill. 109, 7 N. E. 347; Grissom v. Moore, 106 Ind. 296, 6 N. E. 629, 55 Am. Rep. 742; Hill v. Cornwall & Bros.' Assignee, 95 Ky. 512, 16 Ky. L. 97, 26 S. W. 540; Galbraith v. Gedge, 16 B. Mon. (Ky.) 631; Long v. Watts, 7 Ky. L. (abstract) 375; Ratcliffe v. Mason, 92 Ky. 190, 13 Ky. L. 551, 17 S. W. 438; Goodburn v. Stevens, 5 Gill (Md.) 1; Dyer v. Clark, 5 Metc. (Mass.) 562, 39 Am. Dec. 697; Howard v. Priest, 5 Metc. (Mass.) 582; Wilcox v. Wilcox, 13 Allen (Mass.) 252; Free v. Beatley, 95 Mich. 426, 54 N. W. 910; Woodward-Holmes Co. v. Nudd, 58 Minn. 236, 59 N. W. 1010, 27 L. R. A. 340, 49 Am. St. 503; Markham v. Merrett, 7 How. (Miss.) 437, 40 Am. Dec. 76; Willett v. Brown, 65 Mo. 138, 27 Am. Rep. 265; Young v. Thrasher, 115 Mo. 222, 21 S. W. 1104; Uhler v. Semple, 20 N. J. Eq. 288; Campbell v. Campbell, 30 N. J. Eq. 415; Sage v. Sherman, 2 N. Y. 417; Coster v. Clarke, 3 Edw. Ch. (N. Y.) 428; Smith v. Jackson, 2 Edw. Ch. (N. Y.) 28; Greenwood v. Marvin, 111 N. Y. 423, 19 N. E. 228; Stroud v. Stroud, 61 N. Car. 525; Sumney v. Patton, 60 N. Car. 601, 86 Am. Dec. 451; Patton v. Patton, 60 N. Car. 572, 86 Am. Dec. 448; Ferguson v. Hass, 62 N. Car. 113; Blossom v. Van Amringe, 63 N. Car. 65; Sparger v. Moore, 117 N. Car. 449, 23 S. E. 359; Foster's Appeal, 74 Pa. St. 391, 15 Am. Rep. 553; Warfel v. Calder, 8 Lanc. Bar. (Pa.) 205; Reed v. Kennedy, 2 Strob. (S. Car.) 67; Bowman v. Bailey, 20 S. Car. 550; Griffey v. Northcutt, 5 Heisk. (Tenn.) 746; Martin v. Smith, 25 W. Va. 579. See further, Andrews' Heirs v. Brown's Admr., 21 Ala. 437, 56 Am. Dec. 252; Espy v. Comer, 76 Ala. 501; Drewry v. Montgomery, 28 Ark. 256; Gray v. Palmer, 9 Cal. 616; In re Ransom, 17 Fed. 331; Price v. Hicks, 14 Fla. 565; Loubat v. Nourse, 5 Fla. 350; Hale v. Plummer, 6 Ind. 121; Paige v. Paige, 71 Iowa 318, 32 N. W. 360, 60 Am. Rep. 799; Pepper v. Thomas, 85 Ky. 539, 9 Ky. L. 122, 4 S. W. 297; Ellis v. Johnson, 4 Ky. L. (abstract) 991; Bowler v. Blair, 6 Ky. L. (abstract) 666; Burnside v. Merrick, 4 Metc. (Mass.) 537; Hamilton v. Halpin, 68 Miss. 99, 8 So. 739; Duhring v. Duhring, 20 Mo. 174; Shipp v. Snyder, 121 Mo. 155, 25 S. W. 900; Dawson v. Parsons, 10 Misc. (N. Y.) 428, 63 N. Y. St. 320, 31 N. Y. S. 78, affd. 11 App. Div. (N. Y.) 632, 75 N. Y. St. 1479, 41 N. Y. S. 1111; Greene v. Greene, 1 Ohio 535, 13 Am. Dec. 642; Clay v. Freeman, 118 U. S. 97, 30 L. ed. 104, 6 Sup. Ct. 964; Hughes v. Allen, 66 Vt. 95, 28 Atl. 882; Martin v. Smith, 25 W. Va. 579. And compare, Pugh v. Currie, 5 Ala. 446; Dickey v. Shirk, 128 Ind. 278, 27 N. E. 733; Fairchild v. Fairchild, 64 N. Y. 471. The absolute English rule, however, has found favor with the courts of Virginia. Pierce's Admr. v. Trigg's Heirs, 10 Leigh (Va.) 406-423; Parrish v. Parrish, 88 Va. 529, 14 S. E. 325; Deering & Co. v. Kerfoot's Exr., 89 Va. 491, 16 S. E. 671. But compare Davis v. Christian, 15 Grat. (Va.) 11. So also it was adhered to in an early South Carolina decision, since overruled. Richardson's Exrs. v. Wyatt, 2 Desaus. (S. Car.) 471.

[39] Lenow v. Fones, 48 Ark. 557, 4 S. W. 56; Logan v. Greenlaw, 25 Fed. 299; Carter v. Flexner, 92 Ky. 400, 13 Ky. L. 608, 17 S. W. 851; Goodburn v. Stevens, 5 Gill (Md.) 1; Dyer v. Clark, 5 Metc. (Mass.) 562, 39 Am. Dec. 697; Fairchild v. Fairchild, 64 N. Y. 471; Darrow v. Calkins, 154 N. Y. 503, 49 N. E. 61, 48 L. R. A. 299, 61 Am. St. 637; Summey v. Patton, 60 N. Car. 601, 86 Am. Dec. 451; Stroud v. Stroud, 61 N. Car. 525; Mendenhall v. Benbow, 84 205; Williamson v. Fontain, 7 Baxt. N. Car. 646; In re Welles, 191 Pa. St. 239, 43 Atl. 207; Foster's Appeal, 74 Pa. St. 391, 15 Am. Rep. 553;

sessment of partnership realty as such, is proper.[40] So also where property has been purchased with partnership funds as real estate and it has been treated as such by the members of the firm who have sold and conveyed their individual shares independently of their associates, and there are no creditors to be considered, such property will be regarded as real estate and a claim against members of the firm by reason of the property, and the consequential lien, must be enforced against the property itself rather than against the partnership as such.[41] Even when this equitable conversion takes place, it is not of such a nature nor of such an extent that one partner thereby becomes vested with an implied power to dispose of the entire partnership interest in the property.[42] Nor is there a conversion so far as to relieve the partnership from compliance with the provision of the statute of frauds relating to the conveyance of real property.[43]

Warfel v. Calder, 8 Lanc. Bar. (Pa.) (Tenn.) 212; Yeatman's Heirs v. Woods, 6 Yerg. (Tenn.) 20, 27 Am. Dec. 452; Gaines v. Catron, 1 Humph. (Tenn.) 514; Piper v. Smith, 1 Head (Tenn) 93; Griffey v. Northcutt, 5 Heisk. (Tenn.) 746; Robertson v. Miller, 1 Brock. (U. S.) 466, Fed. Cas. No. 11926; Edgar v. Donnally, 2 Munf. (Va.) 387; Martin v. Morris, 62 Wis. 418, 22 N. W. 525. See further Lang's Heirs v. Waring, 17 Ala. 145; Abernathy v. Moses, 73 Ala. 381; Pepper v. Pepper, 24 Ill. App. 316; Van Aken v. Clark, 82 Iowa 256, 48 N. W. 73; Marble v. Marble, 4 Ky. L. 360; Shearer v. Shearer, 98 Mass. 107; Dilworth v. Mayfield, 36 Miss. 40; Waugh v. Mitchell, 21 N. Car. 510. And compare Dickey v. Shirk, 128 Ind. 278, 27 N. E. 733; Pepper v. Thomas, 85 Ky. 539, 9 Ky. L. 122, 4 S. W. 297; McAlister v. Montgomery, 3 Hayw. (Tenn.) 94; Hoxie v. Carr, 1 Sumn. (U. S.) 173, Fed. Cas. No. 6802.

[40] Hubbard v. Winsor, 15 Mich. 146.

[41] Smith v. Wood, 1 N. J. Eq. 74.

[42] Foster's Appeal, 74 Pa. St. 391, 15 Am. Rep. 553.

[43] Foster v. Barns, 81 Pa. St. 377. See also, Davis v. Christian, 15 Grat. (Va.) 11.

CHAPTER CL.

RIGHTS AND LIABILITIES OF PARTNERS INTER SE.

§ 4905. Good faith.
4906. Acts impinging on requirement of good faith.
4907. Exclusion of partner from management of business.
4908. Interest—In general.
4909. Interest—On capital.
4910. Interest—On advances.
§ 4911. Interest—On balance.
4912. Contribution.
4913. Contribution—Limit.
4914. Contribution—Right of partner to salary.
4915. Partner's lien.
4916. Rights of action between partners.

§ 4905. Good faith.—The supreme duty owing from each partner to his copartners is one which is included in every other duty, express[1] or implied,[2]—namely, the exercise of perfect good faith.[3] And in this particular instance the words "partner" and

[1] Stipulated either in the original articles of association or in a subsequent agreement between the partners.

[2] From the partnership articles, subsequent agreement, nature of the business, sudden exigency, etc.

[3] "The first and highest duty which partners owe to each other is perfect good faith." Whitney v. Dewey, 158 Fed. 385. See further, Bestor v. Barker, 106 Ala. 240, 17 So. 389; Goldsmith v. Eichold, 94 Ala. 116, 10 So. 80, 33 Am. St. 97; Warren v. Schainwald, 62 Cal. 56; Meyers v. Merillion, 118 Cal. 352, 50 Pac. 662; Caldwell v. Davis, 10 Colo. 481, 15 Pac. 696, 3 Am. St. 599; Jennings v. Rickard, 10 Colo. 395, 15 Pac. 677; Baker v. Cummings, 4 App. Cas. D. C. 230; Kilbourn v. Latta, 5 Mackey (16 D. C.) 304, 60 Am. Rep. 373, revd. 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. 201; Miller v. O'Boyle, 89 Fed. 140; Williamson v. Monroe, 101 Fed. 322; Stephens v. Orman, 10 Fla. 9; Roby v. Colehour, 135 Ill. 300, 25 N. E. 777, affd. 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. 47; Eldridge v. Walker, 80 Ill. 270; Fordyce v. Schriver, 115 Ill. 530, 15 N. E. 87; Wiggins v. Markham, 131 Iowa 102, 108 N. W. 113; Yetzer v. Applegate, 83 Iowa 726, 50 N. W. 66; Thompson v. Parnell, 81 Kans. 119, 105 Pac. 502; Carlin v. Donegan, 15 Kans. 495; Phœnix Ins. Co. v. Miller, 13 Ky. L. (abst.) 464; Baldey v. Brackenridge, 39 La. Ann. 660, 2 So. 410; Jones v. Dexter, 130 Mass. 380, 39 Am. Rep. 459; Lockwood v. Beckwith, 6 Mich. 168, 72 Am. Dec. 69; Bohrer v. Drake, 33 Minn. 408, 23 N. W. 840; Croughton v. Forrest, 17 Mo. 131; Pomeroy v. Benton, 57 Mo. 531; Martin v. Lutkewitte, 50 Mo. 58; Inglis v. Floyd, 33 Mo. App. 565; Freund v. Murray, 39 Mont. 539, 104 Pac. 683; Renton v. Chaplain, 9 N. J. Eq. 62; Coggswell & Boulter Co. v. Coggswell (N. J.), 40 Atl. 213; Nicholson v. Janeway, 16 N. J. Eq. 285; Jessup v. Cook, 6 N. J. L. 434; Platt v. Platt, 2 Thomp. & C. (N. Y.) 25-39; Patterson v. Hare, 4 App. Div. (N. Y.) 319, 38 N. Y. S. 565, 74 N. Y. St. 302; Wright v. Duke, 91 Hun (N. Y.) 409, 72 N. Y. St. 375, 36 N. Y. S. 853; Lay v. Emery, 8 N. Dak. 515, 79 N. W. 1053; Stidger v. Reynolds, 10 Ohio 351;

"copartners" have a somewhat broader significance than ordinarily attaches to them since this good faith required of actual partners is equally demanded of those who are negotiating for a partnership but between whom as yet the partnership relation does not exist,[4] and of those who have dissolved such relation but who have not entirely determined their partnership concerns.[5] Fur-

Yeoman v. Lasley, 40 Ohio St. 190; Devall v. Burbridge, 6 W. & S. (Pa.) 529; Hermes v. Hermes, 36 Pa. L. J. 265; Coursin's Appeal, 79 Pa. St. 220; Edwards v. Johnson, 90 S. Car. 90, 72 S. E. 638; Venable v. Levick, 2 Head (Tenn.) 351; Morris v. Wood (Tenn.), 35 S. W. 1013, Pierce v. Daniels, 25 Vt. 624; Yost v. Critcher, 112 Va. 870, 72 S. E. 594; Sexton v. Sexton, 9 Grat. (Va.) 204; Salhinger v. Salhinger, 56 Wash. 134, 105 Pac. 236; McMahon v. McClernan, 10 W. Va. 419. And compare Bentley v. Craven, 18 Bev. 75; Burton v. Wookey, 3 Mad. & Geld. 367; Longstaff v. Keogh, 3 Victorian L. R. Eq. 175; Martin v. Smith, 11 Cent. Rep. 748; Kintrea v. Charles, 12 Ont. Ch. 117; Rogers v. Ullmann, 27 Ont. Ch. 137; O'Connor v. Naughton, 13 Ont. Ch. 428; Hopkins v. Watt, 13 Ill. 298; Baldey v. Brackenridge, 39 La. Ann. 660, 2 So. 410; Heath v. Waters, 40 Mich. 457; Pomeroy v. Benton, 57 Mo. 531; Ilman v. Inkster, 90 Nebr. 704, 134 N. W. 265; Dunlop v. Richards, 2 Ed. Smith (N. Y.) 181; Plat v. Plat, 2 N. Y. Sup. Ct. 25; Pearce v. Ham, 113 U. S. 585, 28 L. ed. 1067, 5 Sup. Ct. 676; Chapin v. Streeter, 124 U. S. 460, 31 L. ed. 475, 8 Sup. Ct. 529; Sexton v. Sexton, 9 Grat. (Va.) 204. See also, Aberdeen R. Co. v. Blakie, 1 Macq. App. Cas. 461; Longman v. Pole, M. & M. 223, 22 E. C. L. 297; Jennings v. Rickard, 10 Colo. 395, 15 Pac. 677; Brownell v. Steere, 29 Ill. App. 358, affd. 128 Ill. 209, 21 N. E. 3; Wilder v. Morris, 7 Bush (Ky.) 420; Reynaud's Heirs v. Peytavin's Exrs., 13 La. 121; Struthers v. Pearce, 51 N. Y. 357. But "the purchase by one partner with his own means of an individual judgment against another partner at a time when no funds had arisen out of which the latter was entitled to claim profits is outside of the scope of the partnership business; and, whatever view may be taken of such transactions from the standpoint of propriety, we know of no rule of law which forbids it." Miller v. Ferguson, 110 Va. 217, 65 S. E. 562, 18 L. R. A. (N. S.) 618n, 135 Am. St. 934.

[4] Lindl. Partn., *303; Merchants' Bank v. Thompson, 3 Ont. R. Ch. Div. 541; Davidson v. Thirkell, 3 Ont. Ch. 330; Hichens v. Congreve, 1 Rus. & M. 150; Bloom v. Lofgren, 64 Minn. 1, 65 N. W. 960; Harlow v. La Brum, 151 N. Y. 278, 45 N. E. 859; Esmond v. Seeley, 28 App. Div. (N. Y.) 292, 51 N. Y. S. 36; Densmore Oil Co. v. Densmore, 64 Pa. 43; Beene v. Rotan Grocery Co., 50 Tex. Civ. App. 448, 110 S. W. 162. See further, Lewis v. Loper, 54 Fed. 237; Emery v. Parrott, 107 Mass. 95; Dunlop v. Richards, 2 Ed. Smith (N. Y.) 181; Simons v. Vulcan Oil & Mining Co., 61 Pa. St. 202, 100 Am. Dec. 628. And compare the case of Uhler v. Semple, 20 N. J. Eq. 288, which holds that the rule of caveat emptor applies to persons bargaining with each other for a partnership.

[5] Goldsmith v. Eichold, 94 Ala. 116, 10 So. 80, 33 Am. St. 97; Gunn v. Black, 60 Fed. 151, 8 C. C. A. 534; Renfrow v. Pearce, 68 Ill. 125; Pierce v. McClelland, 93 Ill. 145; Ehrmann v. Stitzel, 121 Ky. 751, 28 Ky. L. 728, 90 S. W. 275, 123 Am. St. 224; Filbrun v. Ivers, 92 Mo. 388, 4 S. W. 674; Knapp v. Reed, 88 Nebr. 754, 130 N. W. 430, 32 L. R. A. (N. S.) 869; Garretson v. Brown, 185 Pa. St. 447, 40 Atl. 293; Wells v. McGeoch, 71 Wis. 196, 35 N. W. 769. See further, Clark v. Clark, 8 Victorian L. R. Eq. 303; Lewis v. Loper, 54 Fed. 237; Heward v. Slagle, 52 Ill. 336; Leslie E. Keeley Co. v. Hargreaves, 236 Ill. 316, 86 N. E. 132; Jones v. Dexter, 130 Mass. 380, 39 Am. Rep. 459; Wyman v. Hooper, 2 Gray (Mass.) 141; Heath v. Waters, 40 Mich. 457; Manufacturers' Nat. Bank

ther, the partnership relation is one of trust and confidence,[6] and intentional concealment[7] and misrepresentation are, as between partners, species of fraud which will not be tolerated.[8] But to whatever extent the law may penalize bad faith in a partner, it

v. Cox, 2 Hun (N. Y.) 572, 5 Thomp. & C. 126, affd. 59 N. Y. 659; McNair v. Ragland, 7 N. Car. 139; Wilson v. Keller, 195 Pa. St. 98, 45 Atl. 682; White v. Gardner, 37 Tex. 407.

[6] "There can be no question but that the law holds each member of a partnership to the highest degree of good faith in his dealings with reference to any matter which concerns the business of the common engagement, and that each partner, being the agent of the firm, must be held, during the existence of the relation, to the same accountability as other trustees, in all matters which affect the common interest." Edwards v. Johnson (S. Car.), 72 S. E. 638. Partnership is "eminently a relation of trust. All its effects are held in trust, and each partner is, in one sense, a trustee; a trustee for the newly-created entity,—the partnership,—and for each member of the firm, who thus becomes a beneficiary under the trust. He is more; he is a trustee and a cestui que trust—a trustee, so far as his own duties bind him; a cestui que trust, so far as duties rest on his copartners." Goldsmith v. Eichold, 94 Ala. 116, 10 So. 80, 33 Am. St. 97. "There is no stronger fiduciary relation known to the law than that of a copartnership, where one man's property and property rights are subject to a large extent to the control and administration of another." Salhinger v. Salhinger, 56 Wash. 134, 105 Pac. 236. See further, Ehrmann v. Stitzel, 121 Ky. 751, 28 Ky. L. 728, 90 S. W. 275, 123 Am. St. 224; Breaux v. LeBlanc, 50 La. Ann. 228, 23 So. 281, 69 Am. St. 403; Knapp v. Reed, 88 Nebr. 754, 130 N. W. 430, 32 L. R. A. (N. S.) 869; Kelly v. Delaney, 136 App. Div. (N. Y.) 604, 121 N. Y. S. 241; Baker v. Brown, 151 N. Car. 12, 65 S. E. 520; Miller v. Ferguson, 110 Va. 217, 65 S. E. 562, 28 L. R. A. (N. S.) 618n, 135 Am. St. 934. See also, Bestor v. Barker, 106 Ala. 250, 17 So. 389; Raymond v. Vaughan, 128 Ill. 256, 21 N. E. 566, 4 L. R. A. 440, 15 Am. St. 112; Pierce v. McClellan, 93 Ill. 145; Martin v. Lutkewitte, 50 Mo. 58; Filbrun v. Ivers, 92 Mo. 388, 4 S. W. 674; Pomeroy v. Benton, 57 Mo. 531; Mitchell v. Reed, 61 N. Y. 123, 19 Am. Rep. 252; Marston v. Gould, 69 N. Y. 220; Forsyth County v. Lash, 89 N. Car. 159; Patterson v. Lilly, 90 N. Car. 82; Henson v. Byrne (Tex. Civ. App.), 41 S. W. 494; Kimberly v. Arms, 129 U. S. 512, 32 L. ed. 764, 9 Sup. Ct. 355; Grant v. Hardy, 33 Wis. 668.

[7] "In the requirement of good faith between partners, naturally, deceit, concealment, and false representations are forbidden." Whitney v. Dewey, 158 Fed. 385. See further, Aas v. Benham, (1891) 2 Ch. 244; Kelly v. Delaney, 136 App. Div. (N. Y.) 604, 121 N. Y. S. 241; Lay v. Emery, 8 N. Dak. 515, 79 N. W. 1053, Zahn v. McMillin, 179 Pa. St. 146, 36 Atl. 188, 57 Am. St. 591; Latta v. Kilbourn, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. 201; Yost v. Critcher, 112 Va. 870, 72 S. E. 594; McKinley v. Lynch, 58 W. Va. 44, 51 S. E. 4. See also, Llewelyn v. Levi, 157 Cal. 31, 106 Pac. 219; Caldwell v. Davis, 10 Colo. 481, 15 Pac. 696, 3 Am. St. 599; Ehrmann v. Stitzel, 121 Ky. 751, 28 Ky. L. 728, 90 S. W. 275, 123 Am. St. 224; Raymond v. Vaughan, 128 Ill. 256, 21 N. E. 566, 4 L. R. A. 440, 15 Am. St. 112; Ward v. Yarnelle, 173 Ind. 535, 91 N. E. 1; Sexton v. Sexton, 9 Grat. (Va.) 204; Salhinger v. Salhinger, 56 Wash. 134, 105 Pac. 236.

[8] "Partners are trustees for each other, and in all proceedings connected with the conduct of the partnership every partner is bound to act in the highest good faith to his copartner, and may not obtain any advantage over him in the partnership affairs by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind. Civ. Code, §§ 2410, 2411." Llewelyn v. Levi, 157 Cal. 31, 106 Pac. 219; Mattern v.

has been held that such bad faith will not be presumed,[9] and that a copartner alone can raise the cry of fraud. "If a member enter into a transaction in his own behalf, which is within the scope of the partnership business, his copartner may insist that it is a fraud upon him and claim the benefit resulting from it; yet this is a right which the partner can alone assert, and is not available to third parties for the purpose of fixing a liability upon the partnership when such claim has not been asserted."[10] Negligence, however, is always reprehensible in the eyes of the law and a partner who is negligent as regards any one of the affairs of the firm of which he is a member will ordinarily be held individually liable for the resulting loss.[11] Thus where a partnership is created for the purpose of purchasing, storing and selling eggs, those partners upon whom devolve the duty of keeping the eggs in their cold storage warehouse will be liable to their associates for the eggs which, through their neglect to exercise ordinary, reasonable care are spoiled.[12] So, also, the negligent paying of an unjust claim against the firm by one of the members thereof, will preclude his charging to the partnership the amount expended.[13] On the other hand although one of the partners neglects an attempt to enforce a claim until the same is barred by limitations, he will not be compelled to bear the entire loss when his associate had knowledge of the debt and might have himself brought suit thereupon within the prescribed time.[14] But where the vice-president of a bank is the manager of a partnership of which the bank is a member, his failure to properly manage the partnership business cannot be charged to the bank when the latter sues to recover money loaned to the firm.[15]

Canavan, 3 Cal. App. 493, 86 Pac. 618. See further, Phillips v. Reynolds, 236 Ill. 119, 86 N. E. 193; Ehrmann v. Stitzel, 121 Ky. 751, 28 Ky. L. 728, 90 S. W. 275, 123 Am. St. 224; Azbill v. Wathen (Ky.), 115 S. W. 756; Lay v. Emery, 8 N. Dak. 515, 79 N. W. 1053; Finn v. Young, 50 Wash. 543, 97 Pac. 741; Salhinger v. Salhinger, 56 Wash. 134, 105 Pac. 236; Fouse v. Shelly, 64 W. Va. 425, 63 S. E. 208.

[9] Jenkins v. Peckinpaugh, 40 Ind. 133.

[10] Lockwood v. Beckwith, 6 Mich. 168, 72 Am. Dec. 69.

[11] Carlin v. Donegan, 15 Kans. 495; Gordon v. Moore, 8 Pa. Co. Ct. 289; Morris v. Wood (Tenn.), 35 S. W. 1013; Pierce v. Daniels, 25 Vt. 624.

[12] Bohrer v. Drake, 33 Minn. 408, 23 N. W. 840.

[13] Gordon v. Moore, 134 Pa. St. 486, 19 Atl. 753.

[14] Chalmers v. Chalmers, 81 Cal. 81, 22 Pac. 395. See also, Aiken v. Ogilvie, 12 La. Ann. 353; Walpole v. Renfroe, 16 La. Ann. 92; Knipe v. Livingston, 209 Pa. 49, 57 Atl. 1130. And compare Jessup v. Cook, 6 N. J. L. 434.

[15] Cameron v. First Nat. Bank, 4

Conformance with the partnership articles devolves upon all the partners, and their acts must be such as are within the prescribed confines of the partnership business.[16] Thus a partner who has disposed of firm property in violation of the partnership agreement must bear the burden of damages resulting therefrom.[17] Again where joint owners of a sawmill plant tortiously and wrongfully enter upon the partnership premises on a Sunday when the other joint proprietor is absent, and remove therefrom certain important parts of the machinery essential to the operation of the mill, and carry them away for the express purpose of preventing the latter from operating the mill and keep them away for more than a month during which time the mill is idle, their associate is entitled to actual and punitive damages commensurate with his loss and injury.[18] Among the basic rights of each member of the partnership are accuracy in accounting in all matters of firm business, and accessibility at all reasonable times to all partnership records,[19] and the chancellor will not be diligent in shap-

Tex. Civ. App. 309, 23 S. W. 334, affd. 34 S. W. 178.

[16] Campbell v. Campbell, 7 Cl. & F. 166; Weeks v. McClintock, 50 Ark. 183, 6 S. W. 734; Haller v. Willamowicz, 23 Ark. 566; Leighton v. Hosmer, 39 Iowa 594; Murrell v. Murrell, 33 La. Ann. 1233; Murphy v. Crafts, 13 La. Ann. 519, 71 Am. Dec. 519; Phillips v. Reeder, 18 N. J. Eq. 95; Herrick v. Ames, 21 N. Y. Super. Ct. 115; Tarbel v. West, 13 N. Y. Wkly. Dig. 314; Hulett v. Fairbanks, 40 Ohio St. 233; McCoy v. Crossfield, 54 Ore. 591, 104 Pac. 423; In re Marsh's Appeal, 69 Pa. St. 30, 8 Am. Rep. 206; Looney v. Gillenwaters, 11 Heisk. (Tenn.) 133; Gill v. Wilson, 2 Willson Civ. Cas. Ct. App. (Tex.), § 380.

[17] Hollister v. Simonson, 36 App. Div. (N. Y.) 63, 55 N. Y. S. 372, revd. 170 N. Y. 357, 63 N. E. 342.

[18] Ball v. Levin, 48 La. Ann. 359, 19 So. 118. See also, Childers v. Neely, 47 W. Va. 70, 34 S. E. 828, 49 L. R. A. 468, 81 Am. St. 777.

[19] Rowe v. Wood, 2 Jac. & W. 559; Greatrex v. Greatrex, 1 De G. & Sm. 692; Pierce v. Scott, 37 Ark. 308; Chandler v. Sherman, 16 Fla. 99; Webb v. Fordyce, 55 Iowa 11, 7 N. W. 385; O'Brien v. Pentz, 48 Md. 562; Hall v. Clagett, 48 Md. 223; Lilly v. Kroesen, 3 Md. Ch. 83; Godfrey v. White, 43 Mich. 171, 5 N. W. 243; McAlpine v. Miller, 104 Minn. 289, 116 N. W. 583; Saunders v. Duval's Admr., 19 Tex. 467; Diamond v. Henderson, 47 Wis. 172, 2 N. W. 73; Wood v. Beath, 23 Wis. 254. And compare Trego v. Hunt, (1896) A. C. 7; Doane v. Cummins, 11 Conn. 152; Gage v. Parmelee, 87 Ill. 329; Over v. Hetherington, 66 Ind. 365; Kemp v. Smith, 88 Iowa 725, 55 N. W. 36; Joplin v. Cordrey, 9 Ky. L. 445, 5 S. W. 397; Meguiar v. Helm, 91 Ky. 19, 14 S. W. 949; Funk v. Leachman, 4 Dana (Ky.) 24; Theall v. Lacey, 5 La. Ann. 548; Bevans v. Sullivan, 4 Gill (Md.) 383; Pierce v. Ten Eyck, 9 Mont. 349, 23 Pac. 423; Allen v. Coit, 6 Hill (N. Y.) 318; Burchell v. Voght, 35 App. Div. (N. Y.) 190, 55 N. Y. S. 80, affd. 164 N. Y. 602, 58 N. E. 1085; Heartt v. Corning, 3 Paige (N. Y.) 566; Jung v. Weyand, 9 Ohio Dec. (Reprint) 485, 14 Wkly. Law Bul. 143; Keys v. Baldwin, 10 Ohio Dec. (Reprint) 271, 19 Wkly. Law Bul. 376; In re Ful-

ing partnership accounts so that a partner who has failed to keep them accurately may profit by his own negligence.[20] But one partner cannot complain that the books kept by his associate are incomplete and fail to show all they should show when for more than twenty years he has tolerated and seems to have authorized a crude and deficient system of bookkeeping.[21] So, also, it has been held that entries upon partnership books which have remained unquestioned for a period of twelve years, cannot be attacked after the expiration of such time.[22] Likewise where a partner covenants to keep proper accounts of the transactions of his firm and fails to do so but there is nothing which can be justly taken as an impeachment of his integrity or which raises a suspicion that his delinquency was wilful, and it appears that he did as well as he could, considering his absolute incompetency and that his associate condoned or waived his lack of capacity, the maxim omnia praesumuntur contra spoliatorem is inapplicable.[23]

§ 4906. Acts impinging on requirement of good faith.—Good faith will not permit any one partner to advantage himself, singly and alone, at the expense of the firm.[24] In general, he

mer's Appeal, 90 Pa. St. 143; United States Bank v. Binney, 5 Mason (U. S.) 176, Fed. Cas. No. 16791.

[20] Hume v. McNees, 10 Ky. L. 947, 10 S. W. 384.

[21] Shoemaker v. Shoemaker, 29 Ky. L. 134, 92 S. W. 546.

[22] Lewis v. Loper, 54 Fed. 237.

[23] Knapp v. Edwards, 57 Wis. 191, 15 N. W. 140.

[24] Aas v. Benham, (1891) 2 Ch. 244, 19 Eng. Ruling Cas. 582; Carter v. Horne, 1 Eq. Cas. Abr. 7, par. 13; Featherstonhaugh v. Fenwick, 17 Ves. Jr. 298; Wright v. Kane, 1 Quebec Q. B. 297; Sneed v. Deal, 53 Ark. 152, 13 S. W. 703; McKenzie v. Dickinson, 43 Cal. 119; Laffan v. Naglee, 9 Cal. 662, 70 Am. Dec. 678; Llewelyn v. Levi, 157 Cal. 31, 106 Pac. 219; Hill v. Miller, 78 Cal. 149, 20 Pac. 304; Grafton v. Paine, 7 App. D. C. 255; Sanderson's Admr. v. Sanderson, 17 Fla. 820; Solomon v. Solomon, 2 Ga. 18; Raymond v. Vaughan, 128 Ill. 256, 21 N. E. 566, 4 L. R. A. 440, 15 Am. St. 112; Smith v. Ramsey, 1 Gilm. (Ill.) 373; Stearnes v. Joy, 41 Ill. App. 157; Wierich v. DeZoya, 2 Gilm. (Ill.) 385; Love v. Carpenter, 30 Ind. 284; Lonergan v. Lonergan, 60 Kans. 855, 55 Pac. 851; McAdams' Exrs. v. Hawes, 9 Bush (Ky.) 15; Farmer v. Samuel, 4 Litt. (Ky.) 187, 14 Am. Dec. 106; Anderson's Admr. v. Whitlock, 2 Bush (Ky.) 398, 92 Am. Dec. 489; Klotz v. Macready, 39 La. Ann. 638, 2 So. 203; Lowry v. Cobb, 9 La. Ann. 592; Bush v. Guion, 6 La. Ann. 797; Tebbetts v. Dearborn, 74 Maine 392; Fanning v. Chadwick, 3 Pick. (Mass.) 420, 15 Am. Dec. 233; Leach v. Leach, 18 Pick. (Mass.) 68; Pierce v. Pierce, 89 Mich. 233, 50 N. W. 851; Gordon v. Tyler, 53 Mich. 629, 19 N. W. 560, 20 N. W. 70; Brown v. Shackleford, 53 Mo. 122; Evans v. Gibson, 29 Mo. 223, 77 Am. Dec. 565; Filburn v. Ivers, 92 Mo. 388, 4 S. W. 674; Croughton v. Forest, 17 Mo. 131; Evans v. Gibson, 29 Mo. 223, 77 Am. Dec. 565; Catron v. Shepherd, 8 Nebr. 308, 1 N. W. 204; Brown v.

cannot possess himself individually, at least for purposes of profit, of claims against the partnership.[25] "Under supposable circumstances, it may be that in equity a partner, who had taken assignments of the obligations of the firm to himself, would be permitted to keep them alive and enforce them against his co-partners for their contributive share of the sums which he had paid for the assignment. This might be done for the purpose of

O'Brien, 4 Nebr. 195; Tucker v. Peaslee, 36 N. H. 167; Partridge v. Wells, 30 N. J. Eq. 176; Coddington v. Idell, 30 N. J. Eq. 540; Shaler v. Trowbridge, 28 N. J. Eq. 595; Todd v. Rafferty's Admrs., 30 N. J. Eq. 254; Baird v. Baird's Heirs, 21 N. Car. 524, 31 Am. Dec. 399; Eason v. Cherry, 59 N. Car. 261; Lay v. Emery, 8 N. Dak. 515, 79 N. W. 1053; Struthers v. Pearce, 51 N. Y. 357; Mitchell v. Reed, 61 N. Y. 123, 19 Am. Rep. 252; Chamberlin v. Chamberlin, 44 N. Y. Sup. Ct. 116; Dougherty v. Van Nostrand, 1 Hoff. (N. Y.) 68; Swift v. Dean, 6 Johns. (N. Y.) 523; Anderson v. Lemon, 8 N. Y. 236, Seld. Notes (N. Y.) 90; Stoughton v. Lynch, 1 Johns. Ch. (N. Y.) 467; Manufacturers' Nat. Bank v. Cox, 2 Hun (N. Y.) 572, 5 Thomp. & C. (N. Y.) 126, affd. 59 N. Y. 659; Weston v. Ketcham, 39 N. Y. Super. Ct. 54; Tolan v. Carr, 12 Daly (N. Y.) 520; Reinhardt v. Reinhardt, 134 App. Div. (N. Y.) 440, 119 N. Y. S. 285; Mitchell v. Read, 61 Barb. (N. Y.) 310, revd. 61 N. Y. 123, 19 Am. Rep. 252; Getty v. Devlin, 54 N. Y. 403; Dunlop v. Richards, 2 E. D. Smith (N. Y.) 181; Case v. Abeel, 1 Paige (N. Y.) 393; Burr v. De La Vergne, 102 N. Y. 415, 7 N. E. 366; Adams v. Outhouse, 45 N. Y. 318; American Bank Note Co. v. Edson, 1 Lans. (N. Y.) 388, 56 Barb. (N. Y.) 84; Reis v. Hellman, 25 Ohio St. 180; Lacy v. Hall, 37 Pa. St. 360; Seibert v. Seibert, 1 Brews. (Pa.) 531; In re Johnson's Appeal, 115 Pa. St. 129, 8 Atl. 36, 2 Am. St. 539; Coder v. Huling, 27 Pa. St. 84; In re Raiguel's Appeal, 80 Pa. St. 234; Lefever v. Underwood, 41 Pa. St. 505; In re Marsh's Appeal, 69 Pa. St. 30, 8 Am. Rep. 206; Bennett v. McMillin, 179 Pa. St. 146, 36 Atl. 188, 57 Am. St. 591; In re Coursin's Appeal, 79 Pa. St. 220; Coder v. Huling, 27 Pa. St. 84; Whitman v. Bowden, 27 S. Car. 53, 2 S. E. 630; Looney v. Gillenwaters, 11 Heisk. (Tenn.) 133; Philips v. Crammond, 2 Wash. (U. S.) 441, Fed. Cas. No. 11092; Kelley v. Greenleaf, 3 Story (U. S.) 93, Fed. Cas. No. 7657; In re Clap, 2 Lowell (U. S.) 168, Fed. Cas. No. 2783; Pearce v. Ham, 113 U. S. 585, 28 L. ed. 1067, 5 Sup. Ct. 676; Chapin v. Streeter, 124 U. S. 360, 31 L. ed. 475, 8 Sup. Ct. 529; Denver v. Roane, 99 U. S. 355, 25 L. ed. 476; Kimberly v. Arms, 129 U. S. 512, 32 L. ed. 764, 9 Sup. Ct. 355; Latta v. Kilbourn, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. 201; Henson v. Byrne (Tex. Civ. App.), 41 S. W. 494; Penniman v. Munson, 26 Vt. 164; Wheatley's Heirs v. Calhoun, 12 Leigh (Va.) 264; Forrer v. Forrer's Exrs., 29 Grat. (Va.) 134; McMahon v. McClernan, 10 W. Va. 419. And compare Rogers v. Riessner, 30 Fed. 525; Watts v. Patton, 66 Miss. 54, 5 So. 628; Otis v. Sill, 8 Barb. (N. Y.) 102; Babb v. Mosby, 7 Lea (Tenn.) 106; Whitesides v. Lafferty, 3 Humph. (Tenn.) 150. Moreover this rule has been carried to a point where it has been held that after a partnership contract confessedly against public policy has been carried out, and money contributed by one of the partners has passed into other forms, a partner in whose hands the profits are can not refuse to account for and divide them on the ground of the illegal character of the contract. Brooks v. Martin, 2 Wall. (U. S.) 70, 17 L. ed. 732. See further, Anderson's Admr. v. Whitlock, 2 Bush (Ky.) 398, 92 Am. Dec. 489; Attaway v. St. Louis Third Nat. Bank, 15 Mo. App. 578; Pfeuffer v. Maltby, 54 Tex. 454, 38 Am. Rep. 631; De Leon v. Trevino, 49 Tex. 89, 30 Am. Rep. 101.

[25] See Eston v. Strother, 57 Iowa

giving him the benefit of securities incident to the debts, when necessary to the doing of justice between the partners, if it could be done without injury to any creditor of the firm, but it is manifest, upon the plainest principles of equity and fair dealing, that a member of a business firm cannot be permitted to make a profit for himself by purchasing the obligations of the firm at a discount, or by keeping them alive at interest; and if permitted, under any circumstances, to enforce the obligations so purchased, it can only be for the amount paid by him in taking them up, and lawful interest thereon if contribution by his copartners shall have been unreasonably delayed."[26] In more than one instance, the purchase by a partner for his own personal benefit of a claim against the firm of which he is a member has been declared equivalent to payment of the same.[27] Further, it seems that the attempt of any one partner to so change a partnership deal as to eliminate his copartner's right to share in the fruits of the contract will avail him nothing.[28] Thus where certain members of a partnership, upon receiving word that the firm is to be awarded a second contract which it has been attempting to obtain through a satisfactory execution of its first contract, write to other of the partners dissolving the partnership, profits accruing to the former under the second contract which they then personally obtain must be shared with their one-time associates, or if the dissolution be regarded as valid such profits may be made the basis of a suit for damages.[29] So also diverted profits under the original contract will be charged against the member of a real estate firm who after consummating a sale of land listed with his company aban-

506, 10 N. W. 877; Filburn v. Ivers, 92 Mo. 388, 4 S. W. 674; Miller v. Ferguson, 110 Va. 217, 65 S. E. 562, 8 L. R. A. (N. S.) 618n, 135 Am. St. 934.

[26] Coleman v. Coleman, 78 Ind. 344. See also, Filbrun v. Ivers, 92 Mo. 388, 4 S. W. 674.

[27] "That a sale and transfer of an obligation of a partnership to one of the members operates as a payment, under ordinary circumstances, results necessarily from the relation of the purchaser to his copartners, and from the fact of his being himself a principal debtor." Coleman v. Coleman, 78 Ind. 344. See further, Edison Electric Illuminating Co. v. De Mott, 51 N. J. Eq. 16, 25 Atl. 952; Booth v. Farmers' &c. Nat. Bank, 74 N. Y. 228; Chapin v. Clemitson, 1 Barb. (N. Y.) 311; Le Page v. McCrea, 1 Wend. (N. Y.) 164, 19 Am. Dec. 469.

[28] Boqua v. Marshall, 88 Ark. 373, 114 S. W. 714. See further Miller v. O'Boyle, 89 Fed. 140; Pearce v. Sutherland, 164 Fed. 609, 90 C. C. A. 519; Williamson v. Monroe, 101 Fed. 322; Chambers v. Mittnacht, 23 S. Dak. 449, 122 N. W. 434.

[29] Williamson v. Monroe, 101 Fed. 322.

dons the same pursuant to an agreement he has made with the purchaser and thereafter sells to the latter land to which he individually holds title.[30] But where a partner through his own fault does not participate in the duties of the partnership, he cannot demand an equal share of the profits realized by his copartner upon his individual contract.[31]

The clandestine use by an individual member of a firm of partnership funds or property in his own private speculations, is inconsistent with the fundamental requirement of good faith.[32] "It seems to be well settled by the cases, and to rest upon unquestionable principles of public policy, that if one partner clandestinely uses the partnership funds or property in his own private speculations, he must account, not only for the funds or property so employed, but also for the profits realized by the transaction."[33] But "to constitute a case of fraud the funds must have been abstracted, not only

[30] Wiggins v. Markham, 131 Iowa 102, 108 N. W. 113. Compare also, White v. Jouett, 147 Ky. 197, 144 S. W. 55.

[31] Grafton v. Paine, 7 App. D. C. 255.

[32] "When a copartner undertakes to apply the assets of the firm to his individual debt, he is going beyond the scope of his authority as the agent of the firm, and his acts are void, and pass no title to the property, as against the firm or creditors of the firm, unless consent of the other copartners to such transaction is shown." Blake v. Third Nat. Bank, 219 Mo. 644, 118 S. W. 641. "A partner has no right to deal with partnership property other than for the sole benefit of the partnership." Llewelyn v. Levi, 157 Cal. 31, 106 Pac. 219. "It would be against the plainest principles of justice and equity, * * * to permit a partner to use partnership funds in paying for and improving property for the benefit of his wife, and hold that there was no charge or lien upon the property in favor of the partnership to the extent that partnership funds had been so used and unaccounted for—especially since it appeared that the partnership assets were insufficient to pay its debts and the burden of paying them would fall upon the surviving partner." Brown v. Orr, 110 Va. 1, 65 S. E. 499. Contra: "Each partner combines in himself at once the character of principal and agent, and may possess and dispose of its [the partnership's] funds and property, even to the extent of appropriating them to his own use, by withdrawing them from the common fund." But this rule does not apply in a case where an agreement to form a partnership has been entered into and one prospective partner has delivered funds into the hands of his intended associate, but the agreement has never been executed. State v. Brown, 38 Mont. 309, 99 Pac. 954. See further, Koyer v. Willmon, 150 Cal. 785, 90 Pac. 135; Deaner v. O'Hara, 36 Colo. 476, 85 Pac. 1123; Solomon v. Solomon, 2 Ga. 18; McGahey v. Oregon King Min. Co., 165 Fed. 86; Pomeroy v. Benton, 57 Mo. 531; Brown v. Schackelford, 53 Mo. 122; Lay v. Emery, 8 N. Dak. 515, 79 N. W. 1053; Holden v. Thurber (R. I.), 72 Atl. 720; Latta v. Kilbourn, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. 201. And compare McKenzie v. Dickinson, 43 Cal. 119; Rouquette v. Ryan, 10 Ky. L. 503, 8 S. W. 702.

[33] Love v. Carpenter, 30 Ind. 284.

without the consent of the other partners, but * * * secretly, as by a false entry upon the books, or by the omission to make any entry at all."[34] This rule does not apparently obtain, however, when the partner of one who has withdrawn partnership funds and charged himself therewith on the books of the firm, lives at a great distance from the place where the books are kept and is without access to them, and cannot readily, by reason of the distance separating him from the scene of the application of the funds, have any extrinsic knowledge of their conversion.[35] Moreover a partner who frequently overdraws from a certain deposit in violation of the articles of association cannot predicate fraud of the fact that his copartner frequently does the same thing.[36] But it has been held that the "sale" by a partner to himself of firm property is absolutely void, and his "transfer" of the title thereby will avail him nothing.[37] This is likewise true of his acquisition for private gain of an adverse title or interest in the partnership property.[38] Any gratuity paid a partner for his influence in securing the execution of a firm contract will usually inure to the benefit of the partnership as a whole.[39] So, while knowledge or information,

[34] In re Hamilton, 1 Fed. 800; citing Ex parte Smith, 1 Glyn & J. 74, in which it was held "that if one partner be entrusted with the entire management of the partnership concern, and he withdraw monies for his separate use, which he duly and openly enters in the partnership books, this is not a fraud, which will entitle the joint estate to prove against the separate; otherwise, if by the entries in the books he disguises the transaction, or wholly omits and conceals it."

[35] Hunt v. Benson, 2 Humph. (Tenn.) 459.

[36] Coldren v. Clark, 93 Iowa 352, 61 N. W. 1045.

[37] Comstock v. Buchanan, 57 Barb. (N. Y.) 127, affd. 57 Barb. (N. Y.) 146.

[38] Crosswell v. Lehman, 54 Ala. 363, 25 Am. Rep. 684; Laffan v. Naglee, 9 Cal. 662, 70 Am. Dec. 678; Miller v. O'Boyle, 89 Fed. 140; Roby v. Colehour, 135 Ill. 300, 25 N. E. 777, affd. 145 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. 47; Goodwin v. Smith, 144 Ky. 41, 137 S. W. 789; Anderson v. Lemon, 8 N. Y. 236, Seld. Notes (N. Y.) 90; Weston v. Ketcham, 39 N. Y. Super. Ct. 54; Eakin v. Shumaker, 12 Tex. 51; Kinsman v. Parkhurst, 18 How. (U. S.) 289, 15 L. ed. 385; Washburn v. Washburn, 23 Vt. 576; Forrer v. Forrer's Exrs., 29 Grat. (Va.) 134; Miller v. Ferguson, 110 Va. 217, 65 S. E. 562, 28 L. R. A. (N. S.) 618n, 135 Am. St. 934. See further, ante § 490; Zimmerman v. Huber, 29 Ala. 379; Wierich v. DeZoya, 2 Gilm. (Ill.) 385; Farmer v. Samuel, 4 Litt. (Ky.) 187, 14 Am. Dec. 106; Gordon v. Tyler, 53 Mich. 629, 19 N. W. 560, 20 N. W. 70. And compare Baird v. Baird, 21 N. Car. 524, 31 Am. Dec. 399.

[39] Hodge v. Twitchell, 33 Minn. 389, 23 N. W. 547; Newell v. Cockran, 41 Minn. 374, 43 N. W. 84; Dunlop v. Richards, 2 E. D. Smith (N. Y.) 181; Esmond v. Seeley, 28 App. Div. (N. Y.) 292, 51 N. Y. S. 36; Short v. Stevenson, 63 Pa. St. 95; Whitman v. Bowden, 27 S. Car. 53, 2 S. E. 630; Grant v. Hardy, 33 Wis. 668. See

which belongs to the firm in the sense that it is available or useful for a purpose within the scope of the partnership business, may be employed by a single partner to further his own private interests in a transaction wholly without the scope of the firm business and not in competition with it,[40] profit resulting from the use of such knowledge or information in an undertaking which transgresses these bounds belongs to all those composing the partnership and not to the designing partner individually.[41] Again, the conducting by a partner of a separate business of like character as, and in competition with, that carried on by the firm is diametrically opposed to the idea of good faith, and a partner thus offending must turn his tainted profits into the partnership coffers.[42] But the right to demand of a partner that the partnership receive the profits resulting from his unlawful undertaking is a right personal to his copartner. It "is not available to third parties for the purpose of fixing a liability upon the partnership

further Gleason v. Chicago, M. & St. P. R. Co. (Iowa), 43 N. W. 517.

[40] Aas v. Benham (1891), 2 Ch. 244, 65 L. T. 25; McGahey v. Oregon King Min. Co., 165 Fed. 86; Latta v. Kilbourn, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. 201. See further Featherstonhaugh v. Fenwick, 17 Ves. Jr. 298; Armstrong v. Bitner, 71 Md. 118, 17 Atl. 1054, 20 Atl. 136.

[41] As regards the use by a partner of information obtained by him in the course of the transaction of partnership business, or by reason of his connection with the firm, the principle is that if he avails himself of it for any purpose which is within the scope of the partnership business, or of any competing business, the profits of which belong to the firm, he must account to the firm for any benefits which he may have derived from such information, but there is no principle or authority which entitles a firm to benefits derived by a partner from the use of information for purposes which are wholly without the scope of the firm's business. Aas v. Benham (1891), 2 Ch. 244, 65 L. T. (N. S.) 25. Quoted with approval in Latta v. Kilbourn, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. 201, and McGahey v. Oregon King Min. Co., 165 Fed. 86. See further, Dean v. Macdowell, 8 Ch. Div. 345; Cassels v. Stewart, 6 App. Cas. 64; Dusenberry v. Horning, 56 Ore. 210, 106 Pac. 1019; Sexton v. Sexton, 9 Grat. (Va.) 204.

[42] A partner "cannot carry on another business in competition or rivalry with that of the firm thereby depriving it of the benefit of his time, skill, and fidelity without being accountable to his copartners for any profit that may accrue to him therefrom." Latta v. Kilbourn, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. 201. See further, Aas v. Benham (1891), 2 Ch. 244; Jennings v. Rickard, 10 Colo. 395, 15 Pac. 677; McGahey v. Oregon King Min. Co., 165 Fed. 86; Reber v. Pearson, 155 Mich. 593, 119 N. W. 897, 15 Det. Leg. N. 1111; Lockwood v. Beckwith, 6 Mich. 168, 72 Am. Dec. 69; Todd v. Rafferty's Admrs., 30 N. J. Eq. 254; Long v. Majestre, 1 Johns. Ch. (N. Y.) 305; Manufacturers' Nat. Bank v. Cox, 2 Hun (N. Y.) 572, 5 Thomp. & C. (N. Y.) 126, affd. 59 N. Y. 659; In re Bast's Appeal, 70 Pa. St. 301; McMahon v. McClernan, 10 W. Va. 419; Fletcher v. Ingram, 46 Wis. 191, 50 N. W. 424. Compare Pierce v. Daniels, 25 Vt. 624; and Bishop v. Riddle, 51 Tex. Civ. App. 317, 113 S. W. 151. It has been held that a partner may be

when such claim [of resulting benefit] has not been asserted."[43] On the other hand, there is no doubt of the right of any member of the firm, not restrained by express agreement to the contrary, to traffic outside of the scope of the partnership business for his own benefit and advantage when he can do so without interfering with any other duty or obligation resting upon him as a partner.[44] An injunction will lie to restrain a partner, required to superintend and manage the business of his firm from engaging, with the idea of furthering his individual interests, in the same business in separate quarters at the same place, notwithstanding the fact that the partnership agreement does not expressly stipulate that he shall not thus do.[45] On the other hand one of the members of a commission and warehouse firm whose partner refuses to provide buildings for the storage of cotton, as he is bound to do under the articles of association, may employ his personal funds in the erection of such buildings and appropriate to himself the profits arising from the storage of cotton therein, provided that this does not cause him to neglect the partnership affairs.[46] So, also, one who enters into a partnership "for the purpose of practicing the law" and agrees to give his "time and talents and strength to the prosecution of the interest of the firm," may, while giving all due attention to partnership matters and upon consent of his copartner, serve as executor of different estates, and the commissions which he under such circumstances thereby obtains will accrue to his individual benefit.[47] And in this particular, even the violation of an express agreement may not give the copartners a right to share in the profits of the separate busi-

enjoined from carrying on a competing business. Marshall v. Johnson, 33 Ga. 500.

[43] Lockwood v. Beckwith, 6 Mich. 168, 72 Am. Dec. 69.

[44] McKenzie v. Dickinson, 43 Cal. 119; Belcher v. Whittemore, 134 Mass. 330; Latta v. Kilbourn, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. 201; Wheeler v. Sage, 1 Wall. (U. S.) 518, 17 L. ed. 646. See further, Curry v. Chas. Warner Co., 2 Marv. (Del.) 98; Sanderson's Admrs. v. Sanderson, 17 Fla. 820; Northrup v. Phillips, 99 Ill. 449; Starr v. Case, 59 Iowa 491, 13 N. W. 645; Henson v. Byrne (Tex. Civ. App.), 41 S. W. 494.

[45] Marshall v. Johnson, 33 Ga. 500.

[46] Parnell v. Robinson, 58 Ga. 26.

[47] Metcalfe v. Bradshaw, 145 Ill. 124, 33 N. E. 1116, 36 Am. St. 478.

ness,[48] their remedy being, it seems, by injunction or action for damages,[49] or by a bill in equity for an accounting.[50]

Before proceeding further, however, it may be well to note that the law does not demand of partners that each of their several acts shall be a source of profit to the company. Consequently, mere lack of discretion or good judgment on the part of a member of the firm will not necessarily throw the resulting loss upon him alone.[51] Even the partner who innocently and legitimately employs an unprofitable servant, need not, so it has been held, sustain the entire loss occasioned by the acts which should otherwise have had a lucrative termination.[52] On the other hand, when, as a result of the articles of partnership, one partner must perform certain duties, and he chooses to palm them off upon his employé, the dilatory member of the firm must as to his comembers bear the responsibility for any untoward results that may follow this unempowered delegation of authority.[53]

§ 4907. Exclusion of partner from management of business.—Ordinarily, when no agreement otherwise has been entered into,[54] or must be implied, the right to manage and conduct the partnership business reposes equally in each one of the several partners, and this, though the latter be unequally interested in the partnership profits and losses. It follows therefore that a member of the firm cannot be rightfully excluded by his

[48] Aas v. Benham, (1891) 2 Ch. 244; Dean v. McDowell, 8 Ch. Div. 345; Metcalfe v. Bradshaw, 145 Ill. 124, 33 N. E. 1116, 36 Am. St. 478; Burr v. De La Vergne, 102 N. Y. 415, 7 N. E. 366; Latta v. Kilbourn, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. 201. See further, King v. Whiton, 15 Wis. 684.

[49] Marshall v. Johnson, 33 Ga. 500.

[50] Moritz v. Peebles, 4 E. D. Smith (N. Y.) 135.

[51] Northen v. Tatum, 164 Ala. 368, 51 So. 17; Hall v. Sannoner, 44 Ark. 34; Poole v. Koons, 252 Ill. 49, 96 N. E. 556; Fordyce v. Shriver, 115 Ill. 530; Morrison v. Smith, 81 Ill. 221; Savery v. Thurston, 4 Ill. App. 55; Snell v. De Land, 136 Ill. 533, 27 N. E. 183; Exchange Bank v. Gardner, 104 Iowa 176, 73 N. W. 591; Charlton v. Sloan, 76 Iowa 288, 41 N. W. 303; Jessup v. Cook, 6 N. J. L. 434; Morris v. Allen, 14 N. J. Eq. 44; Paterson v. Burton, 3 N. J. L. 717; Tygart v. Wilson, 39 App. Div. (N. Y.) 58, 56 N. Y. S. 827; Caldwell v. Leiber, 7 Paige (N. Y.) 433; M'Crae's Admrs. v. Robeson, 6 N. Car. 127; Lyons v. Lyons, 207 Pa. 7, 56 Atl. 54, 99 Am. St. 779; Lyles v. Styles, 2 Wash. (U. S.) 224, Fed. Cas. No. 8625; Peters v. McWilliams, 78 Va. 567.

[52] Aiken v. Ogilvie, 12 La. Ann. 353.

[53] Einstein v. Schnebly, 89 Fed. 540.

[54] Anthony v. Wheatons, 7 R. I. 490. See further, Loy v. Alston, 172 Fed. 90, 96 C. C. A. 578; Einstein v. Schnebly, 89 Fed. 540.

associate or associates from active participation in the affairs of the common business;[55] but it has been held that the expulsion of one partner from the partnership can be accomplished by a majority of his copartners when, applying the strictest test, the articles of agreement authorize such a step.[56] Where one partner gives instructions to his associate who is equal both in power and interest with him, it has been held that the recipient may regard the instructions as in the nature of advice subject to be deviated from according to circumstances.[57]

§ 4908. **Interest—In general.**—Owing to the difference of opinion among the courts, any discussion of the allowance of in-

[55] "The rule of law as to the powers of the members of a partnership in the conduct of its business has been correctly stated thus: 'In the absence of an express agreement to the contrary, the powers of the members of an ordinary partnership are in all respects equal, even although their shares may be unequal; and there is no right on the part of one or more to exclude another from an equal management in the concern. * * * Indeed, speaking generally, it may be said that nothing is considered as so loudly calling for the interference of the court between partners as the improper exclusion of one of them by the others from taking part in the management of the partnership business. It need, however, hardly be observed that it is perfectly competent for partners to agree that the management of the partnership affairs shall be confided to one or more of their number exclusively of the others; and that, where such an agreement is entered into it is not competent for those who have agreed to take no part in the management to transact the partnership business without the consent of the other partners. Lindl. Partn., *540. From this citation it appears that one partner can not have an exclusive right to manage the affairs of the partnership, unless such exclusive right be expressly granted by the partnership agreement, and, furthermore, that in the absence of such an express agreement it is gross misconduct for one partner to exclude the other from taking part in the management of the partnership business." Einstein v. Schnebly, 89 Fed. 540. "The exclusion of a partner from his rightful share in the profits or management of the business, and from his right to inspect the books and to be informed of the state of the accounts, is ground for an injunction." Miller v. O'Boyle, 89 Fed. 140. See further, Peacock v. Peacock, 16 Ves. Jr. 49; Harris v. Harris, 132 Ala. 208, 31 So. 355; Miller v. O'Boyle, 89 Fed. 140; Kennedy v. Kennedy, 3 Dana (Ky.) 239; Meinhard Schaul Co. v. Bedingfield Mercantile Co., 4 Ga. App. 176, 61 S. E. 34; Katz v. Brewington, 71 Md. 79, 20 Atl. 139; Hewitt v. Hayes, 204 Mass. 586, 90 N. E. 985, 27 L. R. A. (N. S.) 154; Wilcox v. Pratt, 52 Hun (N. Y.) 340, 23 N. Y. St. 686, 5 N. Y. S. 361, affd. 125 N. Y. 288, 3 Silvernail Ct. App. (N. Y.) 199, 25 N. E. 1091; Marten v. Van Schaick, 4 Paige (N. Y.) 479; Jackson v. De Forest, 14 How. Pr. (N. Y.) 81; Gilbert v. Howard Automatic Mach. Co., 147 N. Car. 308, 61 S. E. 176; Holder v. Shelley (Tex. Civ. App.), 118 S. W. 590. And compare Roberts v. Eberhardt, Kay 148, 23 L. J. Ch. 201; Decatur Land Co. v. Cook (Ala.), 27 So. 559; Montjoys v. Holden, Litt. Sel. Cas. (Ky.) 447, 12 Am. Dec. 331; Adams v. Kable, 6 B. Mon. (Ky.) 384, 44 Am. Dec. 772; Cougot v. Rodriguez, 1 La. 508.

[56] Blisset v. Daniel, 10 Hare 493.

[57] Cougot v. Rodriguez, 1 La. 508.

terest in taking partnership accounts must descend almost to the point of being a mere digest of cases.[58] Of course, whenever a partner demanding interest can point either to an express or an implied agreement therefor, his account will in general receive credit in consonance therewith.[59] Apparently, even this rule, which has been stated so broadly, is not absolute, there being certain cases which seem to demand its qualification.[60]

§ 4909. Interest—On capital.—Ordinarily when it has not been otherwise agreed, capital contributed is noninterest-bearing, at least prior to dissolution of the partnership relation.[61] Never-

[58] Lindl. Partn., *389; Buckingham v. Ludlum, 29 N. J. Eq. 345; Johnson v. Hartshorne, 52 N. Y. 173; In re Gyger's Appeal, 62 Pa. St. 73, 1 Am. Rep. 382.

[59] "Where one partner furnishes all or more than his share of the capital of the business, he may contract for any rate of interest on the surplus of capital so furnished by him, to be paid out of the profits of the business, as preferred profits. If there are no profits, or the business fails, he gets no interest and loses his capital. It is for this additional risk that he is permitted to charge and receive from the business as a preferred profit, in the event it is earned, a return exceeding the legal rate of interest upon the capital so advanced. Ruggles v. Buckley, 158 Fed. 950, 86 C. C. A. 154. See further, Ex parte Chippendale, 4 De G. M. & G. 19; Pond v. Clark, 24 Conn. 370; Prentice v. Elliott, 72 Ga. 154; Taft v. Schwamb, 80 Ill. 289; Doyle v. Duckworth, 149 Iowa 623, 129 N. W. 59; Meguiar v. Helm, 91 Ky. 19, 14 S. W. 949; Pratt v. McHatton, 11 La. Ann. 260; Juilliard v. Orem's Exrs., 70 Maine 465, 17 Atl. 333; Keiley v. Turner, 81 Md. 269, 31 Atl. 700; Montague v. Hayes, 10 Gray (Mass.) 609; Whitcomb v. Converse, 119 Mass. 38, 20 Am. Rep. 311; Winchester v. Glazier, 152 Mass. 316, 25 N. E. 728, 9 L. R. A. 424; Wells v. Babcock, 56 Mich. 276, 22 N. W. 809, 27 N. W. 575; Beck v. Thompson, 22 Nev. 109, 36 Pac. 562; Morris v. Allen, 14 N. J. Eq. 44; Hayne v. Sealy, 71 App. Div. (N. Y.) 418, 75 N. Y. S. 907; Bullock v. Bemis, 51 Hun (N. Y.) 637, 20 N. Y. St. 836, 3 N. Y. S. 390; Payne v. Freer, 91 N. Y. 43, 43 Am. Rep. 640; Matter of Laney, 50 Hun (N. Y.) 15; Moore v. Westbrook, 156 N. Car. 482, 72 S. E. 842; Wayne v. Hinkle, 9 Ohio Dec. (Reprint) 389, 12 Cinc. L. Bul. 282; Cunningham v. Green, 23 Ohio St. 296; Piper v. Smith, 1 Head (Tenn.) 93; Hodges v. Parker, 17 Vt. 242, 44 Am. Dec. 331; Emerson v. Durand, 64 Wis. 111, 24 N. W. 129, 54 Am. Rep. 593. And compare Barfield v. Loughborough, L. R. 8 Ch. 1; Smith v. Knight, 88 Iowa 257, 55 N. W. 189; Bradley v. Brigham, 137 Mass. 545; Robinson v. Simmons, 156 Mass. 123, 30 N. E. 362; Lockwood v. Roberts, 171 Mass. 109, 50 N. E. 517; Johnson v. Hartshorne, 52 N. Y. 173; Jones v. Jones, 36 N. Car. 332.

[60] "In the absence of an express agreement, partners are not ordinarily entitled to interest against each other." Ames v. Ames, 113 Minn. 137, 129 N. W. 156. See further, Osborn v. Gheen, 5 Mackey (D. C.) 189, affd. 136 U. S. 646, 34 L. ed. 552, 10 Sup. Ct. 1072; Moss v. McCall, 75 Ill. 190; Taylor v. Snell, 79 Ill. App. 462, affd. 182 Ill. 473, 55 N. E. 545; Whitcomb v. Converse, 119 Mass. 38, 20 Am. Rep. 311; St. Paul Trust Co. v. Finch, 52 Minn. 342, 54 N. W. 190; Sanford v. Barney, 50 Hun (N. Y.) 108, 19 N. Y. St. 16, 4 N. Y. S. 500; In re James, 146 N. Y. 78, 40 N. E. 876, 48 Am. St. 774; In re Brown's Appeal, 89 Pa. St. 139.

[61] "The rule applicable to general partnerships is that a partner is not entitled to interest on capital which

theless, the weight, unaffected by prior agreement, to be attached to the demand for interest of a partner who has done that which his copartner has not,—namely, contributed the share of capital assigned to him—is a point on which the decisions do not speak with united voice.[62] However this may be, it will no doubt be proper to penalize an offending partner by debiting him with interest upon the contribution to the capital which for one reason or another he did not make.[63] On the other hand the allowance of interest cannot apparently be used as a tool to smooth off the sharp edges of inequality in the matter of the different shares placed to the credit of the firm capital, whatever their nature may have been, unless there has been an agreement to that effect.[64] Further, it seems that a partner who brings in tangible property as capital cannot obtain equalization of his contribution and that of his copartner, whose prescribed offering to the common fund consisted of time and labor only by the interest method, as of right.[65]

he contributes to the firm, although his contribution be greatly in excess of that of his copartners, unless they have agreed that he may have interest." Bartlett v. Boyles, 66 W. Va. 327, 66 S. E. 474. See further, Cooke v. Benbow, 3 De G. J. & S. 1, 6 New Rep. 135; Rishton v. Grissell, L. R. 5 Eq. 326; Jardine v. Hope, 19 Grant Ch. (U. C.) 76; Carpenter v. Hathaway, 87 Cal. 434, 25 Pac. 549; Day v. Lockwood, 24 Conn. 185; Topping v. Paddock, 92 Ill. 92; Smith v. Knight, 88 Iowa 257, 55 N. W. 189; Doyle v. Duckworth, 149 Iowa 623, 129 N. W. 59; Lee v. Lashbrooke, 8 Dana (Ky.) 214; Seibert's Assignee v. Ragsdale, 103 Ky. 206, 19 Ky. L. 1869, 44 S. W. 653; Adkinson v. Dent, 5 Ky. L. (abstract) 118; Burgher v. Burgher, 12 Ky. L. (abstract) 95; Ashbrook v. Ashbrook, 16 Ky. L. 593, 28 S. W. 660; Baker v. Mayo, 129 Mass. 517; St. Paul Trust Co. v. Finch, 52 Minn. 342, 54 N. W. 190; Rodgers v. Clement, 162 N. Y. 422, 56 N. E. 901, 76 Am. St. 342; Grant v. Smith, 70 App. Div. (N. Y.) 301, 75 N. Y. S. 82; Moore v. Westbrook, 156 N. Car. 482, 72 S. E. 842; Smith v. Putnam, 107 Wis. 155, 82 N. Y. 1077, 83 N. W. 288.

[62] Hill v. King, 3 De G. J. & S. 418; Ligare v. Peacock, 109 Ill. 94; Montague v. Hayes, 10 Gray (Mass.) 609; Clark v. Warden, 10 Nebr. 87; Hartman v. Woehr, 18 N. J. Eq. 383; Stokes v. Hodges, 11 Rich. Eq. (S. Car.) 135.

[63] Ligare v. Peacock, 109 Ill. 94; Hartman v. Woehr, 18 N. J. Eq. 383; In re Laney, 50 Hun (N. Y.) 15, 18 N. Y. St. 463, 2 N. Y. S. 443, affd. 119 N. Y. 607, 23 N. E. 1143.

[64] Desha v. Smith, 20 Ala. 747; Thompson v. Noble, 108 Mich. 19, 65 N. W. 563; Ames v. Ames, 113 Minn. 137, 129 N. W. 156.

[65] Stevens v. Cook, 5 Jur. (N. S.) 1415; Jardine v. Hope, 19 Grant Ch. (U. C.) 76; Tirrell v. Jones, 39 Cal. 655; Tutt v. Land, 50 Ga. 339; O'Bryan v. Brumback, 11 Ky. L. (abst.) 405; Berry v. Folkes, 60 Miss. 576; Jackson v. Johnson, 11 Hun (N. Y.) 509, revd. 74 N. Y. 607; Sanford v. Barney, 50 Hun (N. Y.) 108, 19 N. Y. St. 16, 4 N. Y. S. 500; Rodgers v. Clement, 15 App. Div. (N. Y.) 561, 44 N. Y. S. 516, revd. 162 N. Y. 422, 56 N. E. 901, 76 Am. St. 342; Lewis v. Whitehall Lumber Co., 47 Hun (N. Y.) 637, 14 N. Y. St. 302; Bartlett v. Boyles, 66 W. Va. 327, 66 S. E. 474.

§ 4910. Interest—On advances.—When the question of interest on advances comes under consideration, a prima facie conflict at once intrudes itself,[66] in some instances it having been indicated that such advances possess intrinsically the interest-drawing quality,[67]—in others, that they do not.[68] A comparatively recent

[66] An attempt has been made in a note in 35 L. R. A. (N. S.) 220, appended to Kilworth v. Ice, 84 Kans. 458, 114 Pac. 857, to explain this seeming discord among authorities. In this note at page 223 it is said, citing Buckingham v. Ludlum, 29 N. J. Eq. 345, and Rodgers v. Clement, 162 N. Y. 422, 56 N. E. 901, 76 Am. St. 342: "The apparent conflict between the decisions as to the allowance of interest to a partner on his advances is due to a failure on the part of some of the courts to state whether they refer to advances of money to be employed as capital, or to advances by way of loan. In the one case, as the partner is considered as looking to the profits for compensation, there is no basis upon which an agreement on the part of the firm to pay interest may be implied; while, on the other hand, if it is shown that the advance was not intended as other than a loan, such an agreement may be implied from mercantile usage." When capital itself can ordinarily be regarded as something altogether different from a loan to the firm, the reasoning here employed may be accepted as logical. Until then this explanation must be regarded as being based upon a false distinction,—not upon any practical difference. It may be as is stated that courts in allowing or disallowing interest on advances, have this attempted distinction in mind. Even though this be so, it is undoubtedly true that the same courts could not themselves with invariable exactness discover when an advance was intended as a "loan" and when as a contribution to an agreed increased capital. Hence it seems that until a more practical suggestion is offered, no rule, clearly defined, can be laid down whereby to determine when advances will and when they will not bear interest.

[67] "As between partners, there is no doubt that a partner who makes advances for partnership purposes beyond the amount of his agreed contribution is entitled to collect interest thereon, at the customary legal rate, even in the absence of any express agreement therefor with his copartners." Mack v. Engel, 165 Mich. 540, 131 N. W. 92. See further, Ex parte Chippendale, 4 De G. M. & G. 19, 18 Jur. 710; In re Cleverdon, 4 Ont. App. Rep. 185; Davidson v. Thirkell, 3 Grant Ch. (U. C.) 330; Turnipseed v. Goodwin, 9 Ala. 372; Reynolds v. Mardis' Heirs, 17 Ala. 32; Osborn v. Gheen, 5 Mackey (D. C.) 189, affd. 136 U. S. 646, 34 L. ed. 552, 10 Sup. Ct. 1072; McMillan v. James, 105 Ill. 194; Coldren v. Clark, 93 Iowa 352, 61 N. W. 1045; Keiley v. Turner, 81 Md. 269, 31 Atl. 700; Matthews v. Adams, 84 Md. 143, 35 Atl. 60; Baker v. Mayo, 129 Mass. 517; Mack v. Engel, 165 Mich. 540, 131 N. W. 92; Berry v. Folkes, 60 Miss. 576; Coddington v. Idell, 29 N. J. Eq. 504; Lloyd v. Carrier, 2 Lans. (N. Y.) 364; Hodges v. Parker, 17 Vt. 242, 44 Am. Dec. 331. Discounted as authority by Consaul v. Cummings, 24 App. D. C. 36; McAllister v. Payne, 108 Ga. 517, 34 S. E. 165; Jordan v. Wilson, 64 Ill. App. 665; Folsom v. Marlette, 23 Nev. 459, 49 Pac. 39; Rodgers v. Clement, 162 N. Y. 422, 56 N. E. 901, 76 Am. St. 342; Grant v. Smith, 70 App. Div. (N. Y.) 301, 75 N. Y. S. 82; Atherton v. Whitcomb, 66 Vt. 447, 29 Atl. 674; Bartlett v. Boyles, 66 W. Va. 327, 66 S. E. 474. And compare Hart v. Clarke, 3 De G. M. & G. 232, 24 L. J. Ch. 137, 3 Eq. Rep. 264, 3 Week. Rep. 147; Holloway v. Turner, 61 Md. 217; Winchester v. Glazier, 152 Mass. 316, 25 N. E. 728, 9 L. R. A. 424; Brown v. Schackelford, 53 Mo. 122.

[68] Cooke v. Benbow, 3 De G. J. & S. 1, 6 New Rep. 135; Prentice v. Elliott, 72 Ga. 154; Topping v. Paddock, 92 Ill. 92; Seibert's Assignee v. Ragsdale, 103 Ky. 206, 19 Ky. L. 1869, 44

New York case states the rule in the following language: "Where the share of the several partners in a partnership venture depends upon the capital furnished by them, respectively, it is very clear that interest should not be allowed on moneys furnished to the partnership as capital, either under the original agreement or as additions thereto; but when the amount to be furnished by each partner is fixed and certain, and the share of the respective partners in the profits of the partnership venture is a fixed proportion thereof, advances by one of the partners in excess of his prescribed proportion, although credited to the special account of such partner, and called 'capital' of the firm, are in fact, as between the partners, loans and advancements for the benefit of the partnership; and equity requires that interest should be allowed thereon."[69]

§ 4911. Interest—On balance.—So also in the present state of the law, it is unwise to attempt to prescribe with any degree of accuracy, the boundary within which a balance between partners is entitled to interest.[70] Even when interest does actually attach to such "balance," the latter must be understood ordinarily as referring to the one on final dissolution and settlement and not

S. W. 653; Lee v. Lashbrook, 8 Dana (Ky.) 214; Ashbrook v. Ashbrook, 16 Ky. L. 593, 28 S. W. 660; Miller v. Lord, 11 Pick. (Mass.) 11; Harris v. Carter, 147 Mass. 313, 17 N. E. 649; Godfrey v. White, 43 Mich. 171, 5 N. W. 243, 11 Mor. Min. Rep. 562; Thompson v. Noble, 108 Mich. 19, 65 N. W. 563; Morris v. Allen, 14 N. J. Eq. 44; Lewis v. Whitehall Lumber Co., 47 Hun (N. Y.) 637, 14 N. Y. St. 302. And compare Wells v. Babcock, 56 Mich. 276, 22 N. W. 809, 27 N. W. 575; Jones v. Jones, 36 N. Car. 332.

[69] Grant v. Smith, 70 App. Div. (N. Y.) 301, 75 N. Y. S. 82.

[70] Meynott v. Meynott, 31 Beav. 445, 32 L. J. Ch. 218, 9 Jur. (N. S.) 426; Wilson v. McCarty, 25 Grant Ch. (U. C.) 152; Forsyth v. Butler, 152 Cal. 396, 93 Pac. 90; Solomon v. Solomon, 2 Ga. 18; Taylor v. Peterson, 1 Idaho 513; King v. Hamilton, 16 Ill. 190; Cooper v. McNeill, 14 Ill. App. 408; Kemmerer v. Kemmerer, 85 Iowa 193, 52 N. W. 194; Wendling v. Jennisch, 85 Iowa 392, 52 N. W. 341; Burgher v. Burgher, 12 Ky. L. (abstract) 95; Boreing v. Wilson, 128 Ky. 570, 108 S. W. 914; Masonic Sav. Bank v. Bang's Admr., 10 Ky. L. 743, 10 S. W. 633; Gridley v. Conner, 2 La. Ann. 87; Hilligsberg's Exrs. v. Burthe, 6 La. Ann. 170; Miller v. Lord, 11 Pick. (Mass.) 11; Harris v. Carter, 147 Mass. 313, 17 N. E. 649; McCormick v. McCormick, 7 Nebr. 440; Buckingham v. Ludlum, 29 N. J. Eq. 345; Johnson v. Hartshorne, 52 N. Y. 173; Stoughton v. Lynch, 1 Johns. Ch. (N. Y.) 467; Stiles v. Haight, 124 App. Div. (N. Y.) 60, 108 N. Y. S. 136; Goodwill v. Heim, 212 Pa. St. 595, 62 Atl. 24; Brenner v. Carter, 203 Pa. 75, 52 Atl. 178; Atherton v. Whitcomb, 66 Vt. 447, 29 Atl. 674; Daniels v. McCormick, 87 Wis. 255, 58 N. W. 406; Diamond v. Henderson, 47 Wis. 172, 2 N. W. 73.

to any periodical balance struck off from time to time.[71] "Interest should not be allowed on partnership accounts before there has been an accounting or settlement of the same, unless under the peculiar facts and circumstances surrounding the case the equities demand that interest be charged."[72]

§ 4912. **Contribution.**—The fact that a partner can be held by a third person for the entire amount of a firm contract upon which, as to his copartners, he is but pro rata liable,[73] invests him necessarily, from an equitable standpoint, in the absence of an agreement to the contrary,[74] or illegality inherent in the partnership,[75] with the right to exact contribution from his copartners,[76] in the matter of all losses and expenses which he has

[71] "Interest can never be allowed on an unsettled or an unliquidated account without an agreement, express or clearly implied, and the case must be a very strong one * * * to warrant its allowance without express agreement to that effect." Sweeney v. Neeley, 53 Mich. 421, 19 N. W. 127. So Burnam, J., in Seibert's Assignee v. Ragsdale, 103 Ky. 206, 19 Ky. L. 1869, 44 S. W. 653, approves an instruction which states in part: "nor would one party have the right to interest on the balance, from time to time in the partnership accounts, before a general settlement or dissolution of the partnership, in the absence of a special agreement to that effect." See further, Colgin v. Cummins, 1 Port. (Ala.) 148; In re Stevens, 104 Fed. 323; Gage v. Parmelee, 87 Ill. 329; Lee v. Lashbrook, 8 Dana (Ky.) 214; Bowling's Heirs v. Dobyn's Admrs., 5 Dana (Ky.) 434; Glenn v. Sims, 5 Ky. L. (abstract) 775; Holden v. Peace, 39 N. Car. 223, 45 Am. Dec. 514; In re Browne's Estate, 11 Phila. (Pa.) 127, 89 Pa. St. 139; McKay v. Overton, 65 Tex. 82; Dexter v. Arnold, 3 Mason (U. S.) 284, Fed. Cas. No. 3855; Gilman v. Vaughan, 44 Wis. 646. And compare In re Cleverton, 4 Ont. App. 185; Cooper v. McNeill, 14 Ill. App. 408; Moss v. McCall, 75 Ill. 190; Kemmerer v. Kemmerer, 85 Iowa 193, 52 N. W. 194; Smith v. Knight, 88 Iowa 257, 55 N. W. 189.

[72] Goodwill v. Heim, 212 Pa. 595, 62 Atl. 24

[73] See post, § 4933.

[74] Gillan v. Morrison, 1 De G. & Sm. 421; In re Worcester Corn Exchange Co., 3 De G. M. & G. 180; Northen v. Tatum, 164 Ala. 368, 51 So. 17; McCormick v. Stofer, 11 Ky. L. 398, 12 S. W. 151; Baker v. Safe Deposit & Trust Co., 90 Md. 744, 45 Atl. 1028, 78 Am. St. 463; Hart v. Myers, 25 Abb. N. Cas. (N. Y.) 478, 12 N. Y. S. 140, affd. 59 Hun (N. Y.) 420, 36 N. Y. St. 641, 13 N. Y. S. 388; McFadden v. Leeka, 48 Ohio St. 513, 28 N. E. 874. See further Mussetter v. Timmerman, 11 Colo. 201, 17 Pac. 504; Warring v. Hill, 89 Ind. 497; Myers v. Smith, 15 Iowa 181; Neal v. Berry, 86 Maine 193, 29 Atl. 987; Hanna v. Hyatt, 67 Mo. App. 308; Gilmore v. Ham, 61 Hun (N. Y.) 1, 39 N. Y. St. 664, 15 N. Y. S. 391, 21 Civ. Proc. (N. Y.) 102, affd. 133 N. Y. 664, 31 N. E. 624; Curtis v. Moneith, 1 Hill (N. Y.) 356; Gray v. Williams, 9 Humph. (Tenn.) 503; Long v. Garnett, 59 Tex. 229.

[75] See post, note 79.

[76] Sears v. Starbird, 78 Cal. 225, 20 Pac. 547; Downs v. Jackson, 33 Ill. 464, 85 Am. Dec. 289; Evans v. Clapp, 123 Mass. 165, 25 Am. Rep. 52; Flower v. Millaudon, 19 La. 185; Phillips v. Blatchford, 137 Mass. 510; Smith v. Ayrault, 71 Mich. 475, 39 N. W. 724, 1 L. R. A. 311; Lyons v. Murray, 95 Mo. 23, 8 S. W. 170, 6 Am. St. 17; Edison Electric Illuminating Co. v. DeMott, 51 N. J. Eq. 16, 25 Atl. 952; Gilmore v. Ham, 61 Hun (N. Y.) 1, 39 N. Y. St. 664, 15 N. Y. S.

bona fide incurred for the benefit of the partnership in the course of its business while acting within the scope of his authority as a member of the firm.[77] This right to exact contribution, how-

391, 21 Civ. Proc. (N. Y.) 102, affd. 133 N. Y. 664, 31 N. E. 624; Brasher's Exrs. v. Cortlandt, 2 Johns. Ch. (N. Y.) 400; Mendez v. Schleuter, 30 N. Y. St. 150, 9 N. Y. S. 278; Forbes v. Webster, 2 Vt. 58. In the case of Clayton v. Davett (N. J.), 38 Atl. 308, the contribution sought of the equitable mortgagee of a partner's share was refused. See, however, Hax v. Burnes, 98 Mo. App. 707, 73 S. W. 928.

[77] "Unless otherwise provided in the articles of partnership, the expenses and losses of a partnership are to be borne by all the members in the proportion they share in the profits; and losses occasioned by conduct or omission of a managing partner will not be charged against him, unless he has been guilty, in the conduct or omission, of fraud, bad faith, or culpable negligence." Northen v. Tatum, 164 Ala. 368, 51 So. 17. See further, Christian &c. Grocery Co. v. Hill, 122 Ala. 490, 26 So. 149; Brownell v. Steere, 128 Ill. 209, 21 N. E. 3; Morrison v. Smith, 81 Ill. 221; Campbell v. Stewart, 34 Ill. 151; Savery v. Thurston, 4 Ill. App. 55; Price v. Cavins, 50 Ind. 122; Olleman v. Reagan, 28 Ind. 109; Easton v. Strother, 57 Iowa 506, 10 N. W. 877; Atherton v. Cochran, 11 Ky. L. 185, 9 S. W. 519, 11 S. W. 301; Craig v. Alverson, 6 J. J. Marsh. (Ky.) 609; Savage v. Carter, 9 Dana (Ky.) 408; Jones v. Morehead, 3 B. Mon. (Ky.) 377; Gardner v. Salyer, 1 Ky. L. (abstract) 420; Bayly v. Becnel, 36 La. Ann. 496; Tuyes v. Avegno, 23 La. Ann. 177; Flower v. Millaudon, 19 La. 185; Pratt v. McHatton, 11 La. Ann. 260; Maginnis v. Crosby, 11 La. Ann. 400; Burleigh v. White, 70 Maine 130; Phillips v. Blatchford, 137 Mass. 510; Sweeney v. Neeley, 53 Mich. 421, 19 N. W. 127; Wheeler v. Arnold, 30 Mich. 304; Vaiden v. Hawkins (Miss.), 6 So. 227; Cockrell v. Thompson, 85 Mo. 510; Inglis v. Floyd, 33 Mo. App. 565; Converse v. Hobbs, 64 N. H. 42, 5 Atl. 832; Edison Electric Illuminating Co. v. De Mott, 51 N. J. Eq. 16, 25 Atl. 952; Coleman v. Coleman, 12 Rich. L. (S. Car.) 183; Babb v. Mosby, 7 Lea (Tenn.) 105; Gray v. Williams, 9 Humph. (Tenn.) 503; Martin v. Taylor (Tex. Civ. App.), 141 S. W. 1009; Bufford v. Ashcroft, 72 Wis. 104, 10 S. W. 346; Wells v. McGeoch, 71 Wis. 196, 35 N. W. 769; Logan v. Trayser, 77 Wis. 579, 46 N. W. 877. See further, Ex parte Chippendale, 4 De G. M. & G. 19; Durant v. Rogers, 87 Ill. 508; Noel v. Bowman, 2 Litt. (Ky.) 46; Matthews v. Adams, 84 Md. 143, 35 Atl. 60; Laylin v. Knox, 41 Mich. 40, 1 N. W. 413; Preston v. Fitch, 137 N. Y. 41, 33 N. E. 77; May v. Troutman, 4 Pa. Super. Ct. 42; Stebbins v. Willard, 53 Vt. 665. See also, Wright v. Hunter, 5 Ves. 792; Bradbury v. Barnes, 19 Cal. 120; Burgess v. Badger, 124 Ill. 288, 14 N. E. 850; Downs v. Jackson, 33 Ill. 464, 85 Am. Dec. 289; Meserve v. Andrews, 106 Mass. 419; Bates v. Lane, 62 Mich. 132, 28 N. W. 753; Lee's Exrx. v. Dolan's Admx., 39 N. J. Eq. 193, affd. 40 N. J. Eq. 338; Sells' Admr. v. Hubbell's Admrs., 2 Johns. Ch. (N. Y.) 397; Leserman v. Bernheimer, 113 N. Y. 39, 20 N. E. 869. In this connection it is hardly necessary to cite authority to support the proposition that contribution will not be enforced when it has become desirable by reason of the demanding partner's culpable negligence or wilful misconduct,—in which latter is included the exceeding of his authority, the disregard of instructions given, and the like. Thomas v. Atherton, 10 Ch. Div. 185; Cragg v. Ford, 1 Y. & Coll. C. C. 285; McFadden v. Leeka, 48 Ohio St. 513, 28 N. E. 874; Sattler v. Sauer, 45 Pa. L. J. 143. See further, Rockefeller v. Morehouse, 4 Ohio Dec. (Reprint) 247, 1 Cleve. L. Rep. 164. As to contribution where one partner has put in labor and skill, see In re Aldridge (1894), 2 Ch. 97, 8 Reports 189; Morris v. Neel, 78 Ga. 797, 3 S. E. 643; Manley v. Taylor, 50 N. Y. Super. Ct. 26, following Hasbrouck v. Childs, 16 N. Y. Super. Ct. 105; Emerick v. Moir, 124 Pa. St. 498, 17 Atl. 1.

ever, must not be misunderstood. It consists, ordinarily, of the right to be credited on the taking of an account and the making of a settlement with all property, owned privately and individually, that has been expended in the carrying out of any firm undertaking.[77a] Further, the right of a partner to contribution cannot, in general, be defeated by the illegality of the transaction from which loss has resulted,[78] unless the partnership is itself illegal,[79] or the act involved has been committed by the partner seeking contribution, when he was at least chargeable with knowledge that it was unlawful.[80] Even where an "unlawful act has been knowingly performed by all the partners, so that all are in pari delicto," it seems "that the loss ought to be apportioned between all the partners, unless the illegal act in question is a pure tort,[81] or a direct violation of some statute, or unless the contract of partnership is itself void on the ground of illegality."[82]

[77a] While this holds good in general, it does not by any means apply in every instance, there being apparent authority to support the proposition that, the circumstances requiring it, one former partner may, at least after dissolution and final settlement, bring an action at law against his one-time copartner to compel contribution. Bishop v. Bishop, 54 Conn. 232, 6 Atl. 426; Crossley v. Taylor, 83 Ind. 337; Clarke v. Mills, 36 Kans. 393, 13 Pac. 569; Wright v. Eastman, 44 Maine 220; Torrey v. Twombley, 57 How. Prac. (N. Y.) 149; Farmer v. Putnam, 35 Misc. (N. Y.) 32, 70 N. Y. S. 179; McDonald v. Holmes, 22 Ore. 212, 29 Pac. 735; Rush Centre Creamery Co. v. Hillis, 3 Pa. Super. Ct. 527; Murray v. Herrick, 171 Pa. 21, 32 Atl. 1125; Compton v. Thorn's Admr., 90 Va. 653, 19 S. E. 451; Newman v. Ruby, 54 W. Va. 381, 46 S. E. 172. But compare Sebastian v. Booneville Academy Co., 22 Ky. L. 186, 56 S. W. 810; Hennegin v. Wilcoxin, 13 La. Ann. 576; Phillips v. Blatchford, 137 Mass. 510; Bond v. Bemis, 55 Mo. 524.

[78] Adamson v. Jarvis, 4 Bing. 66; Thomas v. Atherton, 10 Ch. Div. 185; Betts v. Gibbins, 2 Ad. & El. 57; Ramskill v. Edwards, 31 Ch. Div. 100; Lingard v. Bromley, 1 V. & B. 114; Baynard v. Woolley, 20 Beav. 583; Ashurst v. Mason, L. R. 20 Eq. 225; Clayton v. Davett (N. J. Ch.), 38 Atl. 308. But see Smith v. Ayrault, 71 Mich. 475, 39 N. W. 724, 1 L. R. A. 311.

[79] Watson v. Fletcher, 7 Grat. (Va.) 1. And compare In re Longworth's Executor's Case, Johns. 465, on appeal, 1 De G. F. & J. 17; Pfeuffer v. Maltby, 54 Tex. 454, 38 Am. Rep. 631.

[80] Thomas v. Atherton, 10 Ch. Div. 185; Adamson v. Jarvis, 4 Bing. 66; Betts v. Gibbins, 2 Ad. & El. 57; Aubert v. Maze, 2 Bos. & P. 371; Campbell v. Campbell, 7 Cl. & F. 166; Smith v. Ayrault, 71 Mich. 475, 39 N. W. 724, 1 L. R. A. 311; Davis v. Gelhaus, 44 Ohio St. 69. See further, Woolley v. Batte, 2 Car. & P. 417; Pearson v. Skelton, 1 M. & W. 504; Pratt v. McHatton, 11 La. Ann. 260.

[81] Baynard v. Woolley, 20 Beav. 583. See further, Ashurst v. Mason, L. R. 20 Eq. 225. And compare Thomas v. Atherton, 10 Ch. Div. 185; Attorney-General v. Fishmongers Co., Cr. & Ph. 1.

[82] Lindl. Partn., *379.

§ 4913. Contribution—Limit.—In the absence of an agreement defining the limit of contribution,[83] such limit is not arbitrarily fixed either by the amount of stipulated partnership capital,[84] or by the extent, relatively considered, of the interest of the partner from whom contribution is sought, in the property of the firm.[85]

§ 4914. Contribution—Right of partner to salary.—In general, however, the "loss or expense" category to which contribution attaches does not, unless it has been otherwise expressly or impliedly agreed,[86] include services rendered in carrying on the

[83] In re Worcester Corn Exchange Co., 3 De G. M. & G. 180; Scudder v. Ames, 89 Mo. 496, 14 S. W. 525; Magilton v. Stevenson, 173 Pa. St. 560, 34 Atl. 235.

[84] Ex parte Chippendale, 4 De G. M. & G. 19. See further, Taylor v. Coffing, 18 Ill. 422.

[85] In re Maria Anna & Steinbank Coal & Coke Co., 6 Ch. Div. 447; Smith v. Ayrault, 71 Mich. 475, 39 N. W. 724, 1 L. R. A. 311; Scott v. Bryan, 96 N. Car. 289, 3 S. E. 235. See further, Maginnis v. Crosby, 11 La. Ann. 400; Kincaid v. Hocker, 7 J. J. Marsh. (Ky.) 333.

[86] "But still the rule, that each partner must be assumed to render his services in the partnership business gratuitously, is not inflexible or of universal application. It has its exceptions founded in wisdom and experience. Where it can be fairly and justly implied from the course of dealing between the partners, or from circumstances of equivalent force, that one partner is to be compensated for his services, his claim will be sustained." Emerson v. Durand, 64 Wis. 111, 24 N. W. 129, 54 Am. Rep. 593. See further, Adams v. Warren (Ala.), 11 So. 754; Pierce v. Scott, 37 Ark. 308; Haller v. Willamowicz, 23 Ark. 566; Weeks v. McClintock, 50 Ark. 193, 6 S. W. 734; Van Housen v. Copeland, 180 Ill. 74, 54 N. E. 169; Askew v. Springer, 111 Ill. 662; Heckard v. Fay, 57 Ill. App. 20; Lee v. Davis, 70 Ind. 464; Levi v. Karrick, 13 Iowa 344; Stone v. Mattingly, 14 Ky. L. 113, 19 S. W. 402; Keiley v. Turner, 81 Md. 269, 31 Atl. 700; Winchester v. Glazier, 152 Mass. 316, 25 N. E. 728, 9 L. R. A. 424; Major v. Todd, 84 Mich. 85, 47 N. W. 841; Pierce v. Pierce, 89 Mich. 233, 50 N. W. 851; Godfrey v. White, 43 Mich. 171, 5 N. W. 243; Cramer v. Bachmann, 68 Mo. 310; Coddington v. Idell, 29 N. J. Eq. 504; Caldwell v. Leiber, 7 Paige Ch. (N. Y.) 483; Hagenbuchle v. Schultz, 69 Hun (N. Y.) 183, 53 N. Y. St. 598, 23 N. Y. S. 611; Myers v. Kirby, 9 Ohio Dec. 297, 12 Cinc. L. Bul. 78; Mann v. Flanagan, 9 Ore. 425; McCullough v. Barr, 145 Pa. St. 459, 22 Atl. 962; Schriver's Appeal (Pa.), 12 Atl. 553; Emerick v. Moir, 124 Pa. St. 498, 17 Atl. 1; Godfrey v. Templeton, 86 Tenn. 161, 6 S. W. 47; Eakin v. Shumaker, 12 Texas 51; Lyman v. Lyman, 2 Paine (U. S.) 11, Fed. Cas. No. 8628; Emerson v. Durand, 64 Wis. 111, 24 N. W. 129, 54 Am. Rep. 593. And compare Williams v. McKee, 13 Ky. L. 143; Kinney v. Maher, 156 Mass. 252, 30 N. E. 818; Frank v. Webb, 67 Miss. 462, 6 So. 620; Hunter v. Little, 17 N. Y. Wkly. Dig. 500; Gresham v. Harcourt (Tex. Civ. App.), 50 S. W. 1058, revd. 93 Tex. 149, 53 S. W. 1019. On more than one occasion it has been denied that a gross inequality in the service to the credit of the several partners creates the presumption of an agreement to compensate specifically for the superior services rendered. McAllister v. Payne, 108 Ga. 517, 34 S. E. 165; Lewis v. Moffett, 11 Ill. 392; Roach v. Perry, 16 Ill. 37. See further, Burgess v. Badger, 124 Ill. 288, 14 N. E. 850; Cook v. Phillips, 16 Ill. App. 446.

partnership business,—a member of the firm not being thus permitted to add to his profits by demanding allowance and receiving compensation for that which he is ordinarily under obligation to donate.[87] This rule has been approved and applied, from time to

[87] Where "the firm was insolvent, neither partner had the right to draw a salary." Miller v. Electrical Supply &c. Co. (Colo.), 103 Pac. 290. "The general rule is that, though each partner is bound to bestow his services and labor with diligence and skill, he is not entitled to any reward or compensation, unless there be an express stipulation between the partners for that purpose." Major v. Todd, 84 Mich. 85, 47 N. W. 481. "The general rule is well settled, * * * that 'in the absence of special agreement, a partner is not entitled to compensation for his services for the partnership, but must be content with his share of the profits, if any.'" Ruggles v. Buckley, 175 Fed. 57, 99 C. C. A. 73, 27 L. R. A. (N. S.) 541. See further, Glover v. Hembree, 82 Ala. 324, 8 So. 251; Zimmerman v. Huber, 29 Ala. 379; Adams v. Warren (Ala.), 11 So. 754; Haller v. Willamowicz, 23 Ark. 566; Pierce v. Scott, 37 Ark. 308; Reybold v. Jefferson, 1 Har. (Del.) 401, 26 Am. Dec. 401; McAllister v. Payne, 108 Ga. 517, 34 S. E. 165; Van Duzer v. McMillan, 37 Ga. 299; Hanks v. Baber, 53 Ill. 292; Cook v. Phillips, 16 Ill. App. 446; Gerard v. Gateau, 15 Ill. App. 520; Strattan v. Tabb, 8 Ill. App. 225; O'Brien v. Hanley, 86 Ill. 278; Ligare v. Peacock, 109 Ill. 94; Askew v. Springer, 111 Ill. 662; Lee v. Davis, 70 Ind. 464; Boardman v. Close, 44 Iowa 428; Levi v. Karrick, 13 Iowa 344; Insley v. Shire, 54 Kans. 793, 39 Pac. 713, 45 Am. St. 308; Edelen v. Walker, 21 Ky. L. 839, 53 S. W. 38; Tilford v. Forsythe, 14 Ky. L. (abstract) 335; Hayden v. Crouch, 12 Ky. L. (abstract) 893; Herndon v. Terrell, 12 Ky. L. (abstract) 96; Atherton v. Cochran, 11 Ky. L. 185, 9 S. W. 519, 11 S. W. 301; Chamberlain v. Sawyers, 17 Ky. L. 716, 32 S. W. 475; Boyd v. Tabb, 5 Ky. L. (abstract) 516; Glenn v. Sims, 5 Ky. L. (abstract) 775; Sims v. Banta, 9 Ky. L. (abstract) 286; Taylor v. Ragland, 42 La. Ann. 1020, 8 So. 467; Mills v. Fellows, 30 La. Ann. 824; Hill v. Matta, 12 La. Ann. 179; Bevans v. Sullivan, 4 Gill (Md.) 383; Dunlap v. Watson, 124 Mass. 305; Major v. Todd, 84 Mich. 85, 47 N. W. 841; Pierce v. Pierce, 89 Mich. 233, 50 N. W. 851; Frank v. Webb, 67 Miss. 462, 6 So. 620; Randle v. Richardson, 53 Miss. 176; Scudder v. Ames, 89 Mo. 496, 14 S. W. 525; Gaston v. Kellogg, 91 Mo. 104, 3 S. W. 589; Inglis v. Floyd, 33 Mo. App. 565; Warren v. Raben, 33 Nebr. 380, 50 N. W. 257; Folsom v. Marlett, 23 Nev. 459, 49 Pac. 39; Mumford v. Murray, 6 Johns. Ch. (N. Y.) 1; Coddington v. Idell, 29 N. J. Eq. 504; Eckert v. Clark, 14 Misc. (N. Y.) 18, 69 N. Y. St. 491, 35 N. Y. S. 118; Nicoll v. Huntington, 1 Johns. Ch. (N. Y.) 166; Bradford v. Kimberly, 3 Johns. Ch. (N. Y.) 431; Paine v. Thacher, 25 Wend. (N. Y.) 450; Lyon v. Snyder, 61 Barb. (N. Y.) 172; Coursen v. Hamlin, 2 Duer (N. Y.) 513; Dougherty v. Van Nostrand, 1 Hoffm. (N. Y.) 68; Franklin v. Robinson, 1 Johns. Ch. (N. Y.) 157; Parker v. Day, 12 Misc. (N. Y.) 510, 67 N. Y. St. 378, 33 N. Y. S. 676, revd. 155 N. Y. 383, 49 N. E. 1046; Skinner v. White, 1 Hopk. Ch. (N. Y.) 107; Gilhooly v. Hart, 8 Daly (N. Y.) 176; Solomon v. Shinner, 5 N. Y. Wkly. Dig. 491; Philips v. Turner, 22 N. Car. 123; Buford v. Neely, 17 N. Car. 481; Anderson v. Taylor, 37 N. Car. 420, 38 Am. Dec. 689; Butner v. Lemly, 58 N. Car. 148; Cameron v. Francisco, 26 Ohio St. 190; Myers v. Kirby, 9 Ohio Dec. 297, 12 Cinc. L. Bul. 78; Rohr v. Pearson, 16 Ore. 325, 14 Pac. 297; Mann v. Flanagan, 9 Ore. 425; In re Marsh's Appeal, 69 Pa. St. 30, 8 Am. Rep. 206; Delp v. Edlis, 190 Pa. St. 25, 42 Atl. 462; Lindsey v. Stranahan, 129 Pa. St. 635, 18 Atl. 524; Schriver's Appeal (Pa.), 12 Atl. 553; Cunliff v. Dyerville Mfg. Co., 7 R. I. 325; Cothran v. Knox, 13 S. Car. 496; Barry v. Jones, 11 Heisk. (Tenn.) 206, 27 Am. Rep. 742; God-

time, even where the services of the several partners in behalf of the common enterprise have not been equal either in extent or in value.[88] Moreover, it undoubtedly holds good in general not

frey v. Templeton, 86 Tenn. 161, 6 S. W. 47; Hooker v. Williamson, 60 Tex. 524; Lyman v. Lyman, 2 Paine (U. S.) 11, Fed. Cas. No. 8628; Stebbins v. Willard, 53 Vt. 665; Redfield v. Gleason, 61 Vt. 220, 17 Atl. 1075, 15 Am. St. 889; Scott v. Boyd, 101 Va. 28, 42 So. 918; Forrer v. Forrer, 29 Grat. (Va.) 134; Roots v. Mason City Salt & Mining Co., 27 W. Va. 483; Taylor v. Dorr, 43 W. Va. 351, 27 S. E. 317; Drew v. Ferson, 22 Wis. 651; Emerson v. Durand, 64 Wis. 111, 24 N. W. 129, 54 Am. Rep. 593. See also, Osment v. McElrath, 68 Cal. 466, 9 Pac. 731, 58 Am. Rep. 17; Nevills v. Moore Min. Co., 135 Cal. 561, 67 Pac. 1054; Maynard v. Richards, 166 Ill. 46, 46 N. E. 1138, 57 Am. St. 145; Burgess v. Badger, 124 Ill. 288, 14 N. E. 850; Lassiter v. Jackman, 88 Ind. 118; Young v. Scoville, 99 Iowa 177, 68 N. W. 670; Smith v. Smith, 51 La. Ann. 72, 24 So. 618; Godfrey v. White, 43 Mich. 171, 5 N. W. 243; Lamb v. Wilson, 3 Nebr. (unof.) 496, 92 N. W. 167; Younglove v. Liebhardt, 13 Nebr. 557, 14 N. W. 526; Wisner v. Field, 11 N. Dak. 257, 91 N. W. 67. And compare Parker v. Day, 155 N. Y. 383, 49 N. E. 1046. A managing partner, who employs his minor children, with the consent of the other partner, is entitled to compensation for their services. Taylor v. Ragland, 42 La. Ann. 1020, 8 So. 467. See further Zimmerman v. Huber, 29 Ala. 379.

[88] "It is undoubtedly true, as a general rule, that partners are not entitled to charge each other, or the firm of which they are members, for their services in the copartnership business, unless there is a special agreement to that effect, or such agreement can be implied from the course of dealing between them. By the well-settled law of partnership, every partner is bound to work to the extent of his ability for the benefit of the whole, without regard to the services of his copartners, and without comparison of value; for services to the firm can not, from their very nature, be estimated and equalized by compensation of differences. Beatty v. Wray, 19 Pa. St. 519. In the absence, therefore, of any special provision allowing compensation for services, the law will not make any, nor infer one from the greater industry or greater ability of any one partner. The doctrine seems to be that partners are considered as meeting on common ground, each engaged to do all he can for the common good; and whatever any one does, he has no claim for anything beyond his equal share of the common benefit without the consent of his copartners." In re Marsh's Appeal, 69 Pa. St. 30, 8 Am. Rep. 206. "We believe the rule to be well settled that, in the absence of a stipulation to that effect, one partner is not entitled to charge his copartners for his services, or because he has done more than his just proportion of work. The law never undertakes to measure and to settle between the partners their various and unequal services bestowed on the joint business." Burgess v. Badger, 124 Ill. 288, 14 N. E. 850. "The general rule, no doubt, is that a partner is entitled to nothing extra for any inequality of services rendered by him as compared with that rendered by his copartner. * * * Though courts will not undertake to equalize partners with reference to the personal services rendered by them, respectively, in conducting the firm business, there is no reason why the parties can not and should not do it by their own voluntary agreement, whether made before or after the services are rendered." Gray v. Hamil, 82 Ga. 375, 10 S. E. 205, 6 L. R. A. 72. See further, Baker v. Cummings, 8 App. D. C. 515, revd. 169 U. S. 189, 42 L. ed. 711, 18 Sup. Ct. 367; McAllister v. Payne, 108 Ga. 517, 34 S. E. 165; Burgess v. Badger, 124 Ill. 288, 14 N. E. 850; Roach v. Perry, 16 Ill. 37; King v. Hamilton, 16 Ill. 190; Lewis v. Moffett, 11 Ill. 392; Heckard v. Fay, 57 Ill. App. 20; Brownell v. Steere, 29 Ill. App. 358, affd. 128 Ill. 209, 21 N. E. 3; Lee v. Lashbrooke,

only during the actual existence of the partnership relation but until, following dissolution, the business is wound up and the final word said.[89] Still the express right of a partner to receive a cer-

8 Dana (Ky.) 214; Heath v. Waters, 40 Mich. 457; Godfrey v. White, 43 Mich. 171, 5 N. W. 243; Adam's Admr. v. Ringo, 79 Ky. 211; Reily v. Russell, 34 Mo. 524; Beatty v. Wray, 19 Pa. St. 516, 57 Am. Dec. 677; Murray v. Johnson, 1 Head (Tenn.) 353; Piper v. Smith, 1 Head (Tenn.) 93; Stebbins v. Willard, 53 Vt. 665; Drew v. Ferson, 22 Wis. 651. Although a partner takes full charge of the affairs and business of the partnership, his managerial services will not per se increase the share of the profits to which he will otherwise be entitled. Taylor v. Ragland, 42 La. Ann. 1020, 8 So. 467; Pierce v. Pierce, 89 Mich. 233, 50 N. W. 851; Major v. Todd, 84 Mich. 85, 47 N. W. 841; Evans v. Warner, 20 App. Div. (N. Y.) 230; Smith v. Brown, 44 W. Va. 342, 30 S. E. 160.

[89] "But where the partnership is dissolved by death of one of the partners, or by a decree of the court * * * the rule is not so well settled. Indeed, there seems to be a diversity of decisions in relation thereto. After all, the holding in any given case must at last turn upon the facts of that particular case. * * * We are inclined to hold that the greater weight of authority sustains the proposition that, in cases wherein the partnership is dissolved by death of one of the partners or operation of law, the partner who winds up the business would not be entitled to compensation in the absence of an agreement to that effect. Where such partner so winding up the partnership business enters into new business, and assumes obligations and risks not imposed upon him by the partnership agreement, and such new business is successful, and the other partner, or, if he be dead, his representatives, elect to share in the profits of the new business, the partner so conducting such new business under the partnership name might properly be allowed compensation for his services." Ruggles v. Buckley, 175 Fed. 57, 99 C. C. A. 73, 27 L. R. A. (N. S.) 541. "One partner cannot be allowed compensation for extra service in behalf of the firm, either before or after its dissolution, without an express stipulation to that effect." Barry v. Jones, 11 Heisk. (Tenn.) 206, 27 Am. Rep. 742. "The rule of law is well settled by the weight of authorities, that neither partner of a dissolved firm is entitled to compensation for services rendered in winding up the partnership affairs unless it is expressly agreed otherwise, or can be fairly implied from the circumstances. It seems, however, that the rule should not be extended beyond the requirement of merely winding up the partnership affairs, by collecting its outstanding claims, paying debts, and distributing the surplus among the members, and that when it appears that time, skill, and labor have been expended by a partner in the continuance of the partnership business, which inure to the general benefit, he ought to receive, from the profits from his skill and labor, a reasonable compensation, varying according to the nature of the business, the difficulties and results of the undertaking and its necessity or desirability. While few cases are found which directly support this view, it seems to us to be founded upon the plainest principles of equity and justice, especially when applied to partnerships among professional men, where the profits are almost wholly the result of professional skill and labor." Lamb v. Wilson, 3 Nebr. (unof.) 496, 92 N. W. 167; Burden v. Burden, 1 Ves. & B. 170; Stocken v. Dawson, 6 Beav. 371; Consoul v. Cummings, 24 App. D. C. 36; McElroy v. Whitney, 12 Idaho 512, 88 Pac. 349; In re Curlee, 118 Va. 563, 43 So. 165; Lamb v. Wilson, 3 Nebr. (unof.) 496, 92 N. W. 167; Clausen v. Puvogel, 114 App. Div. (N. Y.) 455, 100 N. Y. S. 49; Stockdale v. Maginn, 207 Pa. 226, 56 Atl. 439; Condon v. Callahan, 115 Tenn. 285, 89 S. W. 400, 1 L. R. A. (N. S.) 643, 112 Am. St. 833. See further, Kimball v. Lincoln, 5 Ill. App. 316; Smith

tain salary during the time for which the partnership was created would seem to vest in him the right to receive compensation at the salary rate for such period as the business is continued after the expiration of its predetermined existence.[90] "The partnership may be of such a peculiar kind, and the arrangements and the course of dealing of the partners in regard to it may be such as pretty plainly to show an expectation and understanding, without an express agreement upon the subject, that certain services of a copartner should be paid for. Such cases, presenting unusual conditions, are exceptions to the general rule," however.[91] So, also, where a partnership agreement is rescinded on the ground of fraud, the one who was fraudulently induced to engage in the business may be entitled in addition to his contributions thereto with interest, to reasonable compensation for his services in attending to the same.[92] And it seems that one partner may recover the value of

v. Knight, 88 Iowa 257, 55 N. W. 139; Buford v. Neely, 17 N. Car. 481; Philips v. Turner, 22 N. Car. 123; Anderson v. Taylor, 37 N. Car. 420, 38 Am. Dec. 689; McFarland v. McCormick, 114 Iowa 368, 86 N. W. 369; Wiggins v. Brand, 202 Mass. 141, 88 N. E. 840; Garretson v. Brown, 185 Pa. St. 447, 40 Atl. 293; Stockdale v. Maginn, 207 Pa. 226, 56 Atl. 439; Dodson v. Dodson, 6 Heisk. (Tenn.) 110; Griffey v. Northcutt, 5 Heisk. (Tenn.) 746; Piper v. Smith, 1 Head (Tenn.) 93; Lyman v. Lyman, 2 Paine (U. S.) 11, Fed. Cas. No. 8628; Denver v. Roane, 99 U. S. 355, 25 L. ed. 476. And compare Griggs v. Clark, 23 Cal. 437; Van Duzer v. McMillan, 37 Ga. 299; Hutchinson v. Onderdonk, 2 Halst. Ch. (N. J.) 277, 300. Any attempt, however, to put this proposition in the form of a general statement has been disapproved in Thayer v. Badger, 171 Mass. 279, 50 N. E. 541, in which Holmes, J., delivering the opinion of the court, says: "It is true, no doubt, that there is a disinclination to allow pay to a surviving partner for winding up (Dunlap v. Watson, 124 Mass. 305), but the tendency is to deal with such questions on their particular circumstances, rather than by absolute rules. Turnbull v. Pomeroy, 140 Mass. 117, 118, 3 N. E. 15; Robinson v. Simmons, 146 Mass. 167, 176, 15 N. E. 558." See further, Hite & Fishback's Heirs v. Hite's Exrs., 1 B. Mon. (Ky.) 177; Honore v. Colmesnil, 1 J. J. Marsh. (Ky.) 506; Schenkl v. Dana, 118 Mass. 236; Royster v. Johnson, 73 N. Car. 474; In re Zell's Appeal, 126 Pa. St. 329, 17 Atl. 647; Godfrey v. Templeton, 86 Tenn. 161, 6 S. W. 47; Bradley v. Chamberlain, 16 Vt. 613. In the case of Shumard v. Gano, 8 Ohio C. D. 370, 18 Ohio C. Ct. 871, two persons had agreed to form a partnership, but, through lack of compliance by one of them, the partnership was never launched. And it was held that the delinquent party could not recover from his cocontractor for services rendered by him during the inchoate agreement to form a partnership, there having been no express promise on the part of the defendant to pay for such services.

[90] Gresham v. Harcourt (Tex. Civ. App.), 50 S. W. 1058, judgment reversed on other points, 93 Tex. 149, 53 S. W. 1019. But compare Keiley v. Turner, 81 Md. 269, 31 Atl. 700.

[91] Hoag v. Alderman, 184 Mass. 217, 68 N. E. 199.

[92] Caplen v. Cox, 42 Tex. Civ. App.

his services from his copartner when the same have been performed for the latter individually and not as a member of the firm, and there exists no agreement that such liability shall not attach.[93] Likewise a partner who is employed to render services which neither under the law nor the articles of association he is required to perform may recover compensation therefor on an implied agreement for the same.[94] Again a partner who gives his undivided services to the partnership business has been held entitled to extra compensation even without any agreement to that effect when his associate is employed by a third person on a salary from which the partnership derives no benefit.[95] So a partner who has supplied all the capital and has himself alone managed and controlled the firm affairs, under partnership articles requiring each member of the firm to give their services to the common business, is entitled to a salary in the form of a credit on final settlement.[96] Where the minor children of a managing partner are, with the consent of the other member of the firm, employed in the partnership business, it has been held that their father is entitled to be compensated for their services.[97] And yet where a partner is compelled through sickness to abandon the business in violation of the articles of partnership, it is held that his copartner will not thereby become entitled to compensation for his services.[98] So again it is not altogether clear in the absence of an express agreement defining the services to be performed by the several partners that even the wilful inattention to business by a member of the firm which entails upon his copartners services otherwise unnecessary will entitle the latter or any one of them to any extraordinary share of the profits as such of the firm.[99]

297, 92 S. W. 1048, citing Richards v. Todd, 127 Mass. 167.

[93] Lell v. Hardesty, 23 Ky. L. 2073, 66 S. W. 643.

[94] Levi v. Karrick, 13 Iowa 344.

[95] Morris v. Griffin, 83 Iowa 327, 49 N. W. 846.

[96] Mattingly v. Stone, 18 Ky. L. 187, 35 S. W. 921. See also, Emerson v. Durand, 64 Wis. 111, 24 N. W. 129, 54 Am. Rep. 593.

[97] Taylor v. Ragland, 42 La. Ann. 1020, 8 So. 467. See also, Zimmerman v. Huber, 29 Ala. 379.

[98] MacDowell v. North, 24 Ind. App. 435, 55 N. E. 789. See also, Heath v. Waters, 40 Mich. 457.

[99] Gray v. Hamil, 82 Ga. 375, 10 S. E. 205, 6 L. R. A. 72; In re Marsh's Appeal, 69 Pa. St. 30, 8 Am. Rep. 206; Denver v. Roane, 99 U. S. 355, 25 L. ed. 476; Emerson v. Durand, 64 Wis. 111, 24 N. W. 129, 54 Am. Rep. 593. And compare, Lindl. on Partn., *381; Airey v. Borham, 29 Beav. 620; Morris v. Griffin, 83 Iowa 327, 49 N. W. 846; Clement v. Ditter-

§ 4915. **Partner's lien.**—A partner's lien may be denominated or described as the right of each member of the firm, against each other member thereof and against each of those asserting partnership rights thereunder, to demand that the property of the partnership[1] be finally applied originally in discharge of the debts and liabilities of the common business and then to have all over and above the same used in satisfaction of the amounts owing the separate partners first as such, and secondly as individuals.[2] Fur-

line's Admr., 11 Ky. L. 294, 11 S. W. 658. Certain it is, that it does not require any formal adjudication to accept as a fact the proposition that a partner will not be able to charge the firm specifically for extra services devolved upon him by reason of the illness of his copartner. A partner is "bound to discharge his duties in relation to preserving and caring for the partnership estate without extra compensation, duties which the common law implies are incident to the contract of copartnership,—duties which remain in the absence or disability of the copartner, whether occasioned by causes of a temporary nature, as, for instance, sickness, or a permanent nature, as, for instance, death." Scudder v. Ames, 89 Mo. 496, 14 S. W. 525. "So long as a partnership continues, the sickness or inability of a partner is one of the risks incidental to the business, and works no forfeiture or deduction." Heath v. Waters, 40 Mich. 457.

[1] West v. Skip, 1 Ves. 239; Payne v. Hornby, 25 Beav. 280; Ex parte Ruffin, 6 Ves. 119; Nerot v. Burnand, 4 Russ. 247; Nichol v. Stewart, 36 Ark. 612; Duryea v. Burt, 28 Cal. 569; Roberts v. McCarty, 9 Ind. 16, 68 Am. Dec. 604; Evans v. Hawley, 35 Iowa 83; Divine v. Mitchum, 4 B. Mon. (Ky.) 488, 41 Am. Dec. 241; Sebastian v. Booneville Academy Co., 22 Ky. L. 186, 56 S. W. 810; Collins v. Decker, 70 Maine 23; Buffum v. Buffum, 49 Maine 108, 77 Am. Dec. 249; Crooker v. Crooker, 46 Maine 250; Mann v. Higgins, 7 Gill (Md.) 265; Arnold v. Wainwright, 6 Minn. 358, 80 Am. Dec. 448; Dilworth v. Mayfield, 36 Miss. 40; Priest v. Chouteau, 85 Mo. 398, 55 Am. Rep. 373; Murphy v. Warren, 55 Nebr. 215, 75 N. W. 573; Hiscock v. Phelps, 49 N. Y. 97; Wade v. Rusher, 17 N. Y. Super. Ct. 537; Mendenhall v. Benbow, 84 N. Car. 646; Betts v. Letcher, 1 S. Dak. 182, 46 N. W. 193; Lane v. Jones, 9 Lea (Tenn.) 627; Williams v. Love, 2 Head (Tenn.) 80, 73 Am. Dec. 191; Cowan McClung & Co. v. Gill, 11 Lea (Tenn.) 674; Hoyt v. Sprague, 103 U. S. 613, 26 L. ed. 585; Diggs's Admr. v. Brown, 78 Va. 292.

[2] "Each partner has a lien on the partnership assets for the protection of his rights upon the settlement of partnership accounts." In re Kessler, 174 Fed. 906. "The rule is well settled, especially by courts of equity, that the assets of a partnership must be first applied to the payment of partnership creditors before anything can be applied to the claims of the individual partners thereof or their creditors. This does not result from any lien which the creditors have upon the assets, because they as such have no lien; but it results from the lien which each partner has to have the assets of the partnership applied first to the payment of the firm's debts, and then to the payment of whatever may be due to him from the other partners or partnership accounts. The partnership creditors are practically subrogated to the partner's lien upon the partnership property, and their rights to priority depend upon these." Lacey v. Cowan, 162 Ala. 546, 50 So. 281. See further, West v. Skip, 1 Ves. 239; Ex parte Ruffin, 6 Ves. 119; Donelson's Admrs. v. Posey, 13 Ala. 752; Goldsmith v. Eichold, 94 Ala. 116, 10 So. 80, 33 Am. St. 97; Evans v. Winston, 74 Ala. 349; Warren v. Taylor, 60 Ala. 218; Hart v. Clark, 54 Ala. 490; Coffin v. McCullough's

ther it seems that even a claimant through any member of the

Admr., 30 Ala. 107; McGown v. Sprague, 23 Ala. 524; Summers v. Heard, 66 Ark. 550, 50 S. W. 78, 51 S. W. 1057; Lewis v. Buford, 93 Ark. 57, 124 S. W. 244; Crane v. Dryer, 9 Cal. App. 290, 98 Pac. 1072; Shinn v. Macpherson, 58 Cal. 596; McCauley v. Fulton, 44 Cal. 355; Leedom v. Ham, 116 Colo. 16, 48 Pac. 222; Beecher v. Stevens, 43 Conn. 592; Sanders v. Herndon, 33 Ky. L. 669, 110 S. W. 862; Griffin v. Orman, 9 Fla. 22; Allen v. Hawley, 6 Fla. 142, 63 Am. Dec. 198; John Spry Lumber Co. v. Chappell, 184 Ill. 539, 56 N. E. 794; Davies v. Atkinson, 124 Ill. 474, 16 N. E. 899, 7 Am. St. 373; Royston v. John Spry Lumber Co., 85 Ill. App. 223; Rainey v. Nance, 54 Ill. 29; Hapgood v. Cornwell, 48 Ill. 64, 95 Am. Dec. 516; Reeves v. Ayers, 38 Ill. 418; Hargadine-McKittrick Dry Goods Co. v. Belt, 74 Ill. App. 581; Johnson v. McClary, 131 Ind. 105, 30 N. E. 888; Deeters v. Sellers, 102 Ind. 458, 1 N. E. 854; Roberts v. McCarty, 9 Ind. 16, 68 Am. Dec. 604; Matlock v. Matlock, 5 Ind. 403; Rumsey-Sikemeier Co. v. Bank of Aurora, 139 Mo. App. 306, 123 S. W. 75; Caldwell Banking &c. Co. v. Porter, 52 Ore. 318, 95 Pac. 1; Adams v. Hubbard, 221 Pa. 511, 70 Atl. 835; Smith v. Rainey, 9 Ariz. 362, 83 Pac. 463, revd. 209 U. S. 53, 52 L. ed. 679, 28 Sup. Ct. 474; Case v. Beauregard, 99 U. S. 119, 25 L. ed. 370; Maitland v. Purdy, 49 Wash. 575, 96 Pac. 154; Fouse v. Shelly, 64 W. Va. 425, 63 S. E. 208. See also, Stout v. Fortner, 7 Iowa 183; Pierce v. Wilson, 2 Iowa 20; Kemmerer v. Kemmerer, 85 Iowa 193, 52 N. W. 194; Cook v. Gilchrist, 82 Iowa 277, 48 N. W. 84; Ely v. Hair, 16 B. Mon. (Ky.) 230; Talbot v. Pierce, 14 B. Mon. (Ky.) 195; Wilson v. Soper, 13 B. Mon. (Ky.) 411, 56 Am. Dec. 573; White v. Woodward & Rand, 8 B. Mon. (Ky.) 485; Pearson v. Keedy, 6 B. Mon. (Ky.) 128, 43 Am. Dec. 160; January & Huston v. Poyntz, 2 B. Mon. (Ky.) 404; Meador v. Hughes, 14 Bush (Ky.) 652; Howell v. Commercial Bank, 5 Bush (Ky.) 100; O'Bannon v. Miller, 4 Bush (Ky.) 25; Bank of Kentucky v. Herndon, 1 Bush (Ky.) 359, 89 Am. Dec. 630; Conwell v. Sandidge's Admr., 8 Dana (Ky.) 273; Hodges v. Holeman, 1 Dana (Ky.) 50; Jones v. Lusk, 2 Metc. (Ky.) 356; Couchman's Admr. v. Maupin, 78 Ky. 33; Harlan v. Bennett, 127 Ky. 572, 106 S. W. 287, 128 Am. St. 360; Anderson v. Morris, 10 Ky. L. 544; Evans v. Rhea, 12 Ky. L. 224, 14 S. W. 82; King v. Shaw, 9 Ky. L. (abstract) 577; Flanagan v. Shuck, 82 Ky. 617; Cooper v. Webster, 4 Ky. L. 734; West v. Armstrong, 4 Ky. L. (abstract) 998; Black v. Bush, 7 B. Mon. (Ky.) 210; Sebastian v. Booneville Academy Co., 22 Ky. L. 186, 56 S. W. 810; Calder v. Their Creditors, 47 La. Ann. 346, 16 So. 852; Johnson v. Hersey, 70 Maine 74, 35 Am. Rep. 303; Hacker v. Johnson, 66 Maine 21; Buffum v. Buffum, 49 Maine 108, 77 Am. Dec. 249; Crooker v. Crooker, 46 Maine 250; Mann v. Higgins, 7 Gill (Md.) 265; Pierce v. Tiernan, 10 Gill & J. (Md.) 253; Sanderson v. Stockdale, 11 Md. 563; Glenn v. Gill, 2 Md. 1; Freeman v. Stewart, 41 Miss. 138; Dilworth v. Mayfield, 36 Miss. 40; Lester v. Givens, 74 Mo. App. 395; Dieckmann v. St. Louis, 9 Mo. App. 9; Murphy v. Warren, 55 Nebr. 215, 75 N. W. 573; Whitmore v. Shiverick, 3 Nev. 288; Arnold v. Hagerman, 45 N. J. Eq. 186, 14 Am. St. 712; Hill v. Beach, 12 N. J. Eq. 31; Uhler v. Semple, 20 N. J. Eq. 288; Harney v. First Nat. Bank, 52 N. J. Eq. 697, 29 Atl. 221; Standish v. Babcock, 52 N. J. Eq. 628, 29 Atl. 327, revd. 53 N. J. Eq. 376, 33 Atl. 385, 30 L. R. A. 604, 51 Am. St. 633; Greenwood v. Brodhead, 8 Barb. (N. Y.) 593; Kirby v. Shoonmaker, 3 Barb. Ch. (N. Y.) 46, 49 Am. Dec. 160; Geortner v. Canajoharie, 2 Barb. (N. Y.) 625; Ketchum v. Durkee, 1 Barb. Ch. (N. Y.) 480, 45 Am. Dec. 412; Deveau v. Fowler, 2 Paige (N. Y.) 400; Frith v. Lawrence, 1 Paige (N. Y.) 434; Wade v. Rusher, 17 N. Y. Super. Ct. 537; Addison v. Burckmyer, 4 Sandf. Ch. (N. Y.) 498; Robb v. Stevens, 1 Clarke Ch. (N. Y.) 191; Menagh v. Whitwell, 52 N. Y. 146, 11 Am. Rep. 683; Thornton v. Lambeth, 103 N. Car. 86, 9

firm, of a share in the partnership property, may assert this lien.[3] The law regards with favor this inchoate right which, although undoubtedly capable of waiver and alienation,[4] forbids, by its very nature, that any one member of the firm employ, without prior authorization, partnership assets in the matter of his own

S. E. 432; Scott v. Kenan, 94 N. Car. 296; Sumner v. Hampson, 8 Ohio 328, 32 Am. Dec. 722; Seibricht v. Rohrkasse, 3 Ohio Dec. (Reprint) 43, 2 Wkly. L. Gaz. 257; Moffatt v. Thomson, 5 Rich. Eq. (S. Car.) 155, 57 Am. Dec. 737; Boyce v. Coster's Exrs., 4 Strob. Eq. (S. Car.) 25; Betts v. Letcher, 1 S. Dak. 182, 46 N. W. 193; Lane v. Jones, 9 Lea (Tenn.) 627; Williams v. Love, 2 Head (Tenn.) 80, 73 Am. Dec. 191; Fain v. Jones, 3 Head (Tenn.) 308; White v. Dougherty, Mart. & Y. (Tenn.) 309, 17 Am. Dec. 802; Furman v. Fisher, 4 Coldw. (Tenn.) 626, 94 Am. Dec. 210; Wiggins v. Blackshear, 86 Tex. 665, 26 S. W. 939; Rogers v. Nichols, 20 Tex. 719; Johnston v. Standard Shoe Co., 5 Tex. Civ. App. 398, 24 S. W. 580; Wm. W. Kendall Boot & Shoe Co. v. Johnston (Tex. Civ. App.), 24 S. W. 583; Charleson v. McGraw, 3 Wash. Ter. 344; Densmore Commission Co. v. Shong, 98 Wis. 380, 74 N. W. 114. And compare Brown v. Kennedy, 12 Colo. 235, 20 Pac. 696; White v. Woodward. 8 B. Mon. (Ky.) 484; Whitworth & Moore v. Patterson, 6 Lea (Tenn.) 119; Robinson v. Allen, 85 Va. 721, 8 S. E. 835.

[3] In re Langmead, 7 De G. M. & G. 353, affg. 20 Beav. 20; Croft v. Pyke, 3 P. Wims. 180; Cavender v. Bulteel, L. R. 9 Ch. 79; Warren v. Taylor, 60 Ala. 218; Wade v. Rusher, 17 N. Y. Super. Ct. 537; Whitmore v. Shiverick, 3 Nev. 288; Hobbs v. McLean, 117 U. S. 567, 29 L. ed. 940, 6 Sup. Ct. 870; Hoyt v. Sprague, 103 U. S. 613, 26 L. ed. 585; Miller v. Price, 20 Wis. 117, See further, McCauley v. Fulton, 44 Cal. 355; Beecher v. Stevens, 43 Conn. 587; Frink v. Branch, 16 Conn. 260; Deeters v. Sellers, 102 Ind. 458, 1 N. E. 854; Menagh v. Whitwell, 52 N. Y. 146, 11 Am. Rep. 683.

[4] Ewing v. Osbaldiston, 2 Myl. & C. 53-88; In re Langmead, 7 De G. M. & G. 353, affg. 20 Beav. 20; Lingen v. Simpson, 1 Sim. & St. 602; Ex parte Ruffin, 6 Ves. 119; West v. Skip, 1 Ves. 239; Hart v. Clark, 54 Ala. 490; Jones v. Fletcher, 42 Ark. 422; In re Kessler, 174 Fed. 906; West v. Chasten, 12 Fla. 315; Robertson v. Baker, 11 Fla. 192; Ladd v. Griswold, 4 Gilm. (Ill.) 25, 46 Am. Dec. 443; Williamson v. Adams, 16 Ill. App. 564; Goembel v. Arnett, 100 Ill. 34; Hapgood v. Cornwell, 48 Ill. 64, 95 Am. Dec. 516; Parker v. Merritt, 105 Ill. 293; Trentman v. Swartzell, 85 Ind. 443; Tuller v. Leaverton, 143 Iowa 162, 121 N. W. 515, 136 Am. St. 756; Janney v. Springer, 78 Iowa 67, 43 N. W. 461, 16 Am. St. 460; Tuller v. Leaverton, 143 Iowa 162, 121 N. W. 515, 136 Am. St. 756; Clapp v. Adams, 143 Iowa 697, 121 N. W. 44; Nix v. Menderson, 8 Ky. L. (abstract) 873; Bowman v. Spalding, 8 Ky. L. (abstract) 691, 2 S. W. 911; Giddings v. Palmer, 107 Mass. 269; Andrews v. Mann, 31 Miss. 322; Parish v. Lewis, Freem. Ch. (Miss.) 299; Tennant, Walker & Co. v. McKean, 46 Mo. App. 486; Rumsey-Sikemeier Co. v. Bank of Aurora, 139 Mo. App. 306, 123 S. W. 75; Arnold v. Hagerman, 45 N. J. Eq. 186, 17 Atl. 93, 14 Am. St. 712; Alpaugh v. Savage (N. J.), 19 Atl. 380; Vosper v. Kramer, 31 N. J. Eq. 420; Wade v. Rusher, 17 N. Y. Super. Ct. 537; Dimon v. Hazard, 32 N. Y. 65; Westwood v. Cole, 66 Misc. (N. Y.) 53, 120 N. Y. S. 884; Cory v. Long, 2 Sweeney (N. Y.) 491; Lassiter v. Stainback, 119 N. Car. 103, 25 S. E. 726; Seibricht v. Rohrkasse, 3 Ohio Dec. (Reprint) 43, 2 Wkly. L. Gaz. 257; Croone v. Bivens, 2 Head (Tenn.) 339; Smith v. Edwards, 7 Humph. (Tenn.) 106, 46 Am. Dec. 71; Willis v. Thompson, 85 Tex. 301, 20 S. W. 155. And compare Holderness v. Shackels, 8 B. & C. 612; Mc-

personal contracts.[5] A bona fide transferee for value, however,

Gown v. Sprague, 23 Ala. 524; Hoyt v. Sprague, 103 U. S. 613, 26 L. ed. 585.

[5] Pierce v. Hickenburg, 2 Port. (Ala.) 198; Pierce v. Pass. 1 Port. (Ala.) 232; Nall v. McIntyre, 31 Ala. 532; Burwell v. Springfield, 15 Ala. 273; Feucht v. Evans, 52 Ark. 556, 13 S. W. 217; Filley v. Phelps, 18 Conn. 294; Yale v. Yale, 13 Conn. 185, 33 Am. Dec. 393; Edwards v. Entwistle, 2 Mackey (D. C.) 43; Claflin v. Ambrose, 37 Fla. 78, 19 So. 628; Clarke v. Farrell, 80 Ga. 622, 6 S. E. 20; Perry v. Butt, 14 Ga. 699; Davies v. Atkinson, 124 Ill. 474, 16 N. E. 899, 7 Am. St. 373; Buchanan v. Meisser, 105 Ill. 638; Renfrow v. Pearce, 68 Ill. 125; Rainey v. Nance, 54 Ill. 29; McNair v. Platt, 46 Ill. 211; Granger v. McGilvra, 24 Ill. 152; Marine Co. v. Carver, 42 Ill. 66; Casey v. Carver, 42 Ill. 225; Brewster v. Mott, 5 Ill. 378; Harts v. Byrne, 31 Ill. App. 260; Janney v. Springer, 78 Iowa 67, 43 N. W. 461, 16 Am. St. 460; Thomas v. Stetson, 62 Iowa 537, 17 N. W. 751, 49 Am. Rep. 148; Fletcher v. Anderson, 11 Iowa 228; Newell v. Martin, 81 Iowa 238, 46 N. W. 1120; Brewster v. Reel, 74 Iowa 506; Jackson v. Holloway, 14 B. Mon. (Ky.) 108; Bourne v. Wooldridge, 10 B. Mon. (Ky.) 492; Daniel v. Daniel, 9 B. Mon. (Ky.) 195; Black v. Bush, 7 B. Mon. (Ky.) 210; Jones v. Lusk, 2 Metc. (Ky.) 356; Bank of Kentucky v. Herndon, 1 Bush (Ky.) 359, 89 Am. Dec. 630; Johnson v. Hersey, 70 Maine 74, 35 Am. Rep. 303; Fall River Union Bank v. Sturtevant, 12 Cush. (Mass.) 372; Kingsbury v. Tharp, 61 Mich. 216, 28 N. W. 74; Roberts v. Pepple, 55 Mich. 367, 21 N. W. 319; Chase v. Buhl Iron Works, 55 Mich. 139, 20 N. W. 827; Farwell v. St. Paul Trust Co., 45 Minn. 495, 48 N. W. 326, 22 Am. St. 742; Stegall v. Coney, 49 Miss. 761; Buck v. Mosley, 24 Miss. 170; Minor v. Gaw, 11 Sm. & M. (Miss.) 322; Forney v. Adams, 74 Mo. 138; Hilliker v. Francisco, 65 Mo. 598; Price v. Hunt, 59 Mo. 258; Ackley v. Staehlin, 56 Mo. 558; Rogers v. Batchelor, 12 Pet. (U. S.) 221, 9 L. ed. 1063; Kelley v. Greenleaf, 3 Story (U. S.) 93, Fed. Cas. No. 7657. See Flanagan v. Alexander, 50 Mo. 50; Croughton v. Forrest, 17 Mo. 131; Rock Island Implement Co. v. Sloan, 83 Mo. App. 438; Noble v. Miley, 20 Mo. App. 360; Banking House of Bartholow v. Harvey, 12 Mo. App. 588; Columbia Nat. Bank v. Rice, 48 Nebr. 428, 67 N. W. 165; Mecutchen v. Kennady, 27 N. J. L. 230; Geery v. Cockroft, 33 N. Y. Super. Ct. 146; Ward v. Higgins, 45 Hun (N. Y.) 588, 26 Wkly. Dig. 549, 9 N. Y. St. 641; Dob v. Halsey, 16 Johns. (N. Y.) 34, 8 Am. Dec. 293; Wade v. Rusher, 17 N. Y. Super. Ct. 537; Grist v. Hodges, 14 N. Car. 198; Weed v. Richardson, 19 N. Car. 535; Norment v. Johnston, 32 N. Car. 89; Wells v. Mitchell, 23 N. Car. 484, 35 Am. Dec. 757; Hartness v. Wallace, 106 N. Car. 427, 11 S. E. 259; Evans v. Howell, 84 N. Car. 460; Corwin v. Suydam, 24 Ohio St. 209; Thomas v. Pennrich, 28 Ohio St. 55; Leonard's Exrs. v. Winslow, 2 Grant Cas. (Pa.) 139; Todd v. Lorah, 75 Pa. St. 155; McKinney v. Brights, 16 Pa. St. 399, 55 Am. Dec. 512; Purdy v. Powers, 6 Pa. St. 492; Porter v. Miller, 32 Leg. Int. (Pa.) 283; Kutz v. Naugle, 7 Pa. Super. Ct. 179; Jones' Case, 1 Overt. (Tenn.) 455; Goode v. McCartney, 10 Tex. 193; Young v. Read, 25 Tex. Supp. 113; Powell v. Messer's Admr., 18 Tex. 401; Daugherty v. Haynes (Tex. Civ. App.), 28 S. W. 692; Wm. W. Kendall Boot & Shoe Co. v. Johnston (Tex. Civ. App.), 24 S. W. 583; Seaton v. Brooking, 1 White & W. Civ. Cas. Ct. App. (Tex.), § 1041; Hubbard v. Moore, 67 Vt. 532, 32 Atl. 465; Binns v. Waddill, 32 Grat. (Va.) 588; Cotzhausen v. Judd, 42 Wis. 213, 28 Am. Rep. 539; Viles v. Bangs, 36 Wis. 131; Sauntry v. Dunlap, 12 Wis. 364. And compare Blair v. Harrison, 57 Fed. 257, 6 C. C. A. 326, affg. Claflin v. Bennett, 51 Fed. 693; Porter v. Miller, 32 Leg. Int. (Pa.) 283; Witherington v. Huntsman, 64 Ark. 551, 44 S. W. 74; Sanders v. Bush (Tex.), 39 S. W. 203. Ratification, however, will, as indicated in more than one of the above cases, cure the infirmity of such a disposition of firm property.

is seemingly secure in his equitable rights,[6] and further a transferee with notice may undoubtedly on occasion successfully resist any demand that the subject-matter of the transfer be recovered back.[7]

§ 4916. Rights of action between partners.—Prior to a settlement of the partnership business, one partner cannot maintain an action at law against his copartner with reference to partnership affairs.[8] "This rule has but few exceptions; most of the so-called exceptions being apparent only, and not real. After the partnership is practically at an end, whether it be a single venture or otherwise, the rule cannot apply, for the parties are no longer partners. So an action may be maintained for the breach of an

[6] Duryea v. Burt, 28 Cal. 569; Harts v. Byrne, 31 Ill. App. 260; Ross v. Henderson, 77 N. Car. 170; Corwin v. Suydam, 24 Ohio St. 209; Chipley v. Keaton, 65 N. Car. 534. And compare Moriarty v. Bailey, 46 Conn. 592; Currier v. Bates, 62 Iowa 527, 17 N. W. 759.

[7] "The principle is well recognized, that where the individual creditor of a partner knowingly receives payment of his claim out of the partnership funds, it is, per se, a misappropriation of the assets of the firm to that extent, and it may be recovered back to answer partnership purposes. But it is equally clear that where such payment is made with the consent, express or implied, of the other partners, the latter would have no right to recover the money back to satisfy any demand they might have against the firm. And even conceding it might be recovered in their names, or in the name of the firm, for the use of the firm creditors, it is manifest that a suit in equity could not be maintained for such purpose without showing the insolvency of the firm, and that the money sought to be recovered was necessary for the payment of firm debts." Davies v. Atkinson, 124 Ill. 474, 16 N. E. 899, 7 Am. St. 373. See further, Perry v. Butt, 14 Ga. 699; Lassiter v. Stainback, 119 N. Car. 103, 25 S. E. 726; Carter v. Beaman, 6 Jones L. (N. Car.) 44; Evans v. Howell, 84 N. Car. 460.

[8] Dukes v. Kellogg, 127 Cal. 563, 60 Pac. 44; Paulk v. Creech, 8 Ga. App. 738, 70 S. E. 145; Miller v. Freeman, 111 Ga. 654, 36 S. E. 961, 51 L. R. A. 504; Bowzer v. Stoughton, 119 Ill. 47, 9 N. E. 208; Newman v. Tichenor, 88 Ill. App. 1; Sindelare v. Walker, 137 Ill. 43, 27 N. E. 59, 31 Am. St. 353; Bond v. May, 38 Ind. App. 396, 78 N. E. 260; O'Brien v. Smith, 42 Kans. 49, 21 Pac. 784; Stone v. Mattingly, 14 Ky. L. 113, 19 S. W. 402; Sebastian v. Booneville Academy Co., 22 Ky. L. 186, 56 S. W. 810; Coulson v. Ferree, 27 Ky. Law 451, 85 S. W. 686; Morgan v. Smouse, 103 Md. 463, 63 Atl. 1070, 115 Am. St. 367; Conilliard v. Eaton, 139 Mass. 105, 28 N. E. 579; Evans v. White (Miss.), 31 So. 833; Johnson v. Ewald, 82 Mo. App. 276; Boehme v. Fitzgerald, 43 Mont. 226, 115 Pac. 413; Dall v. Hennessey Mercantile Co., 33 Mont. 80, 81 Pac. 325; Willey v. Renner, 8 N. Mex. 641, 45 Pac. 1132; Mitchell v. Tonkin, 109 App. Div. (N. Y.) 165, 95 N. Y. S. 669; Weiss v. Weiss, 75 Misc. (N. Y.) 644, 133 N. Y. S. 1021; Devore v. Woodruff, 1 N. Dak. 143, 45 N. W. 701; Kunneke v. Mapel, 60 Ohio St. 1, 53 N. E. 259; Oglesby v. Thompson, 59 Ohio St. 60, 51 N. E. 878; Cobb v. Martin, 32 Okla. 588, 123 Pac. 422; Eddins v. Menefee (Tenn. Ch. App.), 54 S. W. 992.

agreement to enter into a partnership, or of an agreement to contribute to the capital stock, or in any other way assist in launching the partnership."[9] Judge Story has stated an exception to this rule in the following language: "Wherever there is an express stipulation in the partnership articles, which is violated by any partner, an action at law, either assumpsit or covenant as the case may require, will ordinarily lie, to recover damages for the breach thereof."[10] It has been said, however, that a "consideration of the statement, and of the authorities cited to sustain it, will show that the cases falling within this exception are of three classes: (1) those in which the partnership is inchoate and has never been launched; (2) those in which the partnership is at an end; and (3) those in which the stipulation which is violated, and for the breach of which the action is brought, is one between the partners individually, and the damages from which belong exclusively to the other partner, and can be assessed without an accounting."[11] The parties may waive the objection, however, that the suit is for an accounting, where all the partnership transactions are so completed as to make nothing necessary but the ascertainment of the money balance due from certain of the partners to others.[12] The suit at law might also be maintained after an accounting or after the partnership has been dissolved.[13] One partner may sue another at law on a matter outside the scope of the partnership business,[14] or upon an item which has been separated from the partnership business.[15] Thus one partner may sue another for

[9] Miller v. Freeman, 111 Ga. 654, 36 S. E. 961, 51 L. R. A. 504.

[10] Story, Partn. (7th ed.), § 218.

[11] Miller v. Freeman, 111 Ga. 654, 36 S. E. 961, 51 L. R. A. 504. And compare, Tevis v. Carter, 111 Ky. 938, 23 Ky. L. 1270, 65 S. W. 17. See also, Eastman v. Dunn (R. I.), 83 Atl. 1057.

[12] Smith v. Putnam, 107 Wis. 155, 82 N. W. 1077, 83 N. W. 288.

[13] Johnson v. Peck, 58 Ark. 580, 25 S. W. 865. "Where nothing is left to be done save the payment of an agreed balance, there can be no necessity of a resort to equity, at least in the absence of insolvency on the part of the defendant." Schmidt v. Mertes, 145 Wis. 468, 130 N. W. 474.

[14] Bull v. Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. 235. "The real test is not solely whether the action can be tried without going into the partnership accounts, but whether the defendant has bound himself personally to the plaintiff." Paulk v. Creech, 8 Ga. App. 738, 70 S. E. 145; Mullany v. Keenan, 10 Iowa 224; Soule v. Frost, 76 Maine 119; Carpenter v. Greenop, 74 Mich. 664, 42 N. W. 276, 4 L. R. A. 241, 16 Am. St. 662; Bates v. Lane, 62 Mich. 132, 28 N. W. 753; Halleck v. Streeter, 52 Nebr. 827, 73 N. W. 219; Bank of British North America v. Delafield, 126 N. Y. 410, 27 N. E. 797; Jennings v. Pratt, 19 Utah 129, 56 Pac. 951; Coffin v. McIntosh, 9 Utah 315, 34 Pac. 247.

[15] Williams v. Henshaw, 11 Pick.

money borrowed by the latter to put into the partnership business.[16] "Where real estate held in common is sold, and one of the joint owners retains possession of the proceeds, the fact that he and the other joint owner are partners in the planting business is no bar to an action by such other joint owner for the recovery of his share of the price, where it does not appear that the property was held as a partnership asset."[17] After an accounting and an adjustment of the rights and liabilities growing out of the partnership one partner may sue another for a balance due.[18] An action at law may also be maintained after a dissolution of the partnership.[19] Equity may, however, grant relief in an action between the partners in regard to matters connected with the partnership business.[20] This applies equally well to an action between two firms having a common membership.[21]

(Mass.) 79, 22 Am. Dec. 366; George v. Benjamin, 100 Wis. 622, 76 N. W. 619, 69 Am. St. 963. Compare McMahon v. Rauhr, 47 N. Y. 67, revg. 3 Daly (N. Y.) 116.

[16] Bull v. Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. 235; Crater v. Bininger, 45 N. Y. 545. A contribution of capital to a firm does not constitute a loan to the other member thereof. The title to the money or property passes to the firm from the partner advancing it and he must look for reimbursement to the success of the partnership venture. Armstrong v. Hollen, 58 Ore. 534, 115 Pac. 423.

[17] Succession of Alexander, 130 La. 7, 57 So. 534 (syllabus by the court).

[18] Douthit v. Douthit, 133 Ind. 26, 32 N. E. 715; Thompson v. Smith, 82 Iowa 598, 48 N. W. 988; Logan v. Trayser, 77 Wis. 579, 46 N. W. 877.

[19] Glade v. White, 42 Nebr. 336, 60 N. W. 556; Huffman v. Huffman, 63 S. Car. 1, 40 S. E. 963; Beede v. Fraser, 66 Vt. 114, 28 Atl. 880, 44 Am. St. 824.

[20] Veith v. Ress, 60 Nebr. 52, 82 N. W. 116; Sanger v. French, 157 N. Y. 213, 51 N. E. 979.

[21] Schnebly v. Culter, 22 Ill. App. 87; Crosby v. Timonlet, 50 Minn. 171, 52 N. W. 526; Cole v. Reynolds, 18 N. Y. 74.

CHAPTER CLI.

RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

§ 4925. Contracts binding upon partnership.
4926. "Apparent" scope of partner's authority.
4927. Particular kinds of contracts —Loans.
4928. Particular kinds of contracts —Negotiable paper.
4929. Particular kinds of contracts —Mortgages.
4930. Particular kinds of contracts —Employment.
§ 4931. Admissions and representations by partner.
4932. Notice to partner.
4933. Liability of partner upon firm obligations.
4934. Creditors of partnership.
4935. Creditors of individual partners.
4936. Liability for debt on change of firm.
4937. Ratification.
4938. Estoppel.

§ 4925. Contracts binding upon partnership.—Without reference to any other questions that may enter in, the general rule is that all contracts made by a partner, within the scope of his actual or apparent authority, in the firm name, are binding on the partnership[1] and all of its members. Neither dormant,

[1] A partner has "full power to dispose of the firm property and assets in the course of the business of the firm." Blake v. Third Nat. Bank, 219 Mo. 644, 118 S. W. 641. See further, Reid v. Hollinshead, 4 B. & C. 867; National Bank v. Dickinson, 107 Ala. 265, 18 So. 144; Rolston v. Click, 1 Stew. (Ala.) 526; Alabama Fertilizer Co. v. Reynolds, 79 Ala. 497; Roberts v. Totten, 13 Ark. 609; Dammon v. Beecher, 97 Cal. 530, 32 Pac. 573; Rocky Mountain Nat. Bank v. McCaskill, 16 Colo. 408, 26 Pac. 821; Tyler v. Waddingham, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657; Ellison v. Stuart, 2 Penn. (Del.) 179, 43 Atl. 836; Brewster v. Hardeman, Dudley (Ga.) 138; Sargent v. Henderson, 79 Ga. 268, 5 S. E. 122; Drefus v. Union Nat. Bank, 164 Ill. 83, 45 N. E. 408; Wiley v. Stewart, 23 Ill. App. 236, affd. 122 Ill. 545, 14 N. E. 835; Kitner v. Whitlock, 88 Ill. 513; Raymond v. Vaughn, 128 Ill. 256, 21 N. E. 566, 4 L. R. A. 440, 15 Am. St. 112; Hoffman v. Toll, 2 Ind. App. 287, 28 N. E. 557; Beebe v. Rogers, 3 G. Green (Iowa) 319; Deitz v. Regnier, 27 Kans. 94; Scruggs v. Russell, McCahon (Kans.) 39, 1 Kans. (Dass. ed.) 478; Pitkin v. Benfer, 50 Kans. 108, 31 Pac. 695, 34 Am. St. 110; Ferguson v. Sims, 3 Ky. L. 684; Davis v. Wiley, 3 Ky. L. 315; Rochester v. Trotter, 1 A. K. Marsh. (Ky.) 54; Shreveport &c. Co. v. Mandel Bros., 128 La. 314, 54 So. 831; Stockwell v. Dillingham, 50 Maine 442, 79 Am. Dec. 621; Willard v. Wright, 203 Mass. 406, 89 N. E. 559; Kennebec Co. v. Augusta Ins. & Banking Co., 6 Gray (Mass.) 204; Hayward v. French, 12 Gray (Mass.) 453; Rolfe v. Dudley, 58 Mich. 208, 24 N. W. 657; Harvey v. McAdams, 32 Mich. 472; Moran v. Palmer, 13 Mich. 367; Burgan v. Lyell, 2 Mich. 102, 55 Am. Dec. 53; Prince v. Crawford, 50 Miss. 344; Davis v. Richard-

silent, nominal nor secret members of the partnership will, on account of their peculiar connection with the firm, be exempt from liability.[2] This rule, of course, obtains only where the

son, 45 Miss. 499, 7 Am. Rep. 732; Faler v. Jordan, 44 Miss. 283; Eau Claire St. Louis Lumber Co. v. Gray, 81 Mo. App. 337; Habig v. Layne, 38 Nebr. 743, 57 N. W. 539; Roney v. Buckland, 4 Nev. 45; National State Capital Bank v. Noyes, 62 N. H. 35; Tucker v. Peaslee, 36 N. H. 167; Gould v. Gould, 36 N. J. Eq. 380; Onondaga County Bank v. De Puy, 17 Wend. (N. Y.) 47; Union Nat. Bank v. Underhill, 102 N. Y. 336, 7 N. E. 293; Chester v. Dickerson, 54 N. Y. 1, 13 Am. Rep. 550; Crocker v. Colwell, 46 N. Y. 212; Abpt v. Miller, 5 Jones L. (N. Car.) 32; Penfield v. Mason, 9 Ohio C. D. 611, 17 Ohio C. C. 165; Rice v. Jackson, 171 Pa. St. 89, 32 Atl. 1036; Edwards v. Tracy, 62 Pa. St. 374; Yeager v. Wallace, 57 Pa. St. 365; London Sav. Fund Soc. v. Hagerstown Sav. Bank, 36 Pa. St. 498, 78 Am. Dec. 390; Mitchell v. Beatty, 1 Phila. (Pa.) 133, 8 Leg. Int. (Pa.) 3; Potts v. Taylor, 140 Pa. St. 601, 21 Atl. 443; Munroe v. Williams, 35 S. Car. 572, 15 S. E. 279; Grollman v. Lipsitz, 43 S. Car. 329, 21 S. E. 272; Venable v. Levick, 2 Head (Tenn.) 351; Pooley v. Whitmore, 10 Heisk. (Tenn.) 629, 27 Am. Rep. 733; Richardson v. Cato, 10 Humph. (Tenn.) 138; Burnley v. Rice, 18 Tex. 481; Randall v. Meredith, 76 Tex. 669, 13 S. W. 576; Crozier v. Kirker, 4 Tex. 252, 51 Am. Dec. 724; Felichy v. Hamilton, 1 Wash. (U. S.) 491, 8 Fed. Cas. No. 4719; Van Reimsdyk v. Kane, 1 Gall. (U. S.) 630, Fed. Cas. No. 16872, revd. 9 Cranch (U. S.) 153, 3 L. ed. 688; In re Warren, 2 Ware (U. S.) 322, 29 Fed. Cas. No. 17191; Le Roy v. Johnson, 2 Pet. (U. S.) 186, 7 L. ed. 391; Winship v. Bank of United States, 5 Pet. (U. S.) 529, 8 L. ed. 216; Davis v. Evana, 39 Vt. 182; Brooke v. Washington, 8 Grat. (Va.) 248, 56 Am. Dec. 142; Rogers v. Brightman, 10 Wis. 55; Gilchrist v. Brande, 58 Wis. 184, 15 N. W. 817; Shaw v. Jones, 133 Ga. 446, 66 S. E. 240; Cherry Lake Turpentine Co. v. Lanier Armstrong Co., 10 Ga. App. 339, 73 S. E. 610; Weirick v. Graves, 73 Ill. App. 266; Iddings v. Pierson, 100 Ind. 418; Carson v. Byers, 67 Iowa 606, 25 N. W. 826; Seeberger v. Wyman, 108 Iowa 527, 79 N. W. 290; Holderman v. Tedford, 7 Kans. App. 657, 53 Pac. 887; Patterson v. Swickard, 19 Ky. L. 661, 41 S. W. 435; Ashley v. Dowling, 203 Mass. 311, 89 N. E. 434, 133 Am. St. 296; Locke v. Lewis, 124 Mass. 1, 26 Am. Rep. 631; Manufacturers' & Mechanics' Bank v. Gore, 15 Mass. 75, 8 Am. Dec. 83; Boardman v. Gore, 15 Mass. 331; Gates v. Fisk, 45 Mich. 522, 8 N. W. 558; Stevens v. McLachlan, 120 Mich. 285, 79 N. W. 627; Graham v. Thornton (Miss.), 9 So. 292; Burchell v. Voght, 164 N. Y. 602, 58 N. E. 1085; Paul v. Stevens, 57 Hun (N. Y.) 171, 32 N. Y. St. 851, 10 N. Y. S. 442, affd. 126 N. Y. 630, 27 N. E. 410; Springs v. McCoy, 122 N. Car. 628, 29 S. E. 903; French v. Griffin, 104 N. Car. 141, 10 S. E. 166; Real Estate Investment Co. v. Smith, 162 Pa. St. 441, 29 Atl. 855; Caraway v. Citizens' Nat. Bank (Tex. Civ. App.), 29 S. W. 506; Anderson v. Clayton, 39 Utah 343, 117 Pac. 41; Miner v. Downer, 19 Vt. 14. The facts of the case may render it proper for the jury to fix the character of the transaction, as either within or without the scope of the partnership business. Stoakes v. Larson, 108 Minn. 234, 121 N. W. 1112. See also, Crosswell v. Lehman, Durr & Co., 54 Ala. 363, 25 Am. Rep. 684; Tate v. Clements, 16 Fla. 339, 26 Am. Rep. 709; Todd v. Jackson, 75 Ind. 272; Custard v. Hodges, 155 Mich. 361, 119 N. W. 583; Hoffmaster Sons' Co. v. Hodges, 154 Mich. 641, 15 Det. Leg. N. 926, 118 N. W. 484; Prince v. Crawford, 50 Miss. 344; Cargill v. Corby, 15 Mo. 425; G. H. Haulenbeck Adv. Agency v. November, 27 Misc. (N. Y.) 836, 60 N. Y. S. 573; Wallace v. Reed, 54 Tex. Civ. App. 457, 117 S. W. 1019; Dowling v. National Exch. Bank, 145 U. S. 512, 36 L. ed. 795, 12 Sup. Ct. 928.

[2] Willey v. Crocker-Woolworth Nat. Bank, 141 Cal. 508, 75 Pac. 106; McDonald v. Clough, 10 Colo. 59, 14

other parties have had no notice of any limitation upon the actual authority of such partner to contract. "It is, undoubtedly, a generally accepted doctrine that 'whatever, as between the partners themselves, may be the limits set to each other's authority, every person not acquainted with those limits is entitled to assume that each partner is empowered to do for the firm whatever is necessary for the transaction of its business, in the way in which that business is ordinarily carried on by other people.' * * * It is equally well settled that where a party dealing with a partner has notice of the limitations upon the partner's authority the partnership is not bound."[3] In case the

Pac. 121; Everitt v. Chapman, 6 Conn. 347; Oppenheimer v. Clemmons, 18 Fed. 886; Griffin v. Orman, 9 Fla. 22; Lindsey v. Edmiston, 25 Ill. 359; Gilmore v. Merritt, 62 Ind. 525; Kennedy v. Bohannon, 11 B. Mon. (Ky.) 118; Cochran v. Anderson County Nat. Bank, 83 Ky. 36, 6 Ky. L. 168; Boudreaux v. Martinez, 25 La. Ann. 167; Butts v. Tiffany, 21 Pick. (Mass.) 95; Lea v. Guice, 13 Smed. & M. (Miss.) 656; Richardson v. Farmer, 36 Mo. 35, 88 Am. Dec. 129; Elliot v. Stevens, 38 N. H. 311; Cammack v. Johnson, 2 N. J. Eq. 163; Poillon v. Secor, 61 N. Y. 456; Tournade v. Hagedorn, 5 Thomp. & C. (N. Y.) 288; Hill v. Voorhies, 22 Pa. St. 68; Green v. People's Warehouse Co., 85 S. Car. 40, 67 S. E. 14, 27 L. R. A. (N. S.) 1015; Nichols v. Cheairs, 4 Sneed (Tenn.) 229; Bradshaw v. Apperson, 36 Tex. 133; Alexandria Bank v. Mandeville, 1 Cranch (U. S.) 575; In re Munn, 3 Biss. (U. S.) 442, Fed. Cas. No. 9925.

[3] Slayden &c. Co. v. Lance (N. Car.), 66 S. E. 449. See further, Cox v. Hickman, 8 H. L. Cas. 268; Bradley Fertilizer Co. v. Polloc, 104 Ala. 402, 16 So. 138; Higgins v. Armstrong, 9 Colo. 38, 10 Pac. 232; Leavitt v. Peck, 3 Conn. 124, 8 Am. Dec. 157; National Exch. Bank v. White, 30 Fed. 412, revd. 145 U. S. 512, 36 L. ed. 795, 12 Sup. Ct. 928; Bishop v. People's Bank, 7 Ga. App. 432, 67 S. E. 119; Crane Co. v. Tierney, 175 Ill. 79, 51 N. E. 715; Straus v. Kohn, 83 Ill. App. 497; Hoffman v. Toll, 2 Ind. App. 287, 28 N. E. 557; Devin v. Harris, 3 Greene (Iowa) 186; Baxter v. Rollins, 90 Iowa 217, 57 N. W. 838, 48 Am. St. 432; Deitz v. Regnier, 27 Kans. 94; Barker v. Mann, 5 Bush (Ky.) 672, 96 Am. Dec. 373; Brooks-Waterfield Co. v. Carpenter, 21 Ky. L. 851, 53 S. W. 40; Gruner v. Stucken, 39 La. Ann. 1076, 3 So. 338; Waldo Bank v. Lumbert, 16 Maine 416; Porter v. White, 39 Md. 613; Maltby v. Northwestern Virginia R. Co., 16 Md. 422; Stimson v. Whitney, 130 Mass. 591; Bailey v. Clark, 6 Pick. (Mass.) 372; Hotchin v. Kent, 8 Mich. 526; Wilson v. Richards, 28 Minn. 337, 9 N. W. 872; Bloom v. Helm, 53 Miss. 21; King v. Levy (Miss.), 13 So. 282; Hayes v. B. F. Blaker & Co., 138 Mo. App. 24, 119 S. W. 1004; Bates v. Forcht, 89 Mo. 121, 1 S. W. 120; Deardorf v. Thacher, 78 Mo. 135, 47 Am. Rep. 95; Bromley v. Elliott, 38 N. H. 287, 75 Am. Dec. 182; People v. Devlin, 63 Misc. (N. Y.) 363, 118 N. Y. S. 478; Campbell v. Huffines, 151 N. Car. 262, 65 S. E. 1000; Powell v. Flowers, 151 N. Car. 140, 65 S. E. 817; Yeager v. Wallace, 57 Pa. St. 365; Ex parte Wilson, 84 S. Car. 444, 66 S. E. 675; Winship v. Bank of United States, 5 Pet. (U. S.) 529, 8 L. ed. 216; Irwin v. Williar, 110 U. S. 499, 28 L. ed. 225; United States Bank v. Binney, 5 Mason (U. S.) 176, Fed. Cas. No. 16791; Chapman v. Devereux, 32 Vt. 616. See also, Corning v. Abbott, 54 N. H. 469; Frost v. Hanford, 1 E. D. Smith (N. Y.) 540; Johnson v. Mon Lee, 30 N. Y. St. 392, 10 N. Y. S. 9; Osgood v. Glover, 7 Daly (N. Y.) 367; Benninger v. Hess, 41 Ohio St. 64; Rice

partnership occupies the position of an undisclosed principal the other party has the right to proceed against either the agent or against the firm as principal.[4] All of this comes about by reason of the dependency of the law of partnership upon that of agency, —persons associated together in the partnership relation being antecedently principals, subsequently partners.[5] Consequently, unless there is another limit upon the actual authority of the individual members of an ordinary partnership[6] by an express

v. Jackson, 171 Pa. St. 89, 32 Atl. 1036; Nichols v. Cheairs, 4 Sneed (Tenn.) 229; Stout v. Ennis Nat. Bank, 69 Tex. 384, 8 S. W. 808; Tyler v. Scott, 45 Vt. 261. But "a member of a mining partnership has not the power to bind his associates by engagements with third persons to the extent that a member of a trading or commercial firm may do. For instance, the law does not imply any authority to a member of a mining partnership to borrow money, to employ counsel, to execute a promissory note, or to draw or accept bills of exchange, no matter how pressing the necessity for the use of the money. The reason assigned for the distinction and for limiting the powers of members of a mining partnership, is that such a partnership is not founded on the delectus personae, whereas other partnerships are. For these reasons, it is held that the powers of members or managers of mining partnerships are limited to the performance of such acts in the name of the partnership as may be necessary to the transaction of its business, or which are usual in like concerns. But a partner can bind the firm by acts in the name of the partnership in such matters as may be necessary to the transaction of the business, or which are usual in like concerns, unless there is an express agreement to the contrary known to the party contracting with the firm." Bentley v. Brossard, 33 Utah 396, 94 Pac. 736.

[4] Snead v. Barringer, 1 Stew. (Ala.) 134; Morse v. Richmond, 97 Ill. 303; Bisel v. Hobbs, 6 Blackf. (Ind.) 479; Seekell v. Fletcher, 53 Iowa 330, 5 N. W. 200; Schmidt v. Ittman, 46 La. Ann. 888, 15 So. 310; Clement v. British-American Assur. Co., 141 Mass. 298, 5 N. E. 847; Bracken v. March, 4 Mo. 74; Tucker v. Peaslee, 36 N. H. 167; Howell v. Adams, 68 N. Y. 314; Galway v. Nordlinger, 51 Hun (N. Y.) 639, 21 N. Y. St. 197, 4 N. Y. S. 649, aff'd. 121 N. Y. 699, 24 N. E. 1100; Poole v. Lewis, 75 N. Car. 417; Kearney v. Snodgrass, 12 Ore. 311; Given v. Albert, 5 Watts & S. (Pa.) 333; Griffith v. Buffum, 22 Vt. 181, 54 Am. Dec. 64; McNair v. Rewey, 62 Wis. 167, 22 N. W. 339.

[5] Cotton Plant Oil Co. v. Buckeye Cotton Oil Co., 92 Ark. 271, 122 S. W. 658; Shaw v. Jones, 133 Ga. 446, 66 S. E. 240; Blake v. Third Nat. Bank, 219 Mo. 644, 118 S. W. 641; State v. Brown, 38 Mont. 309, 99 Pac. 954; Schlicher v. Whyte, 74 N. J. Eq. 839, 71 Atl. 337; Elmira Iron &c. Co. v. Harris, 124 N. Y. 280, 26 N. E. 541; Bienenstok v. Ammidown, 11 Misc. (N. Y.) 76, 29 N. Y. S. 593, 31 Abb. N. Cas. (N. Y.) 400, 59 N. Y. St. 471, revd. 155 N. Y. 47, 49 N. E. 321; People v. Devlin, 63 Misc. (N. Y.) 363, 118 N. Y. S. 478; Powell v. Flowers, 151 N. Car. 140, 65 S. E. 817; McGhee v. Montgomery, 85 S. Car. 207, 65 S. E. 721, 67 S. E. 246; Progressive Lumber Co. v. Rogers (Tex. Civ. App.), 120 S. W. 260; Brooke v. Washington, 8 Grat. (Va.) 248, 56 Am. Dec. 142; Lellman v. Mills, 15 Wyo. 149, 87 Pac. 985. See § 4937.

[6] "Partners of a nontrading firm have no implied power to bind each other, and a creditor seeking to hold one of the partners on commercial paper issued in the firm name must show previous authorization or subsequent ratification of the act by the partner sought to be charged." American Bonding Co. of Baltimore v. Fultz, 157 Mo. App. 553, 138 S. W. 689. See also, Cotton Plant Oil Co. v. Buckeye Cotton Oil Co., 92 Ark.

agreement,[7] this fact carries with it the presumption that the power of each partner to bind the firm is coextensive with all acts ordinarily made necessary or proper by the nature of the business.[8] Further it seems that where a single partner has entered

271, 122 S. W. 658; Teed v. Parsons, 202 Ill. 455, 66 N. E. 1044; Schele v. Wagner, 163 Ind. 20, 71 N. E. 127; Worster v. Forbush, 171 Mass. 423, 50 N. E. 936; Third Nat. Bank v. Fults, 115 Mo. App. 42, 90 S. W. 755; Hayes v. B. F. Blaker & Co., 138 Mo. App. 24, 119 S. W. 1004; Wallace v. Reed, 54 Tex. Civ. App. 457, 117 S. W. 1019; Hatchett v. Sunset Brick &c. Co. (Tex. Civ. App.), 99 S. W. 174; Smith v. Sloan, 37 Wis. 285, 19 Am. Rep. 757.

[7] McCrary v. Slaughter, 58 Ala. 230; Morse v. Richmond, 6 Ill. App. 166, affd. 97 Ill. 303; Wintermute v. Torrent, 83 Mich. 555, 47 N. W. 358; King v. Levy (Miss.), 13 So. 282; Cargill v. Corby, 15 Mo. 425; Corning v. Abbott, 54 N. H. 469; Kramer v. Dinsmore, 152 Pa. St. 264, 25 Atl. 789; Richie v. Levy, 69 Tex. 133, 6 S. W. 685.

[8] Roberts v. Eberhardt, 1 Kay 148, 23 L. J. Ch. 201; Woodruff v. Scaife, 83 Ala. 152, 3 So. 311; Sanborn v. Cunningham, 99 Cal. XIX, 33 Pac. 894; Wasem v. Gray, 43 Colo. 140, 95 Pac. 557; Stillman v. Harvey, 47 Conn. 26-33; Ellison v. Stuart, 2 Penn. (Del.) 179, 43 Atl. 836; Chandler v. Sherman, 16 Fla. 99; Hahn v. Allen, 93 Ga. 612, 20 S. E. 74; Crane Co. v. Tierney, 175 Ill. 79, 51 N. E. 715; Kemp v. Miller, 46 Ill. App. 213; Porter v. Wilson, 113 Ind. 350, 15 N. E. 676; Todd v. Jackson, 75 Ind. 272; Chapple v. Davis, 10 Ind. App. 404, 38 N. E. 355; Boardman v. Adams, 5 Iowa 224; Lemon v. Fox, 21 Kans. 152; Warder v. Newdigate, 11 B. Mon. (Ky.) 174, 52 Am. Dec. 567; Rouse v. Hughes, 1 Ky. L. (abstract) 320; White v. Kearney, 2 La. Ann. 639; Knowlton v. Reed, 38 Maine 246; Harris v. Baltimore, 73 Md. 22, 17 Atl. 1046, 20 Atl. 111, 985, 8 L. R. A. 677, 25 Am. St. 565; Warren v. French, 6 Allen (Mass.) 317; Lowenberg v. Lewis-Herman Co., 94 Miss. 916, 48 So. 517; Vaiden v. Hawkins (Miss.), 6 So. 227; Schmidlapp v. S. D. Currie & Co., 55 Miss. 597, 30 Am. Rep. 530; Flanagan v. Alexander, 50 Mo. 50; Winn v. Hillyer, 43 Mo. App. 139; Hayes v. B. F. Blaker & Co., 138 Mo. App. 24, 119 S. W. 1004; Mace v. Heath, 30 Nebr. 620, 46 N. W. 918; Wills v. Cutler, 61 N. H. 405; People v. Devlin, 63 Misc. (N. Y.) 363, 118 N. Y. S. 478; Powell v. Flowers, 151 N. Car. 140, 65 S. E. 817; Progressive Lumber Co. v. Rogers (Tex. Civ. App.), 120 S. W. 260; Winship v. Bank of United States, 5 Pet. (U. S.) 529, 8 L. ed. 216; Irwin v. Williar, 110 U. S. 499, 28 L. ed. 225; Manitoba Mortg. Co. v. Montreal Bank, 17 Can. Sup. Ct. 692; 2 Code Ga. 1895, § 2643; Selman v. Brown, 78 Ga. 332; Van Brunt v. Mather, 48 Iowa 503; Fomes v. Wright, 91 Iowa 392, 59 N. W. 51; Forbes v. Morehead, 22 Ky. L. 853, 58 S. W. 982; Stockwell v. Dillingham, 50 Maine 442, 79 Am. Dec. 621; Porter v. White, 39 Md. 613; Durrell v. Staples, 169 Mass. 49, 47 N. E. 441; McPherson v. Bristol, 122 Mich. 354, 81 N. W. 254; Lynch v. Hillstrom, 64 Minn. 521, 67 N. W. 636; Creath v. Kolb, 70 Mo. App. 296; Rumsey v. Briggs, 139 N. Y. 323, 34 N. E. 929; Johnston v. Trask, 116 N. Y. 136, 22 N. E. 377, 5 L. R. A. 630, 15 Am. St. 394; Hoskinson v. Eliot, 62 Pa. St. 393; Canfield v. Johnson, 144 Pa. St. 61, 22 Atl. 974; Sweet v. Wood, 18 R. I. 386, 28 Atl. 335; Congdon v. Morgan, 13 S. Car. 190; Pooley v. Whitmore, 10 Heisk. (Tenn.) 629, 27 Am. Rep. 733; Burnley v. Rice, 18 Tex. 481; Munn v. Lackey, 1 White & W. Civ. Cas. Ct. App. (Tex.), § 1331; Cavanaugh v. Salisbury, 22 Utah 465, 63 Pac. 39; Brooke v. Washington, 8 Grat. (Va.) 248, 56 Am. Dec. 142; Seaman v. Ascherman, 57 Wis. 547, 15 N. W. 788; Morse v. Hagenah, 68 Wis. 603, 32 N. W. 634. And compare Smith v. Hill, 13 Ark. 173; Stokes v. Stevens, 40 Cal. 391; Davis v. Wiley, 3 Ky. L. 315.

into a contract as a principal,[9] without the scope of his authority, either express or implied,[10] he cannot impose liability therefor upon the firm of which he is a member by establishing the mere fact of its having received the benefit of the transaction.[11]

§ 4926. "Apparent" scope of partner's authority.—As has been suggested,[12] the firm will ordinarily be bound, speaking in general terms, whenever one of its members shall have consummated a transaction within the apparent scope of his partnership authority. In this connection, however, it is not difficult to understand that a partner will not have acted "apparently within the scope of his authority" who performs in a capacity widely separated from those matters duly connected with the firm's business.

[9] Guice v. Thornton, 76 Ala. 466; Fisher v. Hume, 6 Mackey (D. C.) 9; Goodenow v. Jones, 75 Ill. 48; Hayden v. Cretcher, 75 Ind. 108; Hubenthal v. Kennedy, 76 Iowa 707, 39 N. W. 694; Mousseau v. Thebens, 19 La. Ann. 516; Metzner v. Baldwin, 11 Gil. (Minn.) 92; Ferson v. Monroe, 21 N. H. 462; Wild v. Davenport, 48 N. J. L. 129, 7 Atl. 295, 57 Am. Rep. 552; Bannister v. Miller, 54 N. J. Eq. 121, 32 Atl. 1066, affd. 54 N. J. Eq. 701, 37 Atl. 1117; Willis v. Hill, 19 N. Car. 231, 31 Am. Dec. 412; Ah Lep v. Gong Choy, 13 Ore. 205, 9 Pac. 483; Johnson v. Rankin (Tenn.), 59 S. W. 638; Holmes v. Burton, 9 Vt. 252, 31 Am. Dec. 621; National Bank v. Cringan, 91 Va. 347, 21 S. E. 820; McLinden v. Wentworth, 51 Wis. 170, 8 N. W. 118, 192. And compare Usher v. Waddingham, 62 Conn. 412, 26 Atl. 538; In re Herrick, 13 Nat. Bankr. Reg. 312, 12 Fed. Cas. No. 6420; Aultman v. Shelton, 90 Iowa 288, 57 N. W. 857; Eyrick v. Capital State Bank, 67 Miss. 60, 60 So. 615; Redenbaugh v. Kelton, 130 Mo. 558, 32 S. W. 67; Boice v. Conover, 54 N. J. Eq. 531, 35 Atl. 402; Brownlee v. Lobenstein (Tenn.), 42 S. W. 467.

[10] See ante, note 1, ch. 151.

[11] Hawtayne v. Bourne, 7 M. & W. 595; Smith v. Craven, 1 Cromp. & J. 500; Emly v. Lye, 15 East 7; Bevan v. Lewis, 1 Sim. 376; Beckham v. Drake, 9 M. & W. 79; Ex parte Apsey, 3 Bro. C. C. 265; Guice v. Thornton, 76 Ala. 466; In re Lamon, 171 Fed. 516; Floyd v. Wallace, 31 Ga. 688; Lill v. Egan, 89 Ill. 609; Funk v. Babbitt, 55 Ill. App. 124, affd. 156 Ill. 408, 41 N. E. 166; Bays v. Conner, 105 Ind. 415, 5 N. E. 18; Brooks-Waterfield Co. v. Carpenter, 21 Ky. 854, 53 S. W. 41; Green v. Tanner, 8 Metc. (Mass.) 411; Vetsch v. Neiss, 66 Minn. 459, 69 N. W. 315; Gates v. Watson, 54 Mo. 585; Ferson v. Monroe, 21 N. H. 462; Union Nat. Bank v. Underhill, 21 Hun (N. Y.) 178; National Bank v. Thomas, 47 N. Y. 15; National Bank v. Ingraham, 58 Barb. (N. Y.) 290; Willis v. Hill, 19 N. Car. 231, 31 Am. Dec. 412; Norwalk Nat. Bank v. Sawyer, 38 Ohio St. 339; Donnally v. Ryan, 41 Pa. St. 306; Johnson v. Rankin (Tenn.), 59 S. W. 638; Patriotic Bank v. Coote, 3 Cranch (U. S.) 169, Fed. Cas. No. 10807; Holmes v. Burton, 9 Vt. 252, 31 Am. Dec. 621; National Bank v. Cringan, 91 Va. 347, 21 S. E. 820; Willis v. Bremner, 60 Wis. 622, 19 N. W. 403; McLinden v. Wentworth, 51 Wis. 170, 8 N. W. 118, 192. And compare, Blackburn Benefit Building Society v. Cunliffe, 22 Ch. Div. 61; Wenlock v. River Dee Co., 36 Ch. Div. 675, note; Morris v. First Nat. Bank, 162 Ala. 301, 50 So. 137; Hamilton v. Summers, 12 B. Mon. (Ky.) 11, 54 Am. Dec. 509; Siegel v. Chidsey, 28 Pa. St. 279, 70 Am. Dec. 124.

[12] See ante, note 1, chap. 151.

But "the question whether a given act can or cannot be necessary to the transaction of the business in the way in which it is usually carried on, must evidently be determined by the nature of the business, and by the practice of persons engaged in it. Evidence on both of these points is necessarily admissible, and as readily may be conceived, an act which is necessary for the prosecution of one kind of business may be wholly unnecessary for the carrying on of another in the ordinary way. Consequently no answer of any value can be given to the abstract question: Can one partner bind his firm by such an act? unless having regard to what is usual in business, it can be predicated of the act in question, either that it is one without which no business can be carried on, or that it is one which is not necessary for carrying on any business whatever. There are obviously very few acts of which such an affirmation can be truly made. The great majority of acts which give rise to doubt are those which are necessary in one business, and not in another."[13] It is self-evident, however, that this rule loses its force and effect both when the performing partner did actually

[13] Pooley v. Whitmore, 10 Heisk. (Tenn.) 629, 27 Am. Rep. 733. "The invalidity of an act of one partner does not arise from a want of power nor from the absence of actual knowledge or assent of the other members of the partnership, but from the bad faith of such partner by the perversion of his power for his 'several advantage' and from the knowledge of him with whom he deals of such bad faith." Powell v. Flowers, 151 N. Car. 140, 65 S. E. 817. See further, Niemann v. Niemann, 43 Ch. Div. 198; Kling v. Tunstall, 109 Ala. 608, 19 So. 907; Hendrie v. Berkowitz, 37 Cal. 113, 99 Am. Dec. 251; New York Firemen Ins. Co. v. Bennett, 5 Conn. 574, 13 Am. Dec. 109; Chandler v. Sherman, 16 Fla. 99; Sparks v. Flannery, 104 Ga. 323, 30 S. E. 823; Wittram v. Van Wormer, 44 Ill. 525; McDonald v. Western Tube Co., 64 Ill. App. 458; Moffitt v. Roche, 92 Ind. 96; Seeberger v. Wyman, 108 Iowa 527, 79 N. W. 290; Brooks-Waterfield Co. v. Jackson, 21 Ky. 854, 53 S. W. 41; Gruner v. Stucken, 39 La. Ann. 1076, 3 So. 338; Cadwallader v. Kroesen, 22 Md. 200; Brickett v. Downs, 163 Mass. 70, 39 N. E. 776; Holmes v. Kortlander, 64 Mich. 591; Maurin v. Lyon, 69 Minn. 257, 72 N. W. 72, 65 Am. St. 568; Vaiden v. Hawkins (Miss.), 6 So. 227; Ferguson v. Thacker, 79 Mo. 511; Hayes v. B. F. Blaker & Co., 138 Mo. App. 24, 119 S. W. 1004; Kneisley Lumber Co. v. Edward B. Stoddard Co., 131 Mo. App. 15, 109 S. W. 840; Williams v. Gilchrist, 11 N. H. 535; Union Nat. Bank v. Underhill, 102 N. Y. 336, 7 N. E. 293; Freeman v. Abramson, 30 Misc. (N. Y.) 101, 61 N. Y. S. 839; Palliser v. Erhardt, 46 App. Div. (N. Y.) 222, 61 N. Y. S. 191; McAulay v. Palmer, 53 Hun (N. Y.) 635, 25 N. Y. St. 969, 6 N. Y. S. 402, 3 Silvernail 245, affd. 125 N. Y. 742, 26 N. E. 912, 4 Silvernail Ct. App. 339; Long v. Carter, 25 N. Car. 238; Conn v. Conn, 22 Ore. 452, 30 Pac. 230; McKinney v. Brights, 16 Pa. St. 399, 55 Am. Dec. 512; Green v. People's Warehouse Co., 85 S. Car. 40, 67 S. E. 14, 27 L. R. A. (N. S.) 1015; Venable v. Levick, 2 Head (Tenn.) 351; Scott, Baker & Co. v. Bandy, 2 Head (Tenn.) 197; Oliphant v. Markins, 79 Tex. 543, 15 S. W. 569, 23 Am. St. 363;

possess the requisite authority,[14] and again when his act is afterward recognized as its own by the firm of which he is a member.[15] It must be remembered, however, that "when one deals with a member of a partnership, and the latter apparently exceeds his authority to bind his firm, the one dealing with him is put on inquiry, and should ascertain at his risk whether or not the member is acting for himself, or for the partnership, with the sanction or authority of his partners."[15a]

§ 4927. **Particular kinds of contracts—Loans.**—In general, a commercial partnership will be liable for money borrowed by one of its members on the credit of the firm.[16] Moreover, the lender, in order to charge all of the several partners, is not required to see that the money thus borrowed is applied to partnership purposes.[17] All that is necessary is that he act in good faith

Faires v. Ross (Tex.), 18 S. W. 418; Fore v. Hitson, 70 Tex. 517, 8 S. W. 292; Slayden v. Palmo, 53 Tex. Civ. App. 227, 117 S. W. 1054; United States Bank v. Binney, 5 Mason (U. S.) 176, Fed. Cas. No. 16791; Gutheil v. Gilmer, 23 Utah 84, 63 Pac. 817; Greene v. Burton, 59 Vt. 423, 10 Atl. 575; Wood v. Shepherd, 2 Pat. & H. (Va.) 442; Beardsley v. Tuttle, 11 Wis. 74; Holgate v. Downer, 8 Wyo. 334, 57 Pac. 918.

[14] Kendal v. Wood, L. R. 6 Exch. 243; Woodruff v. Scaife, 83 Ala. 152, 3 So. 311; Chandler v. Sherman, 16 Fla. 99; Seeberger v. Wyman, 108 Iowa 527, 79 N. W. 290; Warder v. Newdigate, 11 B. Mon. (Ky.) 174, 52 Am. Dec. 567; Rollins v. Stevens, 31 Maine 454; Conely v. Wood, 73 Mich. 203, 41 N. W. 259; Long v. Carter, 25 N. Car. 238. And compare Butler v. Stocking, 8 N. Y. 408, Seld. Notes (N. Y.) 123.

[15] See post, Ratification and Estoppel, §§ 4937, 4938.

[15a] Victoria Lumber Co. v. Montgomery, 130 La. 120, 57 So. 650 (syllabus by the court).

[16] Howze v. Patterson, 53 Ala. 205, 25 Am. Rep. 607; Rouse v. Hughes, 1 Ky. L. (abstract) 320; Cohen v. Miller, 46 Misc. (N. Y.) 106, 91 N. Y. S. 345; Real Estate Investment Co. v. Smith, 162 Pa. St. 441, 29 Atl. 855, 34 Wkly. Notes Cas. (Pa.) 488; Steel v. Jennings, Cheves (S. Car.) 183; Gavin v. Walker, 14 Lea (Tenn.) 643; Keeler v. Mathews, 17 Vt. 125; Freeman v. Carpenter, 17 Wis. 126. See also, Bank of Guntersville v. Webb, 108 Ala. 132, 19 So. 14; Buettner v. Steinbrecher, 91 Iowa 588, 60 N. W. 177; Heitman v. Griffith, 43 Kans. 553, 23 Pac. 589; Deitz v. Regnier, 27 Kans. 94; Willson v. Whaley's Admr., 7 Ky. L. (abstract) 527; Brite v. Guy, 28 Ky. L. 57, 88 S. W. 1069; Stevens v. McLachlan, 120 Mich. 285, 79 N. W. 627, 6 Det. Leg. N. 148; Burchell v. Voght, 164 N. Y. 602, 58 N. E. 1085; Maffet v. Lenckel, 93 Pa. St. 468; Phillips v. Stanzell (Tex. Civ. App.), 28 S. W. 900; Caraway v. Citizens' Nat. Bank (Tex. Civ. App.), 29 S. W. 506; Morse v. Hagenah, 68 Wis. 603, 32 N. W. 634. It has been held, however, by the Supreme Court of Mississippi that the "custom" of one partner, concurred in by the other, "to draw drafts, sign contracts, buy cotton, and otherwise generally supervise the business," does not invest him with the right, denied him by the partnership agreement, to borrow money without his copartner's consent. King v. Levy (Miss.), 13 So. 282. For definition of commercial partnership, see Kimbro v. Bullitt, 22 How. (U. S.) 256, 16 L. ed. 313.

[17] Rouse v. Hughes, 1 Ky. L. (ab-

and without knowledge, actual or constructive, that the borrower intends to use the money to further his own individual interests.[18] While there is authority for the proposition that a "Star Route" partnership will be liable for a loan obtained by one of its members for the benefit of the firm,[19] there are other cases which hold that this implied power to borrow money does not obtain when the firm is of a nontrading character.[20] Furthermore, since one may ordinarily do through another that which he may do in person, a partner may direct an agent of the firm to obtain a loan in its behalf.[21] Again, it has been held that a partnership cannot escape liability on the ground either that its managing member who procured the loan had served as counsel for the one from whom the money was obtained in the adjudication of her father's estate,[22] or that the partner who borrowed the money was insane, although not an adjudged lunatic, at the time the loan was made.[23]

§ 4928. Particular kinds of contracts—Negotiable paper.—Associated very closely with the right of a member of a commercial partnership to borrow money in the firm name, is his right to execute negotiable paper for a partnership indebtedness. That he has such right is not open to question,[24] some courts having even gone so far as to declare that he may exercise the same with-

stract) 320; Reed v. Bacon, 175 Mass. 407, 56 N. E. 716; Stockwell v. Dillingham, 50 Maine 442, 79 Am. Dec. 621; Cohen v. Miller, 46 Misc. (N. Y.) 106, 91 N. Y. S. 345; Walden v. Sherburne, 15 Johns. (N. Y.) 409; Benninger v. Hess, 41 Ohio St. 64; Harris County v. Donaldson, 20 Tex. Civ. App. 9, 48 S. W. 791.

[18] Warren v. French, 6 Allen (Mass.) 317; Coller v. Porter, 88 Mich. 549, 50 N. W. 658; Potter v. Dillon, 7 Mo. 228, 37 Am. Dec. 185; Klopfer v. Levi, 33 Mo. App. 322; Best v. Starks, 24 How. Pr. (N. Y.) 58; Gavin v. Walker, 14 Lea (Tenn.) 643; Phillips v. Stanzell (Tex. Civ. App.), 28 S. W. 900.

[19] Parker v. Parker, 25 Ky. L. 2193, 80 S. W. 209. See also, Hoskinson, v. Eliot, 62 Pa. St. 393.

[20] Cooper v. Nelson, 12 Ky. L. 890; Prince v. Crawford, 50 Miss. 344; Davis v. Richardson, 45 Miss. 499, 7 Am. Rep. 732.

[21] Parker v. Parker, 25 Ky. L. 2193, 80 S. W. 209.

[22] Lerch v. Bard, 177 Pa. St. 197, 35 Atl. 714.

[23] Van Brunt v. Taylor, 3 Phila. (Pa.) 123.

[24] Chitty Cont. (4th Am. ed.), *201; Wagner v. Simmons, 61 Ala. 143; Marsh v. Wheeler, 77 Conn. 449, 59 Atl. 410, 107 Am. St. 40; Winkles v. Simpson Grocery Co., 138 Ga. 482, 75 S. E. 640; Van Brunt v. Mather, 48 Iowa 503; Manufacturers' & Mechanics' Bank v. Winship, 5 Pick. (Mass.) 11, 16 Am. Dec. 369; Carter v. Steele, 83 Mo. App. 211; Fairchild v. Rushmore, 21 N. Y. Super. Ct. 698; Flour City Nat. Bank v. Widener, 163 N. Y. 276, 57 N. E. 471; Commercial Bank v. Miller, 96 Va. 357, 31 S. E. 812. That partner can not execute sealed note, see Millwee v. Jay, 47 S. Car. 430, 25 S. E. 298.

out the consent and against the wishes of his associates.[25] Where the act appears to have been necessary for the carrying on of the business in the usual way, the firm will be presumptively liable, notwithstanding all of the partners did not authorize it; contrariwise, if the act was not essential, or apparently essential, to the partnership pursuits.[26] The operation of these rules, however, is, as has been indicated, restricted, and does not as a general proposition extend to partnerships of a nontrading character,[27] for example, planting and professional

[25] Dow v Phillips, 24 Ill. 249; Dickson v. Dryden, 97 Iowa 122, 66 N. W. 148; Miller v. Hughes, 1 A. K. Marsh. (Ky.) 181, 10 Am. Dec. 719; Cottam v. Smith, 27 La. Ann. 128; Martin v. Muncy, 40 La. Ann. 190, 3 So. 640; Partin v. Luterloh, 59 N. Car. 341; Nunn v. Lackey, 1 White & W. Civ. Cas. Ct. App. (Tex.), § 1331.

[26] Graves v. Kellenberger, 51 Ind. 66. For acts which do not measure up to partnership transactions, see the case just cited, and also, Summerlot v. Hamilton, 121 Ind. 87, 22 N. E. 973; Buchanan v. Buckler, 8 Ky. L. (abstract) 617; Brooks-Waterfield Co. v. Jackson, 21 Ky. L. 854, 53 S. W. 41. The court in Vetsch v. Neiss, 66 Minn. 459, 69 N. W. 315, makes the statement that, "The question is one of authority to execute the note, not as to what became of the proceeds, or for whose benefit they were used." This, standing alone, is somewhat misleading by reason of the fact that it is open to misinterpretation. While the court was undoubtedly clear in its own mind as to the correct principle, it did not state the principle as clearly as it might have done. The authority of the partner as far as the promisee is concerned depends upon the apparent use to which the money is to be put. In other words, it will be vain for the promisee to attempt to hold the copartners of the maker, when he has notice that the money is to be used for such maker's personal benefit. The promisee is interested in the represented disposition of the proceeds although he may not be concerned in the matter of their actual disposition. The fraud of the partner will not jeopardize the rights of the promisee, it is true, but the latter as a reasonable, intelligent being can not assume that the partner has authority when the very purpose for which he asserts the money is to be used emphatically proclaims the contrary.

[27] "There is no accurate definition of what is or is not a trading or nontrading or commercial or noncommercial partnership. The business of the world is conducted in such manner at the present day that many firms are engaged in business, a part of which is commercial or trading, and a part of which is not. A partnership may be engaged in manufacture, and at the same time be engaged in buying and selling manufactured articles not produced by themselves. As to the business exclusively relating to manufacture, the law as to nontrading partnerships will apply, while as to the business of buying and selling the manufactures of others the law of commercial or trading partnerships will apply. * * * All the authorities cited, denying the power of one partner, as a general agent, to bind the concern in borrowing money and signing mercantile paper, relate to partnerships in occupation, such as attorneys, brokers, contractors to build a road, farming or planting, mining or quarrying, livery stable, printing, real estate, insurance and collecting, tavern keeping, operating threshing machines, etc., and not the parterships engaged in commercial business, like those of banking concerns." McNeal v. Gossard, 6 Okla. 363, 50 Pac. 159. See also, Johnston v. Dutton's Admr., 27 Ala. 245 (sawmill partnership); Decker v.

ones.[28] Thus it has been said that "attorneys who are in partnership have no implied authority to become parties to negotiable instruments and bind the firm thereby. The authority to do such acts must in such cases be either expressly given, or be recognized as proper and necessary, or in the usual course of a particular business of that firm."[29] "It is generally held that nontrading firms have no power to borrow money and sign negotiable paper, and that one member of such firm has no power to bind the other members by signing the firm name to such paper. * * * This is because such transactions are not generally within the legitimate scope of the business of such firms. There is no reason why such firms should be bound by the acts of their members within the scope of their business. This would be true even in the case of negotiable paper, where it was shown that such

Howell, 42 Cal. 636 (mining partnership); Pease v. Cole, 53 Conn. 53, 22 Atl. 681, 55 Am. Rep. 53 (partnership to conduct theater); Schellenbeck v. Studebaker, 13 Ind. App. 437, 41 N. E. 845, 55 Am. St. 240 (partnership to carry on dairy); Lee v. First Nat. Bank, 45 Kans. 8, 25 Pac. 196, 11 L. R. A. 238 (real estate and insurance partnership); Linn v. Valz, 11 Ky. L. 846 (partnership to build bridge); Benedict v. Thompson, 33 La. Ann. 196 (partnership between stevedores); Harris v. Baltimore, 73 Md. 22, 17 Atl. 1046, 20 Atl. 111, 985, 8 L. R. A. 677, 25 Am. St. 565 (contracting partnership); McPherson v. Bristol, 115 Mich. 258, 4 Det. Leg. N. 848 (fruit raising partnership); Randall v. Lee, 68 Mo. App. 561 (photo-engraving and printing partnership); Deardorf v. Thacher, 78 Mo. 128, 47 Am. Rep. 95 (insurance, real estate and collection partnership); National State Capital Bank v. Noyes, 62 N. H. 35 (partnership to buy stumpage and to manufacture and sell lumber); Schaeffer v. Fowler, 111 Pa. St. 451, 2 Atl. 558 (partnership to purchase land); Faires v. Ross (Tex.), 18 S. W. 418 (partnership conducting business of repairing machinery and selling it on commission); Dowling v. National Exch. Bank, 145 U. S. 512, 12 Sup. Ct. 928, 36 L. ed. 795 (partnership conducting business of sawing lumber, pickets and lath). Compare Voorhees v. Jones, 29 N. J. L. 270; and Holt v. Simmons, 16 Mo. App. 97 (partnership to manufacture refrigerators); Rumsey v. Briggs, 139 N. Y. 323, 34 N. E. 929 (partnership to manufacture and sell lumber, bark and railroad ties).

[28] "Farming partnerships, when strictly confined to that purpose, are held to be within the exceptions to the general rule, upon the ground * * * that their principal object is to make profits out of the soil, by gathering its fruits, and that the partners are in no proper sense engaged in trade." Kimbro v. Bullitt, 22 How. (U. S.) 256, 16 L. ed. 313. See also, McCrary v. Slaughter, 58 Ala. 230; Tanner v. Hyde, 2 Colo. App. 443, 31 Pac. 344; Freeman v. Gordon, 59 Ill. App. 189; Ulery v. Ginrich, 57 Ill. 531; Benton v. Roberts, 4 La. Ann. 216; Prince v. Crawford, 50 Miss. 344; Hunt v. Chapin, 6 Lans. (N. Y.) 139; Walker's Admr. v. Walker's Estate, 66 Vt. 285, 29 Atl. 146. And compare, Burnley v. Rice, 18 Tex. 481. A note given for supplies with which to carry on the planting business will bind the partnership. Selman v. Brown, 78 Ga. 332.

[29] Friend v. Duryee, 17 Fla. 111, 35 Am. Rep. 89. See also, Worster v. Forbush, 171 Mass. 423, 50 N. E. 936.

paper was executed within the scope of the firm's business."[30] So too, it has been said that this "liability of a partnership upon negotiable instruments executed by one partner in the name of the firm, exists not only where the firm is a trading or commercial partnership, but 'where the actual course of business pursued adopts the practice of issuing the mercantile paper of the firm to accommodate its necessities or convenience whenever the occasions occur.' "[31] In other words to render one partner liable on a promissory note made by his copartner in the firm name, it must appear that the note was made in the firm business and for firm purposes.[32] A different presentation of practically this same doctrine is found in an early Illinois case in which it is declared in substance, that, in the eyes of the law, each partner possesses authority to issue notes in the name of his firm where such authority is essential to the successful conduct of the partnership business; where it is according to the usage of similar partnerships or is according to the course of trade of that particular partnership.[33]

So, also, it is undoubtedly true that a partner does not as a general thing bind his associates by an accommodation indorsement in the firm name,[34] so long as such indorsement has not passed into the hands of a bona fide indorsee for value.[35] Again it seems that the authority given the managing partner by the articles of

[30] Alley v. Bowen-Merrill Co., 76 Ark. 4, 88 S. W. 838, 113 Am. St. 73.

[31] Dowling v. National Exch. Bank, 145 U. S. 512, 36 L. ed. 795, 12 Sup. Ct. 928.

[32] Ditts v. Lonsdale, 49 Ind. 521. See also, Zuel v. Bowen, 78 Ill. 234; Wiley v. Stewart, 122 Ill. 545, 14 N. E. 835; Bays v. Conner, 105 Ind. 415, 5 N. E. 18; Blodgett v. Weed, 119 Mass. 215.

[33] Gray v. Ward, 18 Ill. 32. See also, Bradley v. Linn, 19 Ill. App. 322; Fant v. West, 10 Rich. L. (S. Car.) 149. "If the contract of partnership is silent, or the party with whom the dealing has taken place has no notice of its limitations, the authority for each transaction may be implied from the nature of the business according to the usual and ordinary course in which it is carried on by those engaged in it in the locality which is its seat, or as reasonably necessary or fit for its successful prosecution. If it cannot be found in that, it may still be inferred from the actual though exceptional course and conduct of the business of the partnership itself, as personally carried on with the knowledge, actual or presumed, of the partner sought to be charged." Irwin v. Williar, 110 U. S. 499, 28 L. ed. 225, quoted in Dowling v. National Exch. Bank, 145 U. S. 512, 36 L. ed. 795, 12 Sup. Ct. 928.

[34] Talmadge v. Milliken, 119 Ala. 40, 24 So. 843; King v. Mecklenburg, 17 Colo. App. 312, 68 Pac. 984; Vredenburgh v. Logan, 28 La. Ann. 941; Union Nat. Bank v. Wickham, 18 Ohio C. C. 685, 6 Ohio C. D. 790. But see Penfield v. Mason, 17 Ohio C. Ct. 165, 9 Ohio C. D. 611.

[35] See Beach v. State Bank, 2 Ind. 488.

association, to apply the proceeds of the business to, among other objects, the payment of outstanding debts of one of his copartners, is not so broad that a note given for one of such debts will be binding upon the firm.[36] But it has been held that where a person loans money to a member of a mercantile firm and receives therefor a note signed in the partnership name, he is entitled to presume that the note was executed in the course of the business of the firm and that all the partners are bound thereby.[37] On the other hand where a partner uses the name of the firm in giving a note for a purpose entirely distinct from those of the partnership, such apparent misuse or abuse of the common name is prima facie evidence that, in that particular transaction, he acts without authority and in fraud of the partnership.[38] Moreover where the note is of an accommodation character and the name under which the partnership business is conducted is the name of the partner making the paper, the innocent holder of the note will be required to prove that the same constitutes a firm obligation.[39]

The fact, however, that a note was given in violation of the articles of partnership has been held no defense as against a bona fide holder for value and before maturity.[40] "Whenever there are written articles of agreement between the partners, their power and authority, inter se, are to be ascertained and regulated by the terms and conditions of the written stipulations. * * * Any restriction which, by agreement among the partners, is attempted to be imposed upon the authority which one partner possesses, as a gen-

[36] Whitla v. Butler's Estate, 99 Mich. 51, 57 N. W 1082.

[37] Platt v. Koehler, 91 Iowa 592, 60 N. W. 178, following Sherwood v. Snow, 46 Iowa 481, 26 Am. Rep. 155. See Jemison v. Dearing's Exrs., 41 Ala. 283; Persons v. Oldfield (Miss.), 57 So. 417. See also, Lamwersick v. Boehner, 77 Mo. App. 136; Kantrowitz v. Levin, 14 Misc. (N. Y.) 563, 70 N. Y. St. 716, 35 N. Y. S. 1072. And compare Hibbler v. De Forest, 6 Ala. 92.

[38] Eastman v. Cooper, 15 Pick. (Mass.) 276, 26 Am. Dec. 600.

[39] Manufacturers' & Mechanics' Bank v. Winship, 5 Pick. (Mass.) 11, 16 Am. Dec. 369. See also, Mechanics' & Farmers' Bank v. Dakin, 24 Wend. (N. Y.) 411. But see Beach v. State Bank, 2 Ind. 488.

[40] "If by an agreement inter se a different rule were established by commercial partners, it would be without effect against third parties, unless it were shown that such third party had knowledge of that agreement." Cottam v. Smith, 27 La. Ann. 128. See Sandilands v. Marsh, 2 B. & Ald. 673; Hogg v. Skeen, 34 L. J. C. P. 153; Michigan Bank v. Eldred, 9 Wall. (U. S.) 544, 19 L. ed. 763; Winship v. Bank of United States, 5 Pet. (U. S.) 529, 8 L. ed. 216.

eral agent for the other, is operative only between the partners themselves, and does not limit the authority as to third persons, who acquire rights by its exercise, unless they know that such restrictions have been made."[41] So where a note was given by one of the partners in the firm name to pay certain partnership expenses, and signed by him as agent, it was decided in an action thereon by a bona fide holder, who had discounted the same, that the partner had the power to make the note and thereby bind his copartners and that the restriction on his authority contained in an agreement between the partners did not affect the plaintiff since such restriction had not been communicated to him.[42] So it has been held that the bona fide holder, for a valuable consideration without notice, of a bill of exchange indorsed by one of the partners in a certain firm, might recover the amount thereof against all the partners, notwithstanding the indorsement of the name of the firm was expressly prohibited in the articles of partnership.[43] And although partners may have agreed between themselves that no member of the firm should indorse paper to make the others liable, this will be no defense to an action on paper made payable to the firm and indorsed by one of the partners in the firm name to a bona fide purchaser for value.[44] In the case, however, of an action by an indorsee against the members of a firm on a bill accepted in the name of the firm, upon its being proved that the acceptance was by one of the partners in fraud of the partnership and contrary to the articles of association, it has been decided that the burden rests on the plaintiff to show that he gave value.[45] And the fact that a note was executed or transferred in violation of the articles of partnership will, it seems, be a good defense as

[41] Kimbro v. Bullitt, 22 How. (U. S.) 256, 16 L. ed. 313.

[42] National Union Bank v. Landon, 66 Barb. (N. Y.) 189, affd. 45 N. Y. 410.

[43] Bank of Kentucky v. Brooking, 2 Litt. (Ky.) 41. In Barber v. Van Horn, 54 Kans. 33, 36 Pac. 1070, it was held that where a partnership executed a firm note for money borrowed and one of the partners drew money to pay the same at maturity and entered it on the books as paid, but appropriated the money and renewed the note, his fraudulent conduct toward the firm was no defense against a holder for value before maturity and without notice. See also, Albietz v. Mellon, 37 Pa. St. 367; Rogers v. Batchelor, 12 Pet. (U. S.) 221, 9 L. ed. 1063; Henderson v. Anderson, 3 How. (U. S.) 73, 11 L. ed. 499.

[44] Barrett v. Russell, 45 Vt. 43.

[45] Hogg v. Skeen, 34 L. J. C. P. 153. See also, Dickson v. Primrose, 2 Miles (Pa.) 366.

against a holder with notice.[46] Protest of a bill drawn and indorsed by a copartnership may be waived, it has been held, by one of its members even though he is cashier of the bank which has discounted such bill;[47] although a liquidating partner after dissolution of the firm, has no power to waive protest of a draft then given to pay a partnership debt and thus bind a former dormant partner.[48] Where paper belonging to the partnership is transferred by one of the partners, it has been held that it is no defense to an action against the maker, that such transfer was fraudulent as to the firm.[49] The firm will, it seems, be bound in such cases, unless the person taking the paper knew or had reason to believe that it was executed or transferred in fraud of the partnership.[50] If, however, the circumstances under which such paper was given or transferred were such as would naturally arouse suspicion so that the transferee cannot be regarded as a bona fide holder, it has been held that it may be shown that the partner acted in fraud of the firm and that the paper was given for accommodation without the firm's consent.[51] And where the holder of the paper is a party to the fraud of the partner upon his firm, such fraud, it seems, will be available as a defense to an action against the firm.[52] In case of fraud by a partner in procuring the execution of a note to the firm, such fraud, it has been held, will be a defense to an action by the latter on the instrument.[53]

§ 4929. **Particular kinds of contracts—Mortgages.**—The law seems, as a general thing, to accord to each individual partner in a mercantile concern, the power to bind his associates by a

[46] Gallway v. Mathew, 10 East 264; Monroe v. Conner, 15 Maine 178; Dickson v. Primrose, 2 Miles (Pa.) 366.

[47] Hays v. Citizens' Sav. Bank, 101 Ky. 201, 19 Ky. L. 367, 40 S. W. 573, 14 Bkg. & J. 327.

[48] Mauney v. Coit, 80 N. Car. 300, 30 Am. Rep. 80.

[49] Sutton v. Gregory, Peake's Ad. Cas. 150; Ridley v. Taylor, 13 East 175; Drexler v. Smith, 30 Fed. 754; In re Many, Fed. Cas. No. 9054; Barber v. Van Horn, 54 Kans. 33, 36 Pac. 1070; Redlon v. Churchill, 73 Maine 146, 40 Am. Rep. 345; Hopkins v. Boyd, 11 Md. 107; Nichols v. Sober, 38 Mich. 678; First Nat. Bank v. Morgan, 73 N. Y. 593; Windham County Bank v. Kendall, 7 R. I. 77; Duncan v. Clark, 2 Rich. (S. Car.) 587; Winship v. Bank of United States, 5 Pet. (U. S.) 529, 8 L. ed. 216. See also, Hibernian Bank v. Everman, 52 Miss. 500.

[50] Cotton v. Van Bokkelin, 21 N. Car. 284.

[51] Roth v. Colvin, 32 Vt. 125.

[52] Wells v. Masterman, 2 Esp. 731.

[53] Kilgore v. Bruce, 166 Mass. 136, 44 N. E. 108.

mortgage of the partnership chattels, executed in the firm name to secure a partnership debt,[54] provided such mortgage will not have the effect of terminating the common business.[55] It has even been held in a case decided not so very many years ago that, since partnership realty is personalty to the extent necessary for the satisfaction of the firm obligations, one partner may, to secure such an obligation, give a mortgage in the firm name upon land which forms a part of the firm assets, even though there has been no actual knowledge of, express consent to, or ratification of, his act on the part of his associate.[56] Such an unqualified position, however, does not seem to be able to rally the weight of authority to its support. The view more generally adhered to is that a real estate mortgage made by a single partner must, in order to bind the firm, be executed at the instance, with the express consent, with the knowledge, or in the presence of, his associate or associates as the case may be, or the latter must have subsequently

[54] Gates v. Bennett, 33 Ark. 475; Breen v. Richardson, 6 Colo. 605; Settle v. Hargadine-McKittrick Dry-Goods Co., 66 Fed. 850, 14 C. C. A. 144; Phillips v. Trowbridge Furniture Co., 86 Ga. 699, 13 S. E. 19; McCarthy v. Seisler, 130 Ind. 63, 29 N. E. 407; Robards v. Waterman, 96 Mich. 233, 55 N. W. 662; Harvey v. Ford, 83 Mich. 506, 47 N. W. 242; Beckman v. Noble, 115 Mich. 523, 73 N. W. 803; Cohen v. Miller, 46 Misc. (N. Y.) 106, 91 N. Y. S. 345; Hembree v. Blackburn, 16 Ore. 153, 19 Pac. 73; West Coast Grocery Co. v. Stinson, 13 Wash. 255, 43 Pac. 35; Williams v. Gillespie, 30 W. Va. 586, 5 S. E. 210; Rock v. Collins, 99 Wis. 630, 75 N. W. 426; Hage v. Campbell, 78 Wis. 572, 47 N. W. 179, 23 Am. St. 422. Likewise, a mortgage in the several names of the individual partners, Patch v. Wheatland, 8 Allen (Mass.) 102. So also, with his copartner's consent, a mortgage in his own name, Clay v. Greenwood, 35 Nebr. 736, 53 N. W. 659.

[55] Osborne v. Barge, 29 Fed. 725; McGrath v. Cowen, 57 Ohio St. 385, 49 N. E. 338. Contra, Letts-Fletcher Co. v. McMaster, 83 Iowa 449, 49 N. W. 1035. But see, Union Nat. Bank v. Bank of Kansas City, 136 U. S. 223, 34 L. ed. 341, 10 Sup. Ct. 1013, in which it is said: "It was also well settled by the decisions of that court [the Supreme Court of Missouri], that each partner, by virtue of the relation of partnership, and of the community right and interest of the partners, had full power and authority to sell, pledge or otherwise dispose of all personal property belonging to the partnership, for any purpose within the scope of the partnership business, and might therefore, without the concurrence of his copartners, mortgage the partnership property by deed of trust, to secure the payment of a partnership debt * * * although one partner, without the concurrence of his copartners, could not delegate to a stranger the right of the partnership to administer the partnership effects, and therefore could not make a general assignment of all the property of the partnership for distribution by the assignee among the partnership creditors, retaining no equity of redemption in the partnership." See also, Whitton v. Smith, Freem. Ch. (Miss.) 231; Weir Plow Co. v. Evans (Tex. Civ. App.), 24 S. W. 38.

[56] Long v. Slade, 121 Ala. 267, 26 So. 31. See also, Neer v. Oakley, 18 N. Y. St. 374, 2 N. Y. S. 482.

ratified the act of the copartner in giving the same.[57] And yet an exception to the general rule, that an authority to bind another by an instrument under seal must itself be created by a like instrument, seems, in some instances, to have been established in the case of partners.[58] If authority to execute a sealed contract having to do with personalty may be implied from this relation, no good reason can be assigned why the authority to execute a sealed conveyance of land should not likewise be implied. Thus Lord Kenyon has said that if the partnership relation gives this authority in the one case, it "would extend to the case of mortgages."[59] "A conveyance of partnership property by one partner, with the consent of the other, for the purpose of paying partnership debts, binds such other partner, and his death does not operate to defeat the power of sale conferred by the instrument."[60] But it has been held that where the members of a planting partnership acquire immovable property, they become joint owners of the same, and a mortgage by one of the partners in the firm name binds only his portion of the property.[61] And yet where a partnership has at its own expense for its own purposes erected buildings and machinery on land belonging to one of the partners individually, without expressly agreeing as to the ownership of such fixtures, it has been held that the holder of the legal title to the land by mortgaging the latter together with the buildings, etc., to secure a loan obtained by him for the purpose of discharging the partnership debts, binds his copart-

[57] McGahan v. National Bank of Rondout, 156 U. S. 218, 39 L. ed. 403, 15 Sup. Ct. 347. See Greer v. Ferguson, 56 Ark. 324. 19 S. W. 966; Ely v. Hair, 16 B. Mon. (Ky.) 230; Seawell v. Payne, 5 La. Ann. 255; Tarbel v. Bradley, 7 Abb. N. Cas. (N. Y.) 273, affd. 86 N. Y. 280; Williams v. Gillies, 13 Hun (N. Y.) 422, revd. 75 N. Y. 197; Napier v. Catron, 2 Humph. (Tenn.) 534; Byrd v. Perry, 7 Tex. Civ. App. 378, 26 S. W. 749; Schwab Clothing Co. v. Claunch (Tex.), 29 S. W. 922; Caviness v. Black (Tex. Civ. App.), 33 S. W. 712; Wilson v. Hunter, 14 Wis. 683, 80 Am. Dec. 795. Consult Cottle v. Harrold, 72 Ga. 830; Citizens' Nat. Bank v. Johnson, 79 Iowa 290, 44 N. W. 551; Weeks v. Mascoma Rake Co., 58 N. H. 101; McNeal Pipe & Foundry Co. v. Woltman, 114 N. Car. 178, 19 S. E. 109; Jones v. Davis (N. J.), 25 Atl. 370; Baldwin v. Richardson, 33 Tex. 16. Compare Horton v. Bloedorn, 37 Nebr. 666, 56 N. W. 321.

[58] See Wilson v. Hunter, 14 Wis. 683, 80 Am. Dec. 795; and Cady v. Shepherd, 11 Pick. (Mass.) 400, 22 Am. Dec. 379; Swan v. Stedman, 4 Metc. (Mass.) 548; Smith v. Kerr, 3 N. Y. 144.

[59] Harrison v. Jackson, 7 Term Rep. 203.

[60] Barnett v. Houston, 18 Tex. Civ. App. 134, 44 S. W. 689.

[61] Baker v. Lee, 49 La. Ann. 874, 21 So. 588. See also, Kahn v. Becnel, 107 La. 296, 32 So. 444.

ner's interest in the fixtures.[62] Moreover, where a mortgage of chattels is signed by one of the partners without authority and without the knowledge or consent of his associate or the mortgagee, and is delivered to another for the purpose of delivery to the mortgagee, and the latter, when he learns of the mortgage, takes time to decide whether he will accept and does not actually accept until a time subsequent to a dissolution of the firm and notice thereof, such mortgage is not binding upon the member of the firm who did not join in the same.[63] Again "one member of a nontrading partnership has no power to sell or mortgage all the assets of the concern without the consent of his copartner, unless the power is given otherwise than by implication from the ordinary nature of the business."[64]

Since one member of a firm cannot, without the consent of his copartner, use partnership property in discharging his individual obligations, he does not abridge the rights of his associate by giving to his personal creditor a mortgage thereon executed in the firm name.[65] But if one partner mortgages his apparent interest in land, conveyed to the members of the firm as tenants in common, for a consideration paid him at the time as, for instance, for a loan of money, the mortgagee having no notice of the character of the property in equity as copartnership property, it seems that he is entitled to hold it under his mortgage. He may rely upon the legal effect of the conveyance to his mortgagor, and upon his apparent title upon record. A person taking a mortgage without notice that it covers partnership property is a purchaser, and is subject to no equity in favor of the partnership or of its creditors.[66] If the property has been purchased by the individual partners with their own funds, each

[62] Chittenden v. German-American Bank, 27 Minn. 143, 6 N. W. 773.

[63] Meyer v. Michaels, 69 Nebr. 138, 95 N. W. 63, 97 N. W. 817.

[64] Huey v. Fish, 15 Tex. Civ. App. 455, 40 S. W. 29. See also, McManus v. Smith, 37 Ore. 222, 61 Pac. 844.

[65] Gossett v. Morrow (Ala.), 58 So. 799; H. Y. McCord Co. v. Calloway, 109 Ga. 796, 35 S. E. 171; Rainey v. Nance, 54 Ill. 29; Smith v. Andrews, 49 Ill. 28; Deeters v. Sellers, 102 Ind. 458, 1 N. E. 854; Livingston v. Roosevelt, 4 Johns. (N. Y.) 251, 4 Am. Dec. 273. See also, Huiskamp v. Moline Wagon Co., 121 U. S. 310, 30 L. ed. 971, 7 Sup. Ct. 899. And compare Walker v. White, 60 Mich. 427, 27 N. W. 554.

[66] Hewitt v. Rankin, 41 Iowa 35; Hiscock v. Phelps, 49 N. Y. 97, quoted with approval in Seeley v. Mitchell's Assignee, 85 Ky. 508, 9 Ky. L. 86, 4 S. W. 190.

taking a conveyance of an undivided interest, the fact that the property has for a time been used for the partnership business is not generally sufficient to impress it with an equitable lien for the payment of partnership debts as against a mortgage of one partner's interest to secure his individual debt.[67] A mortgage made by a partner of his interest in partnership real estate, to one who knows it to be such, is not a mortgage of the partner's undivided interest in such real estate, but of his interest in the portion mortgaged after the payment of the firm debts upon a settlement of the partnership accounts. The mortgage is not available until the partnership accounts have been discharged, if the other partner chooses to assert his equity, or if subsequent partnership mortgagees assert their priority;[68] or if creditors of the partnership attach the property or levy an execution upon it as belonging to the partnership.[69] There would in such case be no distinction between debts incurred prior to the mortgage and those incurred subsequently.[70] Upon the bankruptcy of the firm, the assignee, in behalf of the creditors, would be entitled to the property in preference. If one partner, upon retiring from the partnership, conveys his interest in the partnership real estate to another person, who then comes in and forms a new firm, and this new partner executes a mortgage of such real estate to secure the purchase-money, in the absence of any evidence that the mortgage was intended to be a mortgage of this partner's interest in the new firm, it is proper to regard it as a mortgage of the same partnership interest in the old firm which was conveyed to the new partner, and not of his interest in the new firm. Such a mortgage is subject to the payment of the debts of the old firm, but not to the payment of the debts of the new firm.[71]

But the mortgagee must be in the position of a bona fide

[67] Wilhite's Admr. v. Boulware, 88 Ky. 169, 11 Ky. L. 59, 10 S. W. 629.

[68] Beecher v. Stevens, 43 Conn. 587, quoted with approval in Seeley v. Mitchell's Assignee, 85 Ky. 508, 9 Ky. L. 86, 4 S. W. 190; Rockefellar v. Dellinger, 22 Mont. 418, 56 Pac. 822, 74 Am. St. 613; Page v. Thomas, 43 Ohio St. 38, 1 N. E. 79, 54 Am. Rep. 788. See also, Goldthwaite v. Janney, 102 Ala. 431, 15 So. 560, 28 L. R. A. 161, 48 Am. St. 56.

[69] Fargo & Co. v. Ames, 45 Iowa 491; Seaman v. Huffaker, 21 Kans. 254; Lovejoy v. Bowers, 11 N. H. 404; French v. Lovejoy, 12 N. H. 458.

[70] Lovejoy v. Bowers, 11 N. H. 404.

[71] Beecher v. Stevens, 43 Conn. 587. See Phelps v. McNeely, 66 Mo. 554, 27 Am. Rep. 378.

purchaser for value; he must have parted with money or goods, or something of value, in reliance upon the security. If he has simply taken the mortgage to secure an existing debt, or has knowledge of the facts which make the property in equity assets of the firm, then his mortgage will be postponed to the equities of those who have a right to have the property applied as assets of the copartnership.[72] But a recital in a deed to three persons that the conveyance was in the proportion of an undivided half to one of them, and an undivided fourth to each of the others, "this being the proportional undivided interest of each of the above partners in the lumber firm and land" of the partnership, was held not necessarily to impart notice to a mortgagee of the interest of one of the grantees of the equitable rights of the others as representing the creditors of the firm.[73] If the description of the property in the mortgage itself shows that the property is that of the partnership, as where it is described as all the right, title and interest of a partner individually, and as a member of a certain firm in all the real estate and other property of the firm, the mortgagee necessarily has notice of the partnership equities. The existence of such a mortgage cannot prevent the copartners from disposing of the real estate for the legitimate purposes of the firm, such as adjusting its affairs with creditors, or with each other. The recording of such mortgage is without effect upon the other members of the copartnership, or upon any one taking a conveyance made for partnership purposes.[74] Where a copartnership carried on business in a store built by the firm upon land, the legal title to which was in A, and one of his copartners, to secure a copartnership debt, executed a mortgage of the land with the consent of his copartners, and in the name of A & Co., and acknowledged the execution of it as "his free act and deed, * * * on behalf of said firm," it was held valid as against a person who, with actual notice of this, took a subsequent mortgage of the same property executed by A.[75] Such a mortgage is likewise valid as against

[72] Hiscock v. Phelps, 49 N. Y. 97.

[73] Van Slyck v. Skinner, 41 Mich. 186, 1 N. W. 971. But the decision in this case does not seem to be quite in harmony with other authorities.

[74] Tarbel v. Bradley, 7 Abb. N. Cas. (N. Y.) 273, affd. 86 N. Y. 280. See note to this case for decisions relating to partnership realty.

[75] Wilson v. Hunter, 14 Wis. 683, 80 Am. Dec. 795.

a creditor of the firm whose lien is of subsequent origin.[76] If a partner mortgage his separate property to secure a firm debt, it has been held that he becomes a surety for the firm and that his separate creditors, upon his bankruptcy or insolvency, have a right to insist that the partnership property be first applied to the payment of the debt so secured.[77]

§ 4930. **Particular kinds of contracts—Employment.**—One partner may ordinarily bind his firm by a contract with another for services to be rendered by the latter in behalf and for the benefit of the partnership as a whole.[78] Moreover it has been held that not only in general, but in particular partnerships as well, each member is the agent of the firm and may bind it by his contracts in everything necessary to carry on its business, and in everything within the apparent scope thereof. Thus where partners for the construction of a school building employ a tradesman to do the plastering according to the plans of the architect and before the completion of the building one of the partners engages such tradesman to do additional plastering made necessary by the installation of the heating and ventilating apparatus, the last contract is within the apparent scope of the partnership business and recovery may be had thereon as against the firm notwithstanding the fact that, as between the partners themselves, the one entering into such contract was not authorized to act for the firm.[79] So, too, it has been held that where a partnership is composed of three married women and each of the three gives a power of attorney to her husband to transact the business for her, and the conduct of such business is then apportioned among the husbands, each of the latter is the agent of the firm as such

[76] Citizens' Nat. Bank v. Johnson, 79 Iowa 290, 44 N. W. 551.

[77] Averill v. Loucks, 6 Barb. (N. Y.) 470.

[78] Froun v. Davis, 97 Ind. 401; Boyd v. Watson, 101 Iowa 214, 70 N. W. 120; Mattingly v. Moore, 17 Ky. L. 220, 30 S. W. 870; Durgin v. Somers, 117 Mass. 55; Bodwell v. Eastman, 106 Mass. 525; Banner Tobacco Co. v. Jenison, 48 Mich. 459, 12 N. W. 655; Brewer v. Wright, 25 Nebr. 305, 41 N. W. 159; Cashman v. Lawson, 175 N. Y. 488, 67 N. E. 1081; Mead v. Shepard, 54 Barb. (N. Y.) 474; Bank of North America v. Embury, 33 Barb. (N. Y.) 323; Burns v. Rowland, 40 Barb. (N Y.) 368; Rice v. Jackson, 171 Pa. St. 89, 32 Atl. 1036; Coons v. Renick, 11 Tex. 134, 60 Am. Dec. 230; Hills v. Bailey, 27 Vt. 548. Compare Briggs v. Smith, 4 Daly (N. Y.) 110; Palliser v. Erhardt, 46 App. Div. (N. Y.) 222, 61 N. Y. S. 191.

[79] Hoffman v. Toll, 2 Ind. App. 287, 28 N. E. 557.

and not alone of his own wife.[80] Again, it has been held that the employment by one partner of an attorney to defend a suit against the partnership does not preclude another member of the firm who feels insecure in the matter from binding his associates by a contract with a second attorney to assist in the defense.[81] But where a partnership has been formed to carry on the business of farming or planting it seems that no one of the partners has the implied authority, as a matter of law, under ordinary circumstances at least, to bind the firm for medicine and medical supplies furnished by a practicing physician to the laborers employed on the farm or plantation.[82] Again when it is manifest that the contract was not executed in good faith, the partnership will not be liable thereon especially when a contrary holding would prejudice its bona fide creditors.[83] So also where one partner agrees to furnish the money-capital and the other the labor, the latter will not bind the firm by his employment of another, with knowledge, to render services for the use and benefit of the partnership.[84] Moreover, it has been held that a partnership will not be liable to an employé, engaged by it at a stipulated price, for additional compensation guaranteed to him after he has rendered his required services by one of the partners who has not received the consent of his associates thus to do.[85]

§ 4931. **Admissions and representations by partner.**—Ordinarily the law will in general, where the evidence establishes the existence of a partnership, regard as binding upon the latter any admission or representation made by an individual member of the firm about partnership matters and in the due course thereof.[86]

[80] Munroe v. Judson, 82 Hun (N. Y.) 215, 63 N. Y. St. 748, 31 N. Y. S. 299, affd. 151 N. Y. 671, 46 N. E. 1149.

[81] Appeal of Messinger, 43 Leg. Int. (Pa.) 101. See also, Wheatley v. Tutt, 4 Kans. 240.

[82] Woodruff v. Scaife, 83 Ala. 152, 3 So. 311.

[83] Beste v. His Creditors, 15 La. Ann. 55.

[84] Pollock v. Williams, 42 Miss. 88. See also, Dooner v. Haws, 21 Misc. (N. Y.) 639, 47 N. Y. S. 1112; Connell v. Alexander, 21 Misc. (N. Y.) 644, 47 N. Y. S. 1115.

[85] Conn v. Conn, 22 Ore. 452, 30 Pac. 230. Compare Carley v. Jenkins, 46 Vt. 721.

[86] Fergusson v. Fyffe, 8 Cl. & F. 121; Crosswell v. Lehman, 54 Ala. 363, 25 Am. Rep. 684; Talbot v. Wilkins, 31 Ark. 411; Dennis v. Kolm, 131 Cal. 91, 63 Pac. 141; Munson v. Wickwire, 21 Conn. 513; In re Many, 17 Nat. Bankr. Reg. 514, Fed. Cas. No. 9054; Swofford Bros. Dry-Goods Co. v. Mills, 86 Fed. 556; Lanier v.

Thus the receipt by one of the members of a partnership engaged in distilling and in the purchase of corn, by which he acknowledges the delivery of a specific quantity of corn to him by a certain person, may be introduced in evidence by the latter in an action by him against the firm.[87] So also it has been held that a partner will be bound by the representations of his copartner that the money, which he procures by loan on the credit of the firm and on the faith of the partnership business, is desired for partnership purposes.[88] But "the authority of a partner to act on behalf of the firm is based upon the general principles regulating the authority of agents; and it is a primary principle that the authority of an agent cannot be proved by the declarations of the agent himself."[89] So it has been held that a partner cannot bind his associates by admissions, as to the scope of the partnership business, not made at the time of the execution of the contract in suit.[90] Again "one partner cannot by his acts or declarations, in the absence of the others, deprive them or either of them of their interest in the firm property."[91] So also it has been said by no less a person than Justice Cooley himself that "a partner's declarations may bind his associates in partnership matters, but not in concerns foreign to the partner-

Chappell, 2 Fla. 621; Lewis v. Allen, 17 Ga. 300; Wanner v. Winters, 33 Ill. App. 149; Wiley v. Griswold, 41 Iowa 375; Bemis v. Becker, 1 Kans. 226; Sneed v. Kelly's Exr., 3 Dana (Ky.) 538; Byrne v. Hooper, 2 Rob. (La.) 229; Fickett v. Swift, 41 Maine 65, 66 Am. Dec. 214; Folk v. Wilson, 21 Md. 538; Cook v. Castner, 9 Cush. (Mass.) 266; Burgan v. Lyell, 2 Mich. 102, 55 Am. Dec. 53; Coleman v. Pearce, 26 Minn. 123, 1 N. W. 846; Faler v. Jordan, 44 Miss. 283; Henslee v. Cannefax, 49 Mo. 295; Caris v. Nimmons, 92 Mo. App. 66; Gulick v. Gulick, 14 N. J. L. 578; Sweet v. Bradley, 24 Barb. (N. Y.) 549; Comstock v. Warner, 2 Thomp. & C. (N. Y.) 663, affd. 60 N. Y. 647; Griswold v. Haven, 25 N. Y. 595, 82 Am. Dec. 380; North Pacific Lumber Co. v. Spore, 44 Ore. 462, 75 Pac. 890. And compare Gooding v. Underwood, 89 Mich. 187, 50 N. W. 818; National Bank of Commerce v. Meader, 40 Minn. 325, 41 N. W. 1043; Kaiser v. Fendrick, 98 Pa. St. 528; Hetterman Bros. Co. v. Young (Tenn.), 52 S. W. 532; Wilson v. McCormick, 86 Va. 995, 11 S. E. 976.

[87] Bisel v. Hobbs, 6 Blackf. (Ind.) 479.

[88] Gavin v. Walker, 14 Lea (Tenn.) 643. See also, Deitz v. Regnier, 27 Kans. 94.

[89] Columbia Nat. Bank. v. Rice, 48 Nebr. 428, 67 N. W. 165. See also, Ex parte Agace, 2 Cox Ch. 312; Rush v. Thompson, 112 Ind. 158, 13 N. E. 665; Ostrom v. Jacobs, 9 Metc. (Mass.) 454; Freeman v. Blumfield, 43 Mo. 391; Rumsey v. Briggs, 63 Hun (N. Y.) 11, 44 N. Y. St. 38, 17 N. Y. S. 562, revd. 139 N. Y. 323, 34 N. E. 929; Kittel v. Callahan, 46 N. Y. St. 404, 19 N. Y. S. 397.

[90] Taft v. Church, 162 Mass. 527, 39 N. E. 283. See also, in this connection, Shellito v. Sampson, 61 Iowa 40, 15 N. W. 572.

[91] Williams v. Lewis, 115 Ind. 45, 17 N. E. 262, 7 Am. St. 403.

ship; and he cannot by his mere admission or declaration bring a transaction within the scope of the business when upon the facts in proof it appears to have no connection."[92] So also, in an action against partners on a promissory note executed by one of them in the name of the firm, it has been held that admissions by him are not admissible to prove the note a partnership obligation.[93]

§ 4932. Notice to partner.—A partnership will be bound by notice received in good faith by an acting partner.[94] Thus, where the drawer and acceptor of a bill are partners, notice of the dishonor of the paper given to the drawer will be sufficient.[95] So upon the question of protest and notice in the case of a partnership, it has been held that such notice is properly left at the residence of one of the partners or at the firm's place of business with some one there in charge.[96] Likewise it has been held that if a bank holds a foreign bill and has notice of its nonpayment, the fact that its cashier is one of the members of the firm which drew and indorsed the paper renders protest of such bill unnecessary to charge

[92] Heffron v. Hanaford, 40 Mich. 305. See Lockwood v. Beckwith, 6 Mich. 168, 72 Am. Dec. 69.

[93] Tuttle v. Cooper, 5 Pick. (Mass.) 414.

[94] "This court in its opinion held that notice to one partner was notice to the other of any transaction occurring after the partnership was formed, which is a correct rule of law." Miller v. Jones, 33 Ky. L. 848, 111 S. W. 295. Overruling on another point, Miller v. Jones, 32 Ky. L. 1078, 107 S. W. 783. See further, Williamson v. Barbour, 9 Ch. Div. 529; Overall v. Taylor, 99 Ala. 12, 11 So. 738; Baskins v. Valdosta Bank & Trust Co., 5 Ga. App. 600, 63 S. E. 648; Wright v. Railey, 13 La. Ann. 536; King v. Remington, 36 Minn. 15, 29 N. W. 352; Hall v. Goodnight, 138 Mo. 576, 37 S. W. 916; King v. National Oil Co., 81 Mo. App. 155; Drake v. White Sew. Mach. Co., 133 App. Div. (N. Y.) 446, 118 N. Y. S. 178; Ross v. Whitefield, 31 N. Y. Super. Ct. 318, 36 N. Y. Super. Ct. 50; Riddle v. Canby, 2 Ohio Dec. 586; McClurkan v. Byers, 74 Pa. St. 405; Thompson v. Christie, 138 Pa. St. 230, 20 Atl. 934, 11 L. R. A. 236, 27 Wkly. Notes Cas. 87; Parrish v. Adwell (Tex. Civ. App.), 124 S. W. 441; Texas Cent. R. Co. v. Pool, 52 Tex. Civ. App. 307, 114 S. W. 685; Loosen v. Schissler, 149 Wis. 449, 135 N. W. 1008. See also, Lacey v. Hill, 4 Ch. Div. 537; Watson v. Wells, 5 Conn. 468; Gedge v. Cromwell, 19 App. D. C. 192; Townsend v. Hagar, 72 Fed. 949, 19 C. C. A. 256; Loeb v. Stern, 198 Ill. 371, 64 N. E. 1043; Barber v. Van Horn, 54 Kans. 33, 36 Pac. 1070; Hays v. Citizens' Sav. Bank, 101 Ky. 201, 19 Ky. L. 367, 40 S. W. 573; Adams Oil Co. v. Christmas, 101 Ky. 564, 19 Ky. L. 760, 41 S. W. 545; Howland v. Davis, 40 Mich. 545; Fitch v. Stamps, 6 How. (Miss.) 487; Parlin, Orendorff Co. v. Glover, 55 Tex. Civ. App. 112, 118 S. W. 731.

[95] Rhett v. Poe, 2 How. (U. S.) 457, 11 L. ed. 338. See also, Collins v. Titusville Bank, 1 Walk. (Pa.) 194.

[96] Fourth Nat. Bank v. Altheimer, 91 Mo. 190, 3 S. W. 858.

the partners.[97] So, also, the members of a partnership will be jointly liable when, as mortgagees they have failed to meet the statutory requirement of entry of satisfaction of the mortgage although the notice or request has been given or made to one of their number only.[98] Again when one partner buys for the benefit of the firm in fraud of the vendor's creditors, notice of the fraud has been imputed to the purchaser's associate.[99] In like manner where one partner purchases timber in behalf of the firm, his associates will be charged with his knowledge that the timber was cut from land which was not the property of the seller, to the extent at least that all will be liable for the statutory damages.[1] So, also, a banking partnership will be charged with the knowledge of one of its members as to the facts having to do with the issuance of a note held by the firm.[2] Again, the statement of the payor that his note is still unpaid does not relieve the partner to whom such declaration is made from knowledge that the note has in reality been paid to his copartner, the latter being fully authorized to receive payment.[3] Further, an early case is authority for the proposition that where one of the members of a mercantile firm against which suit has been brought is served with notice of the taking of depositions, his knowledge will be imputed to his copartner who lives in another state and this notwithstanding the fact that dissolution of the partnership precedes the time of trial.[4] This imputation to all the members of the firm of notice given to one of the partners is not apparently restricted to cases where the personnel of the firm remains the same after the consummation of the transaction involved, as it was at the time when the same took place. In other words, it seems that where a person becomes a member of the partnership after one of its members has received notice of a certain fact, he will be charged with the same in like manner as if he had entered the firm before the knowledge was actually obtained.[5] "The rule of law which

[97] Hays v. Citizens' Sav. Bank, 101 Ky. 201, 19 Ky. L. 367, 40 S. W. 573.

[98] Renfro v. Adams, 62 Ala. 302; Johnson v. Frix (Ala.), 58 So. 427.

[99] Patterson v. Seaton, 70 Iowa 689, 28 N. W. 598. But compare, Jones v. Draper, 26 Ohio C. C. 785.

[1] Tucker v. Cole, 54 Wis. 539, 11 N. W. 703.

[2] Adams v. Ashman, 203 Pa. St. 536, 53 Atl. 375.

[3] Bigelow v. Henniger, 33 Kans. 362, 6 Pac. 593.

[4] Gilly v. Singleton, 3 Litt. (Ky.) 249.

[5] Middleton Sav. Bank v. Dubuque, 19 Iowa 467; Flour City Nat. Bank

attaches a responsibility to the status of a partnership relation for the acts of a copartner within the scope of business transactions is founded upon a just view of the requirements of public commercial interests. To extend its operation to the extent of imputing the notice or knowledge of one copartner, acquired in transactions outside of the partnership business, and which were had for his individual benefit, to the other, would be to convert the rule into an instrumentality of injustice."[6] Moreover, one partner individually acting as trustee under a deed of trust will not be held to have the knowledge of his copartner concerning such trust.[7] Again an agent who deals with a partner without disclosing his agency cannot escape personal liability through the simple fact that the copartner who did not even know of the particular transaction had on another occasion been informed that the one who subsequently contracted with his associate bore the relation of agent to a certain individual.[8] Furthermore, a partner may not be charged with knowledge of the act of his copartner when the latter has been guilty of a fraudulent concealment of the same.[9]

§ 4933. Liability of partner upon firm obligations.—It seems that law and equity are not altogether as one concerning the nature of the liability of the firm upon its contracts. Ordinarily the law apparently regards it as joint, and not as joint and several.[10] In some states it is provided by legislative enactment that all contracts joint at common law shall be regarded as joint

v. Wiedner, 163 N. Y. 276, 57 N. E. 471.

[6] Bienenstok v. Ammidown, 155 N. Y. 47, 49 N. E. 321. See further, Flynn v. Bank of Mineral Wells, 53 Tex. Civ. App. 481, 118 S. W. 848.

[7] Tennent Shoe Co. v. Birdseye, 105 Mo. App. 696, 78 S. W. 1036.

[8] Baldwin v. Leonard, 39 Vt. 260, 94 Am. Dec. 324.

[9] Hawkins v. Western Nat. Bank (Tex. Civ. App.), 146 S. W. 1191.

[10] "At common law the liability of members of a partnership was joint, and not several." Anderson v. Wilson, 142 Iowa 158, 120 N. W. 677. See further, Kendall v. Hamilton, L. R. 4 App. Cas. 504; McLain v. Carson's Exr., 4 Ark. 164, 37 Am. Dec. 777; Northern Ins. Co. v. Potter, 63 Cal. 157; Harrison v. McCormick, 69 Cal. 616, 11 Pac. 456; Erskine v. Russell, 43 Colo. 449, 96 Pac. 249; Sandusky v. Sidwell, 173 Ill. 493, 50 N. E. 1003; Hyde v. Casey-Grimshaw Marble Co., 82 Ill. App. 83, revd. 185 Ill. 580, 57 N. E. 776; Crosby v. Jeroloman, 37 Ind. 264; Capital Food Co. v. Globe Coal Co., 142 Iowa 134, 120 N. W. 704; Scott v. Colmesnil, 7 J. J. Marsh. (Ky.) 416; Bank of Monroe v. E. C. Drew Inv. Co., 126 La. 1028, 53 So. 129, 32 L. R. A. (N. S.) 255n; Faneuil Hall Nat. Bank v. Meloon, 183 Mass. 66, 66 N. E. 410, 97 Am. St. 416; Brown

and several. Such statutes have frequently[11] but not invariably been held to apply to partnership contracts.[12] Equity, however, has from time to time taken an opposite view of the matter, choosing to make the liability several as well as joint.[13] Again, as regards this particular phase of the subject, liability may attach separately to the individual partner when he has thus fixed the same by the terms of the contract,[14] or where he has held himself

v. Fitch, 33 N. J. L. 418; Batavia First Nat. Bank v. Tarbox, 38 Hun (N. Y.) 57; Huse v. Guyot, 3 Thomp. & C. (N. Y.) 790; Tracy v. Suydam, 30 Barb. (N. Y.) 110; Leake & Watts Orphan House v. Lawrence, 11 Paige (N. Y.) 80, affd. 2 Denio (N. Y.) 577; Dob v. Halsey, 16 Johns. (N. Y.) 34, 8 Am. Dec. 293; Le Page v. McCrea, 1 Wend. (N. Y.) 164, 19 Am. Dec. 469; Haines v. Hollister, 64 N. Y. 1; Gaines v. Therman, 8 Ohio N. P. (N. S.) 521; Cox v. Gille Hardware &c. Co., 8 Okla. 483, 58 Pac. 645; North Pacific Lumber Co. v. Spore, 44 Ore. 462, 75 Pac. 890; Nichols v. English, 3 Brewst. (Pa.) 260; Pope Mfg. Co. v. Charleston Cycle Co., 55 S. Car. 528, 33 S. E. 787; Mason v. Eldred, 6 Wall. (U. S.) 231, 18 L. ed. 783; Slutts v. Chafee, 48 Wis. 617, 4 N. W. 763. Contra: "It is the law that the members of a copartnership are personally, jointly, and severally liable for all the indebtedness of the firm." Swing v. Hill, 44 Ind. App. 140, 88 N. E. 721. "It is the certain doctrine of law in this state that every partnership debt and liability is joint and several." Webb v. Gregory, 49 Tex. Civ. App. 282, 108 S. W. 478. See also, Dodson v. Alphin, 88 Ark. 482, 115 S. W. 371; In re Coe, 169 Fed. 1002; De Soto Nat. Bank v. Arcadia Elec. Light &c. Co. (Fla.), 48 So. 745; Anderson v. Stewart, 108 Md. 340, 70 Atl. 228; Wood v. Carter, 67 Nebr. 33, 93 N. W. 158. And compare, Hooks v. Gila Valley Bank &c. Co., 12 Ariz. 315, 100 Pac. 806; Orman v. Potter, 46 Colo. 54, 102 Pac. 893; Metzger v. Manlove, 241 Ill. 113, 89 N. E. 249; Fennell v. Myers, 25 Ky. L. 589, 76 S. W. 136; McCulloh v. Dashiell's Admr., 1 Har. & G. (Md.) 96, 18 Am. Dec. 271; Ashley v. Dowling, 203 Mass. 311, 89 N. E. 434, 133 Am. St. 296; McGhee v. Montgomery, 85 S. Car. 207, 65 S. E. 721, 67 S. E. 246; Brownlee v. Lobenstein (Tenn.), 42 S. W. 467; Tucker v. Oxley, 5 Cranch (U. S.) 34, 3 L. ed. 29; Gray v. Rollo, 18 Wall. (U. S.) 629, 21 L. ed. 927; Empire State Surety Co. v. Ballou, 66 Wash. 76, 118 Pac. 923.

[11] Ratchford v. Covington County Stock Co., 172 Ala. 461, 55 So. 806; Williams v. Muthersbaugh, 29 Kans. 730; Putnam v. Ross, 55 Mo. 116; Davis v. Sanderlin, 119 N. Car. 84, 25 S. E. 815; Wiggins v. Blackshear, 86 Tex. 665, 26 S. W. 939. See also, Sherburne v. Hyde, 185 Ill. 580, 57 N. E. 776; Wilson v. Horne, 37 Miss. 477.

[12] Currey v. Warrington, 5 Harr. (Del.) 147; Sandusky v. Sidwell, 173 Ill. 493, 50 N. E. 1003; Cox v. Gille Hardware &c. Co., 8 Okla. 483, 58 Pac. 645; Pope Mfg. Co. v. Charleston Cycle Co., 55 S. Car. 528, 33 S. E. 787.

[13] "It is settled that the liability of the firm and of the individuals composing it was joint and several." United States v. Hughes, 161 Fed. 1021. See further, Ladd v. Griswold, 4 Gilm. (Ill.) 25, 46 Am. Dec. 443; Edison Elec. Illum. Co. v. De Mott, 51 N. J. Eq. 16, 25 Atl. 952. And compare, Exchange Bank v. Ford, 7 Colo. 314.

[14] Ex parte Harding, 12 Ch. Div. 557; Konheim v. Meryast, 115 N. Y. S. 96. And compare, Harrison v. McCormick, 69 Cal. 616, 11 Pac. 456; Goddard v. Pratt, 16 Pick. (Mass.) 412; In re Gray's Estate, 111 N. Y. 404, 18 N. E. 719; Haslett's Exrs. v. Wotherspoon, 2 Rich. Eq. (S. Car.) 395.

out to the creditor as the one solitary member of the firm.[15] In this connection it seems that in an action by a partner on a note given to him individually there cannot be a set-off of a partnership debt.[16] And where one partner gives a note to another for the use of the firm, it has been determined that, in an action by the payee, a partnership account against him is not available as a set-off.[17] So, also, where a person purchased, after maturity, a firm note indorsed to one of the partners, the purchaser having no knowledge or notice of the relationship of the indorsee to the firm, it was held in an action by such purchaser that an account between the firm and the partner to whom the note was indorsed was not available as a set-off, it having been declared that though it is a rule that a purchaser after maturity takes a note subject to the defenses and equities existing between the parties to the note, the rule has reference to defenses and equities connected with the instrument.[18]

§ 4934. **Creditors of partnership.**—The question as to the rights of partnership creditors in the matter of subjecting the partnership property to the payment of their debts has frequently occupied the attention of the courts and while it cannot be doubted that firm creditors have, as a general thing, a claim against the partnership for the satisfaction of their debts, it seems that it cannot be affirmed that they have an interest in the property corresponding to that created by a specific lien. "On the contrary, it is well settled by the great weight of authority that simple partnership creditors have no specific lien, either legal or equitable, upon the partnership property."[19] However this may be, it has been held that in Indiana the rule obtaining as a general thing is that a preference is to be accorded partnership creditors in the payment of their claims out of the proceeds of the firm property, and that the rights of the creditors of the individual members of

[15] Bonfield v. Smith, 12 M. & W. 405. And compare, Scarfe v. Jardine, 7 App. Cases 345.

[16] Mitchell v. Lellman, 5 Md. 376, See also, Mynderse v. Snook, 1 Lans. (N. Y.) 488.

[17] Anderson v. Robertson, 32 Miss. 241; Willis v. Barron, 143 Mo. 450, 45 S. W. 289, 65 Am. St. 673.

[18] Young v. Shriner, 80 Pa. St. 463. Compare, Davis v. Briggs, 39 Maine 304.

[19] Hawkins v. Western Nat. Bank (Tex. Civ. App.), 146 S. W. 1191, See also, Fairbanks &c. Co. v. Welshaus, 55 Nebr. 362, 75 N. W. 865.

the firm are measured by the amount of the distributive share of the debtor partner on final settlement.[20] Again, it has been stated that "the general rule is that the assets of a firm are to be applied in the following manner: (1) In payment of the debts of the firm to persons who are not partners; (2) in payment to each partner ratably what is due from the firm to him for advances, as distinguished from capital put in; (3) in paying each partner ratably what is due from the firm to him in respect of capital; (4) the ultimate residue, if any, is divisible among the partners in the proportion in which profits are divisible under the partnership contract."[21] If it is true that creditors of a partnership do have a lien upon the firm assets, it can only be one which they derive from or through the several members of the firm.[22] In other words, since each of the partners would have the right to demand the primary application of the firm assets to the payment of partnership obligations, firm creditors will be regarded as possessing a like right.[23] Thus it has been held that where a partner waives

[20] McMillan v. Hadley, 78 Ind. 590. See also, Hundley v. Faris, 103 Mo. 78, 15 S. W. 312, 12 L. R. A. 254, 23 Am. St. 863. Compare and see generally, Booher v. Perrill, 140 Ind. 529, 40 N. E. 36; Johnson v. Shirley, 152 Ind. 453, 53 N. E. 459.

[21] Hyre v. Lambert, 37 W. Va. 26, 16 S. E. 446.

[22] John Spry Lumber Co. v. Chappell, 184 Ill. 539, 56 N. E. 794; Johnson v. McClary, 131 Ind. 105, 30 N. E. 888; Merkley v. Gravel Switch Roller Mills Co.'s Assignee, 28 Ky. L. 1010, 90 S. W. 1059; Thorpe v. Pennock Mercantile Co., 99 Minn. 22, 108 N. W. 940.

[23] Schmidlapp v. Currie, 55 Miss. 597, 30 Am. Rep. 530. See also, Goldsmith v. Eichold, 94 Ala. 116, 10 So. 80, 33 Am. St. 97; Jones v. Fletcher, 42 Ark. 422; Hawkeye Woolen Mills v. Conklin, 26 Iowa 422; Huiskamp v. Moline Wagon Co., 121 U. S. 310, 30 L. ed. 971, 7 Sup. Ct. 899. Compare Menagh v. Whitwell, 52 N. Y. 146, 11 Am. Rep. 683. "The great weight of authority favors the doctrine that the firm creditors have no lien in their own right upon the partnership effects, and no direct right to compel their application to firm, in preference to individual debts. The right to compel such an application of partnership assets is generally regarded as an equity the partners have as between themselves, but, so long as it exists in any of the partners, the creditors may, by a sort of subrogation to the right of the partner, compel its enforcement and by this means obtain an application of partnership property to their demands. The right of the firm creditor in this respect is, however, a derivative one only, and not held or enforced in his own right; in other words 'the equities of the creditors can only be worked out through the equities of the partners'. From these premises it necessarily follows that, unless a partner is in condition to enforce such right, the creditors cannot do so. The quasi lien, as it is sometimes called, of the creditor, being at best only the resultant of his debtor's lien, it of course cannot exist after the debtor had himself ceased to have any lien from which it could be derived. The leading case upon this subject is, perhaps, that of Case v. Beauregard, 99 U. S. 119, in which it was held that transfers made by the individual members of an insolvent

his lien the creditor thereby loses his equity.[24] So, again, when the partners dispose of their interests in the property, they coincidentally obliterate any right existing in firm creditors to proceed against the same.[25] In one jurisdiction, at least, the Supreme Court has gone to the extent of holding that, even when the firm or one of the members thereof is insolvent, a creditor of one of the partners who takes partnership property or the proceeds of the same in payment of his debtor's personal obligation need not account therefor to a creditor of the firm, although he takes with knowledge that the property belonged to the firm as such.[26] So, it has been held that a mortgage by partners upon partnership property to secure an individual debt of one of the members of the firm will be valid, such mortgage of itself constituting a waiver of the rule, established for the benefit of the partners themselves, whereby firm debts are accorded a preference in the matter of payment out of the partnership property.[27] The partners, while the partnership property is still under their control, have power to appropriate it to secure their individual debts and the mere preference, by a mortgage, of individual debts over partnership debts is not such a fraud on firm creditors that a court of equity will

firm of their interest in the partnership assets terminated the equity of any partner to require the application thereof to the payment of firm debts, and was, therefore, a complete bar to a bill filed by the partnership creditors for that purpose. But probably no clearer enunciation of the doctrine is to be found than that of Mr. Justice Matthews in Fitzpatrick v. Flannagan, 106 U. S. 654, 1 Sup. Ct. 374. He says: 'The legal right of a partnership creditor to subject the partnership property to the payment of his debt consists simply in the right to reduce his claim to judgment, and to sell the goods of his debtors on execution. His right to appropriate the partnership property specifically to the payment of his debt, in equity, in preference to creditors of an individual partner, is derived through the other partner, whose original right it is to have the partnership assets applied to the payment of partnership obligations. And this equity of the creditor subsists as long as that of the partner, through which it is derived, remains'." Stahl v. Osmers, 31 Ore. 199, 49 Pac. 958.

[24] Royston v. John Spry Lumber Co., 85 Ill. App. 223, affd. 184 Ill. 539, 56 N. E. 794; Selz v. Mayer, 151 Ind. 422, 51 N. E. 485; Ewart v. Nave-McCord Mercantile Co., 130 Mo. 112, 31 S. W. 1041; Millhiser v. McKinley, 98 Va. 207, 35 S. E. 446.

[25] Thorpe v. Pennock Mercantile Co., 99 Minn. 22, 108 N. W. 940; Stahl v. Osmers, 31 Ore. 199, 49 Pac. 958.

[26] First Nat. Bank v. Brubaker, 128 Iowa 587, 105 N. W. 116, 2 L. R. A. (N. S.) 256, 111 Am. St. 209.

[27] Fisher v. Syfers, 109 Ind. 514, 10 N. E. 306; Purple v. Farrington, 119 Ind. 164, 21 N. E. 543, 4 L. R. A. 535; Kirby v. Schoonmaker, 3 Barb. Ch. (N. Y.) 46, 49 Am. Dec. 160; Carver Gin &c. Co. v. Bannon, 85 Tenn. 712, 4 S. W. 831, 4 Am. St. 803; In re Kahley, 2 Biss. (U. S.) 383, Fed. Cas. No. 7593.

set the mortgage aside.[28] As has been stated, partnership creditors have no lien on the property of the partnership if the partners themselves have none.[29] Such a preference of individual creditors when the partnership is insolvent, and this fact is known to the mortgagee, may, however, render the mortgage void as against firm creditors.[30]

§ 4935. **Creditors of individual partners.**—Whatever may be the facts concerning the possession of a lien by partnership creditors, no court has been found which has gone to the extent of holding that creditors of the individual members of the firm are entitled to a preference over the partnership creditors in the matter of satisfaction of their claims from the common property. On the other hand, it seems to be settled by the weight of authority that firm creditors take priority over personal creditors, and that the latter are recognized only after the amounts owing the former have been paid.[31] So it has been held that although an individual creditor attaches firm property prior to the suing out of attachment by partnership creditors, the lien of the latter will be superior to that of the former.[32] Again, in another case, the complainants, alleging themselves to be judgment creditors of the partnership, sought to hold the defendants who had obtained possession of the partnership assets by fraudulently representing that one of their number had been appointed receiver, trustees ex maleficio, but the court denied them a decree on account of the fact that their judgments were against persons associated in the partnership relation as individuals, and third persons not members of the firm.[33] So a loan of money to a per-

[28] Winslow v. Wallace, 116 Ind. 317, 17 N. E. 923, 1 L. R. A. 179; Fisher v. Syfers, 109 Ind. 514, 10 N. E. 306; National Bank of the Metropolis v. Sprague, 20 N. J. Eq. 13, revd. 21 N. J. Eq. 530; Kennedy v. National Union Bank, 23 Hun (N. Y.) 494.

[29] Carver Gin &c. Co. v. Bannon, 85 Tenn. 712, 4 S. W. 831, 4 Am. St. 803. See Jones Liens (2d ed.), § 788.

[30] Cribb v. Morse, 77 Wis. 322, 46 N. W. 126.

[31] State v. Emmons, 99 Ind. 452; Holmes v. Miller, 19 Ky. L. 660, 41 S. W. 432; In re Edward's Estate (Mo.), 24 S. W. 758, revd. 122 Mo. 426, 25 S. W. 904, 29 L. R. A. 681; In re Stewart's Estate, 193 Pa. St. 347, 44 Atl. 434; Maddock's Admx. v. Skinker, 93 Va. 479, 25 S. E. 535.

[32] New York Commercial Co. v. Francis, 101 Fed. 16, 41 C. C. A. 167.

[33] See Savage v. Johnson, 125 Ala. 673, 28 So. 547.

son with which to purchase an interest in a firm,[34] or to a partner to pay the amount of his contribution to the partnership capital does not create a firm obligation.[35] Moreover it has been held that the indorsement by a partner of the individual note of his copartner does not entitle it to satisfaction as a claim against the firm.[36] So where a partner assigns his interest in the property of the firm as security for his individual debt, such security is taken subject to the fluctuations of the business and can only be realized upon after firm debts, including those subsequently contracted, have been paid.[37] In this connection it seems that a partner stands, in the matter of obtaining satisfaction of any debts owing him by the firm as such, on a plane intermediate between those occupied by firm and individual creditors. In other words, he is a secondary creditor. Whatever right he may possess as regards reimbursement is inferior to the rights of partnership creditors and it is only after the latter's claims have been discharged that he can secure recognition of his demands.[38] And yet it has been held both that the assignee of a partner's claim ranks equally with other creditors[39] and, perhaps upon peculiar facts, that the claim of a partner will take precedence over the claims of individual creditors of other members of the firm.[40] So, too, it has been held that if a partner mortgage his separate property to secure a firm debt, he thereby becomes a surety for the firm, and that his separate creditors, upon his bankruptcy

[34] Dixie Cotton Oil Co. v. Morris, 79 Ark. 113, 94 S. W. 933; Hargadine-McKitrick Dry Goods Co. v. Sappington, 105 Mo. App. 655, 78 S. W. 1049.

[35] McGillis v. Hogan, 190 Ill. 176, 60 N. E. 91, affg. 85 Ill. App. 194.

[36] In re Hallock, 47 Misc. (N. Y.) 571, 96 N. Y. S. 105.

[37] Ivie v. Blum (N. Car.), 74 S. E. 807.

[38] Wallerstein v. Ervin, 112 Fed. 124, 50 C. C. A. 129; Lawson v. Dunn, 66 N. J. Eq. 90, 57 Atl. 415; White Cloud Milling &c. Co. v. Thomson, 166 Mo. App. 170, 148 S. W. 969. But see Gillespie v. Salmon, 2 Cal. App. 501, 84 Pac. 310, in which it is held that where a partner pays and takes up a firm note, he thereby becomes a creditor of the partnership and in his suit for an accounting and settlement, the assets of the firm must be first applied to the payment of his claim.

[39] Frank v. Anderson, 13 Lea (Tenn.) 695. Contra, In re Rieser, 19 Hun (N. Y.) 202, affd. 81 N. Y. 629. See also, Nichol v. Stewart, 36 Ark. 612; Moore v. Steele, 67 Tex. 435, 3 S. W. 448.

[40] Rainey v. Nance, 54 Ill. 29; Purdy v. Hood, 5 Mart. (N. S.) (La.) 626; Crooker v. Crooker, 52 Maine 267, 83 Am. Dec. 509; Conkling v. Washington University, 2 Md. Ch. 497; Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; Hobbs v. McLean, 117 U. S. 567, 29 L. ed. 940, 6 Sup. Ct. 870.

or insolvency, have a right to insist that the partnership property be first applied to the payment of the debt so secured.[41]

§ 4936. Liability for debt on change of firm.—When one member of a partnership retires from the firm it is entirely competent for those who continue the business to assume the firm liabilities. Indeed, when a retiring partner sells his interest in the firm business to his copartners it is implied that the purchasing partner assumes the firm obligations and that he will discharge them and save the retiring partner from liability thereon.[42] As between the remaining and the retiring partner the former becomes the principal and the latter stands in the relation of a surety.[43] The retiring partner generally remains liable as principal, however, to all creditors of the firm who have no knowledge of or who do not assent to the terms of settlement between the partners.[44] Mere knowledge on the part of the creditor that one partner has purchased the interest of the other and assumed the partnership liabilities does not require such creditor to treat the retiring partner as a surety.[45] There are cases, however, which hold that when notice is given to a creditor which fully and fairly apprises him of the fact and of the changed attitude of the parties he is bound by such notice and must look to the remaining partner as principal.[46]

[41] Averill v. Loucks, 6 Barb. (N. Y.) 470.

[42] Cobb v. Benedict, 27 Colo. 342, 62 Pac. 222; Edens v. Williams, 36 Ill. 252; Schlicher v. Vogel, 61 N. J. Eq. 158, 47 Atl. 448, affd. 65 N. J. Eq. 404, 54 Atl. 1125.

[43] Wendlandt v. Sohre, 37 Minn. 162, 33 N. W. 700; Graham v. Thornton (Miss.), 9 So. 292; Dean & Co. v. Collins, 15 N. Dak. 535, 108 N. W. 242, 9 L. R. A. (N. S.) 49, 125 Am. St. 610; Allen v. Cooley, 53 S. Car. 414, 31 S. E. 634.

[44] Swire v. Redman, L. R. 1 Q. B. Div. 536; Tootle v. Cook, 4 Colo. App. 111, 35 Pac. 193; Eagle Mfg. Co. v. Jennings, 29 Kans. 657, 44 Am. Rep. 668; Norman v. Jackson Fertilizer Co., 79 Miss. 747, 31 So. 419; Keim &c. Hardw. Co. v. Williams (Mo. App.), 136 S. W. 1; Grotte v. Weil, 62 Nebr. 478, 87 N. W. 173; Dean & Co. v. Collins, 15 N. Dak. 535, 108 N. W. 242, 9 L. R. A. (N. S.) 49, 125 Am. St. 610; Rawson v. Taylor, 30 Ohio St. 389, 27 Am. Rep. 464; Whittier v. Gould, 8 Watts (Pa.) 485; Shapleigh Hardware Co. v. Wells, 90 Tex. 110, 37 S. W. 411, 59 Am. St. 783; Harris v. Lindsay, 4 Wash. (U. S.) 98, Fed. Cas. No. 6123; Buchanan v. Clark, 10 Grat. (Va.) 164; Wadhams v. Page, 1 Wash. 420, 25 Pac. 462, revd. on other grounds in 6 Wash. 103, 32 Pac. 1068; McCoy v. Jack, 47 W. Va. 201, 34 S. E. 991.

[45] Preston v. Garrard, 120 Ga. 689, 48 S. E. 118, 102 Am. St. 124; Young v. Bell (N. J. Eq.), 41 Atl. 226; United States Nat. Bank v. Underwood, 2 App. Div. (N. Y.) 342, 73 N. Y. St. 50, 37 N. Y. S. 838; McLaughlin v. Bieber, 56 N. Y. S. 490, revd. 41 App. Div. (N. Y.) 561, 58 N. Y. S. 790.

[46] Oakeley v. Pasheller, 4 Clark & F. 207, 10 Bligh (N. S.) 548; Smith v. Shelden, 35 Mich. 42, 24 Am. Rep.

Some American authorities hold that the creditor is not bound by his assent to the partnership agreement unless his assent thereto is supported by consideration.[47] An incoming partner is not liable for the debts of the firm contracted prior to his becoming a member in the absence of an assumption of liability on his part.[48] He becomes liable only by express agreement or by such conduct as will raise a presumption of a special promise.[49] Nor is the new firm liable for the debts of an old firm merely because one of the members of the former was also a member of the latter.[50]

§ 4937. Ratification. — Where an unauthorized contract has been entered into by one of the partners, the firm's liability thereon may ordinarily be established by a subsequent ratification thereof.[51] Such ratification may be accomplished by acquiescence, with knowledge of the fact, in the terms of the agreement after

529; Palmer v. Purdy, 83 N. Y. 144; Campbell v. Floyd, 153 Pa. 84, 25 Atl. 1033; First Nat. Bank v. Larsen, 146 Wis. 653, 132 N. W. 610. The American cases so holding all go back to the case of Oakeley v. Pasheller, 4 Cl. & F. 207. It was said of this case, however, in the case of Preston v. Garrard, 120 Ga. 689, 48 S. E. 118, 102 Am. St. 124: "In the case of Swire v. Redman, L. R. 1 Q. B. 536; Cockburn, C. J., shows very clearly that the House of Lords did not, in Oakeley v. Pasheller [4 Cl. & F. 207], intend to rule as was supposed, but merely to hold that the retiring partner would be released only in the event the creditor consented to the arrangement between the partners."

[47] National Cash Register Co. v. Brown, 19 Mont. 200, 47 Pac. 995, 37 L. R. A. 515, 31 Am. St. 498. See also, Norman v. Jackson Fertilizer Co., 79 Miss. 747, 31 So. 419.

[48] Butler v. Henry, 48 Ark. 551, 3 S. W. 878; Smith v. Millard, 77 Cal. 440, 19 Pac. 824; Nix v. First Nat. Bank, 23 Colo. 511, 48 Pac. 522; Wright v. Brosseau, 73 Ill. 381; Mellor v. Lawyer, 55 Ill. App. 679; Sternburg v. Callanan, 14 Iowa 251; Cross v. Burlington Nat. Bank, 17 Kans. 336; Meador v. Hughes, 14 Bush (Ky.) 652; Beall v. Poole, 27 Md. 645; Shamburg v. Ruggles, 83 Pa. St. 148; Hart v. Kelley, 83 Pa. St. 286.

[49] Ringo v. Wing, 49 Ark. 457, 5 S. W. 787; Smith v. Millard, 77 Cal. 440, 19 Pac. 824; Morris v. Marqueze, 74 Ga. 86; Bracken v. Dillon, 64 Ga. 243, 37 Am. Rep. 70; Karraker v. Eddleman, 101 Ill. App. 23; Beall v. Poole, 27 Md. 645; Dodge v. Cutrer, 100 Miss. 647, 56 So. 455; Peters v. McWilliams, 78 Va. 567.

[50] Ball v. Mashburn, 110 Ga. 285, 34 S. E. 851.

[51] Gunter v. Williams, 40 Ala. 561; Pacific Mut. Life Ins. Co. v. Fisher, 109 Cal. 566, 42 Pac. 154; United States v. Baxter, 46 Fed. 350; United States v. Turner, 2 Bond (U. S.) 379, Fed. Cas. No. 16547; In re Norris, 2 Hask. (U. S.) 19, Fed. Cas. No. 10302; Hawkins v. Hastings Bank, 1 Dill. (U. S.) 462, Fed. Cas. No. 6244; McGahan v. National Bank, 156 U. S. 218, 39 L. ed. 403, 15 Sup. Ct. 347. See also, Tischler v. Kurtz, 35 Fla. 323, 17 So. 661; Sparks v. Flannery, 104 Ga. 323, 30 S. E. 823; Easter v. Farmers' Nat. Bank, 57 Ill. 215; Trumbull v. Union Trust Co., 33 Ill. App. 319, affd. 23 N. E. 355; Buettner v. Steinbrecher, 91 Iowa 588, 60 N. W. 177; Corbett v. Cannon, 57 Kans. 127, 45 Pac. 80; Saufley v. Howard, 7 Dana (Ky.) 367; O'Connor v. Sherley, 107 Ky. 70, 52 S. W. 1056; Stewart v. Caldwell, 9 La. Ann. 419; Waite v. Foster, 33 Maine 424; Burkhardt v. Yates, 161 Mass. 591, 37 N. E. 759; Koch v.

its execution.[52] Thus, acquiescence by one partner in a chattel mortgage executed by the other has been held to amount to a ratification of such mortgage.[53] So, also, a jury would be warranted in finding that each of the firms in whose names the lease was executed had ratified the same where it appears in evidence that the "renting" firm entered into occupation and possession of the premises described in the lease, paid the rent reserved as required, and used the light, heat, power and water furnished and supplied by the "lessor," and that the latter opened an account on its books for the rent to be paid under the lease, and gave directions to its bookkeeper to make out bills therefor and to collect and receive the same from the "leasing" firm.[54] So, also, it is undoubtedly true that ratification may be evinced by an express parol adoption of the act.[55] But it has been held that a partner does not become liable on single bills executed in the firm's name by his copartner who has acted without authority, by acknowledging his liability on the open ac-

Endriss, 97 Mich. 444, 56 N. W. 847; Van Dyke v. Seelye, 49 Minn. 557, 52 N. W. 215; Davis v. Richardson, 45 Miss. 500, 7 Am. Rep. 732; Meadowcraft v. Walsh, 15 Mont. 544, 39 Pac. 914; Columbus State Bank v. Dole, 56 Nebr. 508, 76 N. W. 1054; Dow v. Moore, 47 N. H. 419; Rumsey v. Briggs, 139 N. Y. 323, 34 N. E. 929; Hardin v. Dolge, 46 App. Div. (N. Y.) 416, 61 N. Y. S. 753; G. H. Haulenbeck Advertising Agency v. November, 27 Misc. (N. Y.) 836, 60 N. Y. S. 573; Bate v. McDowell, 49 N. Y. Super. Ct. 106, affd. 99 N. Y. 665; Galway v. Nordlinger, 51 Hun (N. Y.) 639, 21 N. Y. St. 197, 4 N. Y. S. 649, affd. 121 N. Y. 699, 24 N. E. 1100; McGregor v. Ellis, 2 Disn. (Ohio) 286, 13 Ohio Dec. 175; McNaughten v. Partridge, 11 Ohio 223, 38 Am. Dec. 731; Miller v. Royal Flint Glass Works, 172 Pa. St. 70, 33 Atl. 350; Enterprise Oil &c. Co. v. National Transit Co., 172 Pa. St. 421, 33 Atl. 687, 51 Am. St. 746; Murray v. Ayer, 16 R. I. 665, 19 Atl. 241; Salinas v. Bennett, 33 S. Car. 285, 11 S. E. 968; Hatton v. Stewart, 2 Lea (Tenn.) 233; Metcalf v. Denson, 4 Baxt. (Tenn.) 565; Spencer v. Jones (Tex. Civ. App.), 47 S. W. 665; Gutheil v. Gilmer, 23 Utah 84, 63 Pac. 817; Lynch v. Flint, 56 Vt. 46; Richards v. Jefferson, 20 Wash. 166, 54 Pac. 1123; Rock v. Collins, 99 Wis. 630, 75 N. W. 426, 67 Am. St. 885.

[52] Sparks v. Flannery, 104 Ga. 323, 30 S. E. 823; Clark v. Hyman, 55 Iowa 14, 7 N. W. 386, 39 Am. Rep. 160; Corbett v. Cannon, 57 Kans. 127, 45 Pac. 80; Clippinger v. Starr, 130 Mich. 463, 90 N. W. 280; Columbus State Bank v. Dole, 56 Nebr. 508, 76 N. W. 1054; Rock v. Collins, 99 Wis. 630, 75 N. W. 426, 67 Am. St. 885; Wipperman v. Stacy, 80 Wis. 345, 50 N. W. 336.

[53] Columbus State Bank v. Dole, 56 Nebr. 508, 76 N. W. 1054; Rock v. Collins, 99 Wis. 630, 75 N. W. 426, 67 Am. St. 885.

[54] Golding v. Brennan, 183 Mass. 286, 67 N. E. 239. See also, Porter v. Curry, 50 Ill. 319, 99 Am. Dec. 520; Holbrook v. Chamberlin, 116 Mass. 155, 17 Am. Rep. 146; Burkhardt v. Yates, 161 Mass. 591, 37 N. E. 759.

[55] Gunter v. Williams, 40 Ala. 561; Tischler v. Kurtz, 35 Fla. 323, 17 So. 661; Harper v. Devene, 10 La. Ann. 724; Batty v. Adams, 16 Nebr. 44, 20 N. W. 15; Smith v. Kerr, 3 N. Y. 144.

count which the bills purported to secure.[56] However, where a partnership sues upon a sealed instrument executed by one of the partners in the firm name, it thereby ratifies the contract.[57] Likewise ratification may in general be implied as from a receipt, with full knowledge, of the benefits of the transaction.[58] The receipt of a part of the purchase-price of the real estate belonging to a partnership which has been sold by one of the partners may operate as a ratification of such sale.[59] The same principle would probably apply when money is received on a promissory note executed by one of the partners in the name of the firm,[60] and is used in the partnership business.[61] Even though fraud on the vendor accompanies the procuring of goods by a partner for the use of his firm, the receipt and participation in the use of such goods by the other partners may establish the liability of the firm for the act of the partner who obtained the property.[62] So, too, where a partner who purports to act for his firm enters into a contract with one of the judgment debtors of the partnership, which provides that the debtor shall discontinue proceedings to open his judgment and shall consent to a sale of his land on execution, the same to be conveyed to his wife if purchased by the partnership, the latter will ratify the agreement by issuing execution after the discontinuance has been entered and by purchasing the property at the subsequent sale.[63] Again

[56] Sibley v. Young, 26 S. Car. 415, 2 S. E. 314.

[57] Dodge v. McKay, 4 Ala. 346.

[58] Markell v. Matthews, 3 Colo. App. 49, 32 Pac. 176; Tyler v. Waddingham, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657; Smith v. Packard, 98 Fed. 793, 39 C. C. A. 294; Weld v. Peters, 1 La. Ann. 432; Doll v. Hennessey Mercantile Co., 33 Mont. 80, 81 Pac. 625; In re Appeal of Levick, 1 Sad. (Pa.) 365, 2 Atl. 532. See also, Richardson v. Ames, 79 Wis. 237, 48 N. W. 423. "If the sale [of all the goods of a mercantile partnership] was made subject to the condition that the other partner should assent to it, his assent or subsequent ratification must be shown; but such assent or ratification may be either express or implied, and is a question for the jury, to be determined by a consideration of all the circumstances in evidence." Ellis v. Allen, 80 Ala. 515, 2 So. 676.

[59] Thomas v. Scott, 3 Rob. (La.) 256; Weld v. Peters, 1 La. Ann. 432.

[60] O'Connor v. Sherley, 107 Ky. 70, 52 S. W. 1056. See also, American Exch. Nat. Bank v. Georgia Const. &c. Co., 87 Ga. 651, 13 S. E. 505.

[61] Buettner v. Steinbrecher, 91 Iowa 588, 60 N. W. 177. See also, Baldwin's Bank v. Morris, 144 N. Y. 637, 39 N. E. 493.

[62] Levy v. Abramsohn, 39 Misc. (N. Y.) 781, 81 N. Y. S. 344. See also, Tate v. Clements, 16 Fla. 339, 26 Am. Rep. 709; Drumright v. Philpot, 16 Ga. 424, 60 Am. Dec. 738.

[63] Kramer v. Dinsmore, 152 Pa. St. 264, 25 Atl. 789.

a partner ratifies the sale of property of which he subsequently asserts that he was individually possessed, by consenting to its resale by the purchaser and by leasing to the latter's transferee the realty on which the property was located for the purpose of conducting thereon the same business as had the partnership, and this notwithstanding the fact that at the time of the sale he registered the objection that the property was mortgaged to a third person.[64]

If one partner fails to repudiate an unauthorized act of the other within a reasonable time after he has acquired knowledge thereof, he will ordinarily be held to have ratified the same.[65] While a partner does not necessarily ratify by failing to repudiate within eight days,[66] repudiation, postponed for the period of one year[67] or of four years after full knowledge of the facts is acquired, has been held not to have been made within a reasonable time.[68] As opposed to this view of the matter, it has been held that a partner is not required by law to deny his liability until it is sought to be enforced and therefore, that mere silence or omission to repudiate upon knowledge of the facts will not per se be equivalent to ratification.[69] Again, ratification will not have been effected where the partner by whom the same is alleged to have been made has not had full knowledge of all material facts[70] or at least, a knowledge of such facts as would have put him on inquiry.[71] Actual knowledge of the

[64] Morris v. Brown (Ala.), 58 So. 910. See also, Gutheil v. Gilmer, 23 Utah 84, 63 Pac. 817, affd. 27 Utah 496, 76 Pac. 628.

[65] Murphy v. Whitlow, 1 Ariz. 340, 25 Pac. 532; Sparks v. Flannery, 104 Ga. 323, 30 S. E. 823; Parsons v. Ponting, 46 Ill. App. 101; In re Succession of Arick, 22 La. Ann. 501; Swan v. Stedman, 4 Metc. (Mass.) 548; Hodenpyl v. Hines, 160 Pa. St. 466, 28 Atl. 825; Livingston v. Pittsburg & S. R. Co., 2 Grant Cas. (Pa.) 219.

[66] Johnson v. McClary, 131 Ind. 105, 30 N. E. 888.

[67] Clippinger v. Starr, 130 Mich. 463, 90 N. W. 280. That repudiation does not ipso facto impose liability upon the partner refusing to ratify, see Jamison v. Cullom, 110 La. 781, 34 So. 775.

[68] Marine Co. of Chicago v. Carver, 42 Ill. 66.

[69] Van Dyke v. Seelye, 49 Minn. 557, 52 N. W. 215. See also, Barnard v. Lapeer &c. Plank Road Co., 6 Mich. 274, and Tyree v. Lyon, 67 Ala. 1; Reubin v. Cohen, 48 Cal. 545; Ferguson v. Sheperd, 33 Tenn. 254.

[70] Love v. Payne, 73 Ind. 80, 38 Am. Rep. 111; Wheeler v. Timpson, 59 Hun (N. Y.) 625, 37 N. Y. St. 210, 13 N. Y. S. 640; Hull v. Young, 30 S. Car. 121, 8 S. E. 695, 3 L. R. A. 521; Biggs v. Hubert, 14 S. Car. 620. And compare Meyer v. Hegler, 121 Cal. 682, 54 Pac. 271; Rumsey v. Briggs, 139 N. Y. 323, 34 N. E. 929.

[71] Sargent v. Henderson, 79 Ga. 268,

accommodation character of an indorsement in the firm name, and of the circumstances attendant thereupon is not required in order for the ratification of the nonacting partner to be binding. If the latter ratify the act of his copartner in incurring the liability and assume to personally discharge the same upon notice of such facts only as would serve to put a reasonably prudent man upon inquiry, he becomes charged with all the facts discoverable had he made duly diligent inquiry. This being the case, it will be proper in an action on the note to refuse a charge which, by making the binding force of the ratification dependent upon actual knowledge, excludes from consideration the effect of the constructive knowledge which might have been obtained by inquiry.[72] Moreover, failure to understand the legal effects of the contract will not avoid a ratification otherwise valid.[73]

Further, in connection with this subject it seems that retiring partners may ratify the acts of the one or ones continuing.[74] But "Evidence that members of a partnership, after beginning the transaction of the partnership business, ratified certain unauthorized acts done in its behalf, and in anticipation of its formation, by one who was to become a member of such partnership, is not proof of the ratification of another unauthorized act so done by such person at a time when he had no power to act in its behalf."[75] Moreover, "ratification" of an assignment by one partner of the firm property will not validate the same as to creditors who have acquired rights by attachment or garnishment

5 S. E. 122. See Casey v. Carver, 42 Ill. 225; Sweetser v. French, 2 Cush. (Mass.) 309, 48 Am. Dec. 666; Peterson v. Armstrong, 24 Utah 96, 66 Pac. 767.

[72] Sibley v. American Exch. Nat. Bank, 97 Ga. 126, 25 S. E. 470. See also, Atkinson v. Howlett, 11 Ky. L. (abstract) 364; Woodward v. Winship, 12 Pick. (Mass.) 430; Miller v. Royal Flint Glass Works, 172 Pa. St. 70, 33 Atl. 350, 37 Wkly. Notes Cas. (Pa.) 260. And compare Tootle v. Rice, 53 Kans. 576, 36 Pac. 990; Hayes v. Baxter, 65 Barb. (N. Y.) 181.

[73] Miller v. Royal Flint Glass Works, 172 Pa. St. 70, 33 Atl. 350.

[74] Van Valkenburg v. Bradley, 14 Iowa 108, overruling Kemp v. Coffin, 3 G. Greene (Iowa) 190. See also, Brown v. Bamberger, 110 Ala. 342, 20 So. 114; Sanborn v. Stark, 31 Fed. 18; Silas v. Adams, 92 Ga. 350, 17 S. E. 280; Roberts v. Barrow, 53 Ga. 314; Chamberlain v. Stone, 24 Ga. 310; Conklin v. Ogborn, 7 Ind. 553; Carter v. Pomeroy, 30 Ind. 438; Eaton v. Taylor, 10 Mass. 54; Fowle v. Harrington, 1 Cush. (Mass.) 146; Wilson v. Forder, 20 Ohio St. 89, 5 Am. Rep. 627; Murray v. Ayer, 16 R. I. 665, 19 Atl. 241; Hatton v. Stewart, 2 Lea (Tenn.) 233; McElroy v. Melear, 7 Cold. (Tenn.) 140.

[75] Cody v. First Nat. Bank, 103 Ga. 789, 30 S. E. 281 (syllabus by the court).

before the contract is "ratified."[76] Again, it is held that neither a "ratification" by the contracting partner alone[77] nor by a single one of the several remaining partners is binding upon the firm.[78]

§ 4938. Estoppel.—There remains still another method by which a partner may impose upon himself partnership obligations, and that is by estoppel. This occurs when one holds himself out, or knowingly permits himself to be held out, as a partner in a particular firm. He is thereby rendered liable to third persons who knew of and acted in reliance upon such representation, or holding out.[79] Thus it seems that a partnership is liable on contracts entered into by one who has been permitted to act as a member of the firm.[80] So, also, property used by an ostensible partner in conducting the business may undoubtedly, in equity, be regarded as the joint property of the firm and creditors be permitted to subject the same to the payment of their debts.[81]

[76] Coleman v. Rosenfeld, 66 Wis. 155, 28 N. W. 367, 57 Am. Rep. 253. See also, Kittrell v. Blum, 77 Tex. 336, 14 S. W. 69, and Mayer v. Bernstein, 69 Miss. 17, 12 So. 257.

[77] Blake v. Third Nat. Bank, 219 Mo. 644, 118 S. W. 641.

[78] North Star Boot & Shoe Co. v. Stebbins, 2 S. Dak. 74, 48 N. W. 833.

[79] Steele v. Michigan Buggy Co. (Ind. App.), 95 N. E. 435, quotes Farmers' Bank v. Orr, 25 Ind. App. 71, 55 N. E. 35, as follows: "To constitute an estoppel in pais, the following elements must be present: (1) A representation or concealment of material facts; (2) the representation must have been made with knowledge of the facts; (3) the party to whom the representation was made must have been ignorant of the truth of the matter; (4) the representations must have been made with the intention that the other party should act upon it; and (5) the other party must have been induced thereby to act." See further, Kuriger v. Joest, 22 Ind. App. 633, 52 N. E. 764, 54 N. E. 414; Roberts v. Abbott, 127 Ind. 83, 26 N. E. 565. See also, Waugh v. Carver, 2 H. Bl. 235; De Berkom v. Smith, 1 Esp. 29; Morris v. Brown (Ala.), 58 So. 910; Nicholson v. Moog, 65 Ala. 471; Deputy v. Harris, 1 Marv. (Del.) 100, 40 Atl. 714; Mitchell v. Craig (Ga. App.), 74 S. E. 716; Bartlett v. Powell, 90 Ill. 331; Rider v. Hammell, 63 Kans. 733, 66 Pac. 1026; Fennell v. Myers, 25 Ky. L. 589. 76 S. W. 136; Johnson v. Levy, 109 La. 1036, 34 So. 68; Fletcher v. Pullen. 70 Md. 205, 16 Atl. 887, 14 Am. St. 355; Lighthiser v. Allison, 100 Md. 103, 59 Atl. 182; Kritzer v. Sweet, 57 Mich. 617, 24 N. W. 764; Rittenhouse v. Leigh, 57 Miss. 697; Seabury v. Bolles, 51 N. J. L. 103, 16 Atl. 54, 11 L. R. A. 136; Cassidy v. Hall, 97 N. Y. 159; Campbell v. Huffines, 151 N. Car. 262, 65 S. E. 1000, 134 Am. St. 987; In re Scull's Appeal, 115 Pa. St. 141, 7 Atl. 588; Hamner v. Barker (Tex. Civ. App.), 144 S. W. 1180; Benjamin v. Covert, 47 Wis. 375, 2 N. W. 625, note in 18 L. R. A. (N. S.) 988. One who, by his acts or conduct, authorizes a stranger to believe that he is a partner, is, as to such stranger, a partner. Letson v. Hall, 1 Ala. App. 619, 55 So. 944.

[80] Chicago Trust & Savings Bank v. Kinnare, 174 Ill. 358; 51 N. E. 607; Peninsular Sav. Bank v. Currie, 123 Mich. 666, 82 N. W. 511; Tyler v. Omeis, 76 Minn. 537, 79 N. W. 528.

[81] Thayer v. Humphrey, 91 Wis. 276, 64 N. W. 1007, 30 L. R. A. 549, 51 Am. St. 887.

Before one will be estopped to deny his liability as a partner, it is essential in general that he be guilty of some wrongful act or omission. One who is not a partner and has no knowledge of the fact that he has been held out as a partner, and one who has been neither negligent nor at fault in the matter cannot be held liable.[82] Thus the declarations of a person that another is associated with him in the partnership relation where there is no partnership in fact do not ordinarily bind the alleged partner when such declarations are not made in his presence or with his knowledge or consent.[82a] Under such circumstances, neither partnership nor agency being actually existent, the declarant's statements will not, as a general rule, be admissible in evidence against the one referred to in the declarations,[83] the latter, in the absence of other evidence, binding no one but the party making them.[84] Moreover, a person who without knowledge of the fact on his part is falsely represented as being a partner need not exercise diligence in ascertaining and contradicting the report that he is such.[85] Thus, in the absence of proof of the defendant's authorization of, or assent to the article, estoppel cannot be predicated of the failure of one, attempted to be held as a partner, to publish a denial of an article, appearing in a trade paper, which informed the public as item of news, that he and his alleged partner had entered into a partnership and would

[82] It has been said that one who denies that he is a partner is estopped to prove partnership as against the rights of intervening third persons. Willard v. Bullen, 41 Ore. 25, 67 Pac. 924, 68 Pac. 422. See, however, Hoaglin v. Henderson, 119 Iowa 720, 94 N. W. 247, 61 L. R. A. 756, 97 Am. St. 335, in which a debtor was not permitted to set off a claim he held against one of the partners when he had dealt with such partner in his individual capacity and without knowledge that he was acting for a partnership. See further, Nofsinger v. Goldman, 122 Cal. 609, 55 Pac. 425; Munton v. Rutherford, 121 Mich. 418, 80 N. W. 112; Seabury v. Bolles, 52 N. J. L. 413, 21 Atl. 952, 11 L. R. A. 136. See also, note in 18 L. R. A. (N. S.) 992.

[82a] See Vanderhurst v. De Witt, 95 Cal. 57, 30 Pac. 94, 20 L. R. A. 595; Frisbie v. Felton, 65 Vt. 138, 26 Atl. 110; Commercial Bank v. Miller, 96 Va. 357, 31 S. E. 812.

[83] Thompson v. Mallory, 108 Ga. 797, 33 S. E. 986; Keim &c. Hardw. Co. v. Williams (Mo. App.), 136 S. W. 1; Wolle v. Brown, 4 Whart. (Pa.) 365. See also, Salinas City Bank v. De Witt, 97 Cal. 78, 31 Pac. 744; Brotherton v. Gilchrist, 144 Mich. 274, 107 N. W. 890, 115 Am. St. 397.

[84] Dodds v. Ragan Co., 110 Ga. 303, 54 S. E. 1004; McCann v. McDonald, 7 Nebr. 305; Whitney v. Ferris, 10 Johns. (N. Y.) 66.

[85] Campbell v. Hastings, 29 Ark. 512. See also, Butler v. Hinckley, 7 Colo. 523, 30 Pac. 250.

transact business under a designated firm name.[86] Even, "where one inserts in a newspaper an advertisement of a partnership between himself and other persons, which does not in fact then exist, the latter are not affected by such advertisement, in the absence of evidence showing that they knew of and acquiesced in it."[87] But where the name of a certain person is at the latter's instance used in the name of a firm, such person cannot deny his liability on contracts executed by the firm.[88] Even where no firm ever existed by the name of "Hill & Co." and Hill and Harrington were never partners, if the former consents to the use of his name by the latter, merely enjoining him not to use it in a manner that will injure him, he will be liable on a promissory note signed "Hill & Co. by Harrington."[89]

Further on this subject, the wrongful act or omission that is relied upon to create an estoppel must, it seems, have been acted on in good faith by the party in whose favor the same is sought to be invoked.[90] Should the latter have no knowledge, at the time the contract is entered into, that the person against whom he subsequently seeks to enforce liability was being held out as a partner, an estoppel does not exist in his favor,[91] any more than it does when he knew of the holding out, but also knew that the parties were in reality not partners.[92] Thus it will be proper to refuse an instruction requiring the jury to find the defendant liable if he has held himself out to the general public or to the plaintiff as a member of the firm whose name is signed to the note in suit, it being

[86] Munton v. Rutherford, 121 Mich. 418, 80 N. W. 112, 6 D. L. N. 507.

[87] First Nat. Bank v. Cody, 93 Ga. 127, 19 S. E. 831 (syllabus by the court). But see Williams v. Rogers, 14 Bush (Ky.) 776.

[88] Speer v. Bishop, 5 Ohio Dec. 128, 3 Am. L. Rec. 91, affd. 24 Ohio St. 598.

[89] Smith v. Hill, 45 Vt. 90, 12 Am. Rep. 189.

[90] Nofsinger v. Goldman, 122 Cal. 609, 55 Pac. 425; Seabury v. Bolles, 52 N. J. L. 413, 21 Atl. 952, 11 L. R. A. 136.

[91] Nofsinger v. Goldman, 122 Cal. 609, 55 Pac. 425; Webster v. Clark, 34 Fla. 637, 16 So. 601, 27 L. R. A. 126, 43 Am. St. 217; Wood v. Pennell, 51 Maine 52; Parchen v. Anderson, 5 Mont. 438, 5 Pac. 588, 51 Am. Rep. 65; Carey v. Marshall, 67 N. J. L. 236, 51 Atl. 698; Cook v. Slate Co., 36 Ohio S. 135, 38 Am. Rep. 568; Denithorne v. Hook, 112 Pa. St. 240; 3 Atl. 777; Thompson v. First Nat. Bank, 111 U. S. 529, 28 L. ed. 507, 4 Sup. Ct. 689; Hicks v. Cram, 17 Vt. 449.

[92] Alderson v. Pope, 1 Camp. 404n; Nightingale v. Milwaukee Furniture Co., 71 Fed. 234; Krans v. Luthy, 56 Ill. App. 506; Booe v. Caldwell, 12 Ind. 12; Pratt v. Langdon, 97 Mass. 97, 93 Am. Dec. 61; Beudell v. Hettrick, 3 Jones & S. (N. Y.) 405. And

possible to construe such instruction to mean that the defendant is liable if he has held himself out to the public as a partner, notwithstanding the plaintiff has had no knowledge of such fact.[93] But reliance by a subscriber upon information transmitted to him by a mercantile agency which in turn has received it from the defendant himself, to the effect that the latter is a full partner in a certain firm, estops such defendant from denying his liability as a member of the partnership.[94] On the other hand when a private corporation cannot enter into the partnership relation with another, one with whom such corporation deals is bound to know this fact and cannot impute liability to it on the contract of the person which it has held out as its partner.[95] Again, evidence that the owner of the building witnessed the partnership agreement of the contractor and another, and subsequently accepted receipts for money paid by him on the contract which were signed by both the individuals, does not conclusively establish the fact that he dealt with the partners as such.[96] So too, a verdict should be directed for R, defendant in a suit on a note signed by another, "R. & Co." where the evidence shows that R permitted the use of his name only to make possible the obtaining of a license to carry on the business in the course of which the note is given, and that the plaintiff's drummer when he sold the goods whose price is evidenced by the instrument in suit was informed of R's connection with the business, and this, notwithstanding such instrument was given to a second agent of the plaintiff.[97]

compare Brown v. Leonard, 2 Chit. 120; Stearns v. Haven, 14 Vt. 540.

[93] Sheldon v. Bigelow, 118 Iowa 586, 92 N. W. 701.

[94] Ellison v. Stuart, 2 Pennew. (Del.) 179, 43 Atl. 836. See also, Iowa Leather & Saddlery Co. v. Hathaway (Iowa), 78 N. W. 193. And compare Sohn v. Freiberg, 6 Ohio Dec. 1175, 11 Am. L. Rec. 736, 9 Wkly. L. Bul. 290.

[95] Murray Ginning System Co. v. Exchange Nat. Bank (Tex. Civ. App.), 61 S. W. 508. See also, Spaulding v. Nathan, 21 Ind. App. 122, 51 N. E. 742.

[96] Lapenta v. Lettieri, 72 Conn. 377, 44 Atl. 730, 77 Am. St. 315.

[97] Willis v. Rector, 50 Fed. 684, 1 C. C. A. 611. But see, In re Krueger, Fed. Cas. No. 7941.

CHAPTER CLII.

DISSOLUTION.

§ 4950. In general.
4951. By operation of law.
4952. By act of the partners.
4953. By decree.
§ 4954. Post-dissolution transactions.
4955. Surviving partner.
4956. Liquidating partner.

§ 4950. In general.—There are various ways in which a partnership may be dissolved. For convenience they will be classified under three heads: by operation of law; by act of the partners themselves; and by the decree of a court of competent jurisdiction.

§ 4951. By operation of law.—In the first instance the death of one of the partners ordinarily terminates the partnership as to all the members thereof.[1] Even where a partnership

[1] Pigott v. Bayley, M'Clel. & Y. 569, 19 Eng. Rul. Cas. 509, note; Didlake v. Roden Grocery Co., 160 Ala. 484, 49 So. 384; Espy v. Comer, 76 Ala. 501; Knapp v. McBride, 7 Ala. 19; Lee v. Wimberly, 102 Ala. 539, 15 So. 444; Humphries v. McCraw, 5 Ark. 61; Louis v. Elfelt, 89 Cal. 547, 26 Pac. 1095; Gleason v. White, 34 Cal. 258; Filley v. Phelps, 18 Conn. 301; Canfield v. Hard, 6 Conn. 184; Ruggles v. Buckley, 175 Fed. 57, 27 L. R. A. (N. S.) 541, 99 C. C. A. 73; Carter v. Lipsey, 70 Ga. 417; Mulherin v. Rice, 106 Ga. 810, 32 S. E. 865; Talcott v. Dudley, 4 Scam. (Ill.) 427; McCall v. Moss, 112 Ill. 493; Forrester v. Oliver, 1 Ill. App. 259; Schmidt v. Archer, 113 Ind. 365, 14 N. E. 543; Cobble v. Tomlinson, 50 Ind. 550; Johnson v. Clark, 18 Kans. 157; Ellis v. Johnson, 4 Ky. L. 991; Price v. Succession of Mathews, 14 La. Ann. 11; Cane v. Battle, 3 La. Ann. 642; Smith v. Smith, 51 La. Ann. 72, 24 So. 618; Hamlin v. Mansfield, 88 Maine 131, 33 Atl. 788; Williamson v. Wilson, 1 Bland (Md.) 418; Goodburn v. Stevens, 5 Gill (Md.) 1; Walker v. House, 4 Md. Ch. 39; Hall v. Clagett, 48 Md. 223; Jenness v. Carleton, 40 Mich. 343; Hoard v. Clum, 31 Minn. 186, 17 N. W. 275; Mayson's Admr. v. Beazley's Admr., 27 Miss. 106; Beller v. Murphy, 139 Mo. App. 663, 123 S. W. 1029; Burwell v. Cawood, 2 How. (U. S.) 560, 11 L. ed. 378; Scholefield v. Eichelberger, 7 Pet. (U. S.) 586, 8 L. ed. 793; McKinzie v. United States, 34 Ct. Cl. (U. S.) 278; Crawshay v. Maule, 1 Swanst. 495-520; 19 Eng. Rul. Cas. 467-476; Ex parte Ruffin, 6 Ves. 119, 19 Eng. Rul. Cas. 626; Pitkin v. Pitkin, 7 Conn. 307, 18 Am. Dec. 111; Remick v. Emig, 42 Ill. 342; Nelson v. Hayner, 66 Ill. 487; Oliver v. Forrester, 96 Ill. 315; Knowlton v. Reed, 38 Maine 246; Dyer v. Clark, 5 Metc. (Mass.) 562, 39 Am. Dec. 697; Washburn v. Goodman, 17 Pick. (Mass.) 519; Van Kleeck v. McCabe, 87 Mich. 599, 49 N. W. 872, 24 Am. St. 182; Roberts v. Kelsey, 38 Mich. 602; Rob-

agreement provides for the continuance of the business after the death of any one of the partners,[2] it seems that, strictly speaking, the effect of such agreement upon the happening of the contingency mentioned, will be the formation of a new firm,[3] although the courts of some jurisdictions apparently take the view

ertshaw v. Hanway, 52 Miss. 713; Exchange Bank v. Tracy, 77 Mo. 594; Edwards v. Thomas, 66 Mo. 468; Mudd v. Bast, 34 Mo. 465; Gaskill v. Adams, 83 Mo. App. 380; Greenburg v. Early, 4 Misc. (N. Y.) 99, 30 Abb. N. Cas. (N. Y.) 300, 53 N. Y. St. 130, 23 N. Y. S. 1009; Ames v. Downing, 1 Bradf. Sur. (N. Y.) 321; Dexter v. Dexter, 43 App. Div. (N. Y.) 268, 60 N. Y. S. 371; Stewart v. Robinson, 115 N. Y. 328, 22 N. E. 160, 5 L. R. A. 410; Durant v. Pierson, 124 N. Y. 444, 26 N. E. 1095, 21 Am. St. 686; Egberts v. Wood, 3 Paige Ch. (N. Y.) 517, 24 Am. Dec. 236; Griswold v. Waddington, 15 Johns. (N. Y.) 57, affd. 16 Johns. (N. Y.) 438; Cheeseman v. Wiggins, 1 Thomp. & C. (N. Y.) 595; Sage v. Woodin, 66 N. Y. 578; Champion v. Williams, 2 Ohio Dec. 388, 2 Ohio (N. P.) 329; In re Smith's Estate, 11 Phila. (Pa.) 131; Gratz v. Bayard, 11 Serg. & R. (Pa.) 41; Darling's Estate, 7 Kulp (Pa.) 323; Potter v. Moses, 1 R. I. 430; Jones v. McMichael, 12 Rich. L. (S. Car.) 176; Fisher v. Tucker, 1 McCord Eq. (S. Car.) 169; Tompkins v. Tompkins, 18 S. Car. 1; Carroll v. Alston, 1 S. Car. 7; Bank of Mobile v. Andrews, 2 Sneed (Tenn.) 535; Isler v. Baker, 6 Humph. (Tenn.) 85; Landa v. Shook, 87 Tex. 608, 30 S. W. 536; Alexander's Exrs. v. Lewis, 47 Tex. 481; McNeish v. United States Hulless Oat Co., 57 Vt. 316; Walker v. Wait, 50 Vt. 668; Tenney v. New England Protective Union, 37 Vt. 64; Davis v. Christian, 15 Grat. (Va.) 11; Vilas v. Farwell, 9 Wis. 460.

[2] Page v. Ratliffe, 76 L. T. (N. S.) 63; Hunter v. Dowling (1895), 2 Ch. 223; Jennings v. Jennings, 67 L. J. Ch. 190; Ex parte Bevan, 10 Ves. Jr. 107; Dowse v. Gorton (1891), A. C. 190; In re Johnson, 15 Ch. Div. 548; Espey v. Comer, 76 Ala. 501; Houston v. Stanton, 11 Ala. 412; Knapp v. McBride, 7 Ala. 19; Edgar v. Cook, 4 Ala. 588; Duffield v. Brainerd, 45 Conn. 424; Blodgett v. American Nat. Bank, 49 Conn. 9; Butler v. American Toy Co., 46 Conn. 136; Rand v. Wright, 141 Ind. 226, 39 N. E. 447; Stanwood v. Owen, 14 Gray (Mass.) 195; Roberts v. Kelsey, 38 Mich. 602; Jenness v. Carlton, 40 Mich. 343; Mattison v. Farnham, 44 Minn. 95, 46 N. W. 347; Hoard v. Clum, 31 Minn. 186, 17 N. W. 275; Edwards v. Thomas, 66 Mo. 468; Scharringhausen v. Luebsen, 52 Mo. 337; Wild v. Davenport, 48 N. J. L. 129, 7 Atl. 295, 57 Am. Rep. 552; Stewart v. Robinson, 115 N. Y. 328, 22 N. E. 160, 163, 5 L. R. A. 410; Wilson v. Simpson, 89 N. Y. 619; Delemater v. Hepworth, 48 Hun (N. Y.) 618, 15 N. Y. St. 833, 2 N. Y. S. 310; In re Laney, 50 Hun (N. Y.) 15, 18 N. Y. St. 463, 2 N. Y. S. 443, affd. 119 N. Y. 607, 23 N. E. 1143; Peters v. Campbell, 2 Ohio Dec. (Reprint) 526, 3 West. L. Month. 587; Jones v. Procter, 5 Ohio Dec. 416, 5 Ohio N. P. 315; Wilcox v. Derickson, 168 Pa. St. 331, 31 Atl. 1080; In re Leaf's Appeal, 105 Pa. St. 505; Brew v. Hastings, 196 Pa. St. 222, 46 Atl. 257, 49 Am. St. 706; Roessler's Estate, 5 Pa. Dist. 776; Laughlin v. Lorenz's Admr., 48 Pa. St. 275, 86 Am. Dec. 592; Carter v. Young, 9 Lea (Tenn.) 210; Godfrey v. Templeton, 86 Tenn. 161, 6 S. W. 47; Morrow v. Morrow, 2 Tenn. Ch. 549; Alexander's Exrs. v. Lewis, 47 Tex. 481; Smith v. Ayer, 101 U. S. 320, 25 L. ed. 955; Jones v. Walker, 103 U. S. 444, 26 L. ed. 404; Burwell v. Cawood, 2 How. (U. S.) 560, 11 L. ed. 378; McNeish v. United States Hulless Oat Co., 57 Vt. 316; Walker v. Wait, 50 Vt. 668; Tenney v. New England Protective Union, 37 Vt. 64.

[3] Pitkin v. Pitkin, 7 Conn. 307, 18 Am. Dec. 111; Ellis v. Johnson, 4 Ky. L. 991; Mattison v. Farnham, 44 Minn. 95, 46 N. W. 347; Hoard v. Clum, 31 Minn. 186, 17 N. W. 275; Brenner v. Hische, 69 Miss. 309, 13 So. 730; Wild v. Davenport, 48 N. J.

that it will prevent the dissolution of the partnership.[4] Again, a partnership is dissolved by operation of law when either the firm itself or any one of its members is adjudged insolvent or a bankrupt.[5] In like manner an assignment for the benefit of creditors, ordinarily, it seems, accomplishes a dissolution.[6] And the continuation of the business after such adjudication or assignment will not in all probability change the effect of either.[7] Under the common law, the marriage of a female partner worked a dissolution of the firm of which she was a member.[8] It has also been held that the marriage of a man and woman who are partners will dissolve the partnership relation.[9] Again, the law may operate to dissolve a partnership when any event happens which renders business of the firm unlawful.[9a] So if a war breaks out which renders the members of the partnership alien enemies, it operates as a dissolution of the firm.[10]

L. 129, 7 Atl. 295, 57 Am. Rep. 552; Stewart v. Robinson, 115 N. Y. 328, 22 N. E. 160, 163, 5 L. R. A. 410; McGrath v. Cowen, 57 Ohio St. 385, 168 Pa. St. 331, 31 Atl. 1080. See also, Andrews v. Stinson, 254 Ill. 111, 98 N. E. 222, Ann. Cas. 1913B, 927, and note. And compare Lee v. Wimberly, 102 Ala. 539, 15 So. 444.

[4] Ferris v. Van Ingen, 110 Ga. 102; Rand v. Wright, 141 Ind. 226, 39 N. E. 447; Roberts v. Kelsey, 38 Mich. 602; Edwards v. Thomas, 66 Mo. 468; Farmers' &c. Sav. Inst. v. Garesche, 12 Mo. App. 584.

[5] Ex parte Ruffin, 6 Ves. 119, 19 Eng. Rul. Cas. 626; McNutt v. King, 59 Ala. 597; Lacey v. Cowan, 162 Ala. 546, 50 So. 281; Wells v. Ellis, 68 Cal. 243, 9 Pac. 80; Gordon v. Freeman, 11 Ill. 14; Talcott v. Dudley, 4 Scam. (Ill.) 427; Fitch v. Pryse, 4 Ky. L. 904; Williamson v. Wilson, 1 Bland (Md.) 418; Arnold v. Brown, 24 Pick. (Mass.) 89, 35 Am. Dec. 296; Eustis v. Bolles, 146 Mass. 413, 4 Am. St. 327; Atwood v. Gillett, 2 Doug. (Mich.) 206; Halsey v. Norton, 45 Miss. 703, 7 Am. Rep. 745; Greene v. Breck, 32 Barb. (N. Y.) 73; Marquand v. New York Mfg. Co., 17 Johns. (N. Y.) 525; Welles v. March, 30 N. Y. 344; Havens v. Hussey, 5 Paige Ch. (N. Y.) 30; Siegel v. Chidsey, 28 Pa. St. 279, 70 Am. Dec. 124; In re McKelvy's Appeal, 72 Pa. St. 409.

[6] Simmons v. Curtis, 41 Maine 373; Davis v. Megroz, 55 N. J. L. 427; Ferrero v. Buhlmeyer, 34 How. Pr. (N. Y.) 33; Carrol v. Evans, 27 Tex. 262; Riddle v. Whitehill, 135 U. S. 621, 34 L. ed. 283, 10 Sup. Ct. 924.

[7] Atwood v. Gillett, 2 Doug. (Mich.) 206. And compare Fitch v. Pryse, 4 Ky. L. 904.

[8] Little v. Grayson, 30 Pittsb. Leg. Jour. (N. S.) (Pa.) 222; Little v. Hazlett, 197 Pa. St. 591, 47 Atl. 855; Brown v. Chancellor, 61 Tex. 437. And compare Nerot v. Burnand, 4 Russ. 247; Alexander v. Morgan, 31 Ohio St. 546.

[9] Bassett v. Shepardson, 52 Mich. 3, 17 N. W. 217. And compare Burney v. Savannah Grocery Co., 98 Ga. 711, 58 Am. St. 342.

[9a] Esposito v. Bowden, 7 El. & Bl. 763; Griswold v. Waddington, 16 Johns. (N. Y.) 438.

[10] McAdams' Exrs. v. Hawes, 9 Bush (Ky.) 15; New York Life Ins. Co. v. Clopton, 7 Bush (Ky.) 179, 3 Am. Rep. 290; Seaman v. Waddington, 16 Johns. (N. Y.) 510; Buchanan v. Curry, 19 Johns. (N. Y.) 137, 10 Am. Dec. 200; Griswold v. Waddington, 15 Johns. (N. Y.) 57, affd. 16 Johns. (N. Y.) 438; Woods v. Wilder, 43 N. Y. 164, 3 Am. Rep. 684; New Orleans Bank v. Matthews, 49 N. Y. 12; Matthews v. McStea, 91 U. S. 7, 23 L. ed. 188; Booker v. Kirk-

§ 4952. **By act of the partners.**—Dissolution by act of the partners is worked ipso facto by the expiration of the limited period for which the partnership was formed.[11] So, also, the accomplishment of the particular transaction or venture to which the partnership was devoted terminates the relation.[12] In a recent Indiana case it is declared that the election and qualification of a member of a law firm as judge dissolves the partnership.[13] Of course, the fact that the partnership was or was not originally formed to continue for a definite period will not prevent the members of the firm from agreeing, at any time, to dissolve the relation which they then maintain.[14] This intent to dissolve need not ordinarily be expressed in words but may be implied, as for instance by discontinuance or abandonment of the partnership business,[15] or by sale of the whole of the partnership property and business.[16] If the length of life of a partnership has not been definitely fixed, the firm exists, in general, at will

patrick, 26 Grat. (Va.) 145; Taylor v. Hutchison, 25 Grat. (Va.) 536, 18 Am. Rep. 699.

[11] Ex parte Ruffin, 6 Ves. 119, 19 Eng. Rul. Cas. 626; Phillips v. Reeder, 18 N. J. Eq. 95; Morrill v. Weeks, 70 N. H. 178, 46 Atl. 32; Peyser v. Myers, 63 Hun (N. Y.) 634, 45 N. Y. St. 413, 18 N. Y. S. 736, affd. 135 N. Y. 599, 32 N. E. 699; Masters v. Brooks, 132 App. Div. (N. Y.) 874, 117 N. Y. S. 585; Hoffman v. Hauptner, 135 App. Div. (N. Y.) 148, 119 N. Y. S. 1022; Schlater v. Winpenny, 75 Pa. St. 321; Isler v. Baker, 6 Humph. (Tenn.) 85; Bank of Mobile v. Andrews, 2 Sneed (Tenn.) 535.

[12] Bank of Montreal v. Page, 98 Ill. 109; Spurck v. Leonard, 9 Ill. App. 174; Bohrer v. Drake, 33 Minn. 408, 23 N. W. 840; McAuley v. Palmer, 53 Hun (N. Y.) 635, 25 N. Y. St. 969, 6 N. Y. S. 402, 3 Silvernail 245, affd. 125 N. Y. 742, 26 N. E. 912, 4 Silvernail Ct. App. 339; Kennedy v. Porter, 109 N. Y. 526, 17 N. E. 426; Jones v. Jones, 18 Ohio C. C. 260, 10 Ohio C. D. 71; Sims v. Smith, 11 Rich. (S. Car.) 565. And compare Petrikin v. Collier, 1 Pa. St. 247.

[13] Felt v. Mitchell (Ind. App.), 88 N. E. 723.

[14] Ex parte Ruffin, 6 Ves. 119, 19 Eng. Rul. Cas. 626; Phelps v. State, 109 Ga. 115, 34 S. E. 210; Bank of Montreal v. Page, 98 Ill. 109; Richardson v. Gregory, 126 Ill. 166, 18 N. E. 777; Ligare v. Peacock, 109 Ill. 94; Wantling v. Howarth, 65 Ill. App. 598; Kelley v. Hanes, 143 Ill. App. 1; Wood v. Fox's Heirs, 1 A. K. Marsh. (Ky.) 451; Wood v. Gault, 2 Md. Ch. 433; Dille v. Parker, 204 Mass. 163, 90 N. E. 520; Ferguson v. Baker, 116 N. Y. 257; Bushby v. Berkeley, 135 App. Div. (N. Y.) 443, 119 N. Y. S. 739; Gould v. Banks, 8 Wend. (N. Y.) 562. And compare Stevenson v. Shields, 7 La. 433; Truesdell v. Baker, 2 Rich. L. (S. Car.) 351.

[15] Richardson v. Gregory, 126 Ill. 166, 18 N. E. 777, affg. 27 Ill. App. 621; Spurck v. Leonard, 9 Ill. App. 174; Ligare v. Peacock, 109 Ill. 94; Potter v. Tolbert, 113 Mich. 486, 71 N. W. 849; Dobbins v. Tatem (N. J.), 25 Atl. 544; Ferguson v. Baker, 116 N. Y. 257; Green v. Waco State Bank, 78 Tex. 2, 14 S. W. 253. And compare Wright v. Cudahy, 168 Ill. 86, 48 N. E. 39; Shakopee First Nat. Bank v. Strait, 75 Minn. 396, 78 N. W. 101.

[16] Coggswell &c. Co. v. Coggswell (N. J.), 40 Atl. 213; In re Welles, 191 Pa. St. 239, 43 Atl. 207.

and may be dissolved whenever any one of its members bona fide[17] so chooses,[18] and his desire in this regard may be indicated by his

[17] "The Supreme Court of Arkansas, in Howell v. Harvey, 5 Ark. 270, 39 Am. Dec. 376, said this: 'As a general principle, contracts subsisting during pleasure, are naturally and necessarily dissolvable by the mere exercise of the will of either of the parties; and this is the principle according to the civil law under ordinary circumstances. * * * In cases of equity, we think the true rule to be this, that to enable one partner to dissolve at will the partnership, two things must occur; first, the renunciation of the partnership must be in good faith, and secondly, it must not be made at an unreasonable time. This is the doctrine of the civil law.' The rule laid down in the second paragraph of the foregoing excerpt was not the rule of the common law (see 30 Cyc. Law & Proc., p. 650; Meysenburg v. Littlefield, 135 Fed. 184; Blake v. Sweeting, 121 Ill. 67, 12 N. E. 67; Carlton v. Cummins, 51 Ind. 478; Koenig v. Adams, 37 Kans. 52, 14 Pac. 439), and is not the rule in this state, either at law or in equity, unless it is made so by § 5475, Rev. Codes.'" Freund v. Murray (Mont.), 104 Pac. 683. See also, Stitt v. Rat Portage Lumber Co., 98 Minn. 52, 107 N. W. 824.

[18] "It is universally conceded that a contract of partnership containing no stipulation as to the time during which it shall continue in force does not endure for the life of the partners, or of either of them, nor for any longer time than their mutual consent, [and] may be dissolved by either partner at his own will at any time." Karrick v. Hannaman, 168 U. S. 328, 42 L. ed. 484, 18 Sup. Ct. 135. Champlin, J., delivering the opinion of the court in Walker v. Whipple, 58 Mich. 476, 25 N. W. 472, says: "In this case it is conceded that the copartnership entered into was not limited by the express agreement of the parties. It was therefore determinable, in the absence of fraud, at the will of either party. I do not agree that a limitation may be ingrafted upon such a copartnership agreement by implication arising out of the business engaged in, or the circumstances of the case. It may be said that it is generally understood that such contract relations are not formed except with a view of engaging in some business which may require both time and capital to carry out the object for which the partnership was formed. It is nevertheless true that unless the term for which the partnership is to continue is limited or fixed by the agreement, either party may, at his pleasure, dissolve the relation. This is elementary law. The defendant exercised his right, and the partnership was dissolved by his refusing to continue the business further in company with complainant. It does not concern us what his reasons or notions for doing so were." See further, Featherstonhaugh v. Fenwick, 17 Ves. 298; Peacock v. Peacock, 16 Ves. Jr. 49; Crawshay v. Maule, 1 Swanst. 495-508; Howell v. Harvey, 5 Ark. 270, 39 Am. Dec. 376; Lawrence v. Robinson, 4 Colo. 567; Lapenta v. Lettieri, 72 Conn. 377, 44 Atl. 730, 77 Am. St. 315; Null v. Parsons, 145 Ill. App. 436; Carlton v. Cummins, 51 Ind. 478; Blaker v. Sands, 29 Kans. 551; Koenig v. Adams, 37 Kans. 52, 14 Pac. 439; Whiting v. Leakin, 66 Md. 255, 7 Atl. 688; Whitman v. Robinson, 21 Md. 30; Fletcher v. Reed, 131 Mass. 312; Buck v. Smith, 29 Mich. 166, 18 Am. Rep. 84; Berry v. Folkes, 60 Miss. 576; Gaty v. Tyler, 33 Mo. App. 494; Freund v. Murray, 39 Mont. 539, 104 Pac. 683, 25 L. R. A. (N. S.) 959; Dobbins v. Tatem (N. J.), 25 Atl. 544; Wood v. Warner, 15 N. J. Eq. 81; Pine v. Ormsbee, 2 Abb. Pr. (N. S.) (N. Y.) 375; Briggs v. Weidmann Cooperage Co., 3 N. Y. S. 813, 24 N. Y. St. 300, affg. 125 N. Y. 704, 26 N. E. 752; Loorya v. Kupperman, 25 Misc. (N. Y.) 518, 54 N. Y. S. 1005; McElvey v. Lewis, 76 N. Y. 373; Smith v. Ervin, 168 Pa. St. 271, 31 Atl. 1067; Yoos v. Doyle, 4 Lack. Leg. N. (Pa.) 128; Heck v. McEwen, 12 Lea (Tenn.) 97; Green v. Waco State Bank, 78 Tex. 2, 14 S. W. 253; Rice v. Angell, 73 Tex. 350, 11 S. W. 338, 3 L. R. A. 769; McMahon v. McClernan, 10 W.

merely giving notice to the other partner or partners.[19] Likewise the intention of a partner to accomplish a dissolution of the firm may, it seems, be effected by conduct such as removing the personal effects of his associates during the latter's absence from the building in which the partnership business is conducted, and refusing to permit him to longer engage in the partnership business.[20] So, also, it has been held that where no definite provision was made as to the time during which the partnership was to continue, and no formal notice of an intention to dissolve was given prior to the bringing of suit, the partnership will be treated as being strictly at will and as dissolved from the date of filing the bill.[20a] Further a partner who has dissolved the firm is not ordinarily liable in damages for loss resulting to his copartners from his conduct, at least when he has acted in good faith and without fraud.[21] These principles, however, do not apparently apply when the firm has come into being, unattended by any prescribed limit as to the length of its existence, for the accomplishment of a particular object; in such case, it seems, dissolution prior to the achievement of the purpose of the partnership should only be for cause.[22] Where a partnership has been formed to continue for a definite period, the right

Va. 419. And compare Beaver v. Lewis, 14 Ark. 138.

[19] "The dissolution of a partnership at will may be implied from circumstances; but, when not the result of mutual agreement there must be notice by the party desiring a dissolution, to his copartner, of his election to terminate the partnership, or his election must be manifested by unequivocal acts or circumstances brought to the knowledge of the other party, which signify the exercise of the will of the firm that the partnership be dissolved." Spears v. Willis, 151 N. Y. 443, 45 N. E. 849. Quoted in Freund v. Murray, 39 Mont. 539, 104 Pac. 683, 25 L. R. A. (N. S.) 959. See further, Blake v. Sweeting, 121 Ill. 67, 12 N. E. 67; Boyd v. Tabb, 7 Ky. L. (abstract) 225; Avery v. Craig, 173 Mass. 153; Major v. Todd, 84 Mich. 85, 47 N. W. 841; Baldwin v. Walser, 41 Mo. App. 243; Beller v. Murphy, 139 Mo. App. 663, 123 S. W. 1029; Abbot v. Johnson, 32 N. H. 9; Skinner v. Tinker, 34 Barb. (N. Y.) 333; Eagle v. Bucher, 6 Ohio St. 295, 57 Am. Dec. 342; Yoos v. Doyle, 4 Lack. Leg. N. (Pa.) 128. And compare Wilson v. Davis, 1 Mont. 183.

[20] Solomon v. Kirkwood, 55 Mich. 256, 21 N. W. 336; Freund v. Murray, 39 Mont. 539, 104 Pac. 683, 25 L. R. A. (N. S.) 959.

[20a] Wiggins v. Brand, 202 Mass. 141, 88 N. E. 840.

[21] Fletcher v. Reed, 31 Mass. 312; Walker v. Whipple, 58 Mich. 476, 25 N. W. 472; Gaty v. Tyler, 33 Mo. App. 494; Baldwin v. Walser, 41 Mo. App. 243; Beller v. Murphy, 139 Mo. App. 663, 123 S. W. 1029; Freund v. Murray, 39 Mont. 539, 104 Pac. 683, 25 L. R. A. (N. S.) 959.

[22] Beaver v. Lewis, 14 Ark. 138; Burgess v. Badger, 124 Ill. 288, 14 N. E. 850; Walker v. Whipple, 58 Mich. 476, 25 N. W. 472; Hubbell v.

of a partner to dissolve at will is an open question.[23] Even if he has such right he may nevertheless by his exercise thereof without cause, render himself liable in damages to his copartners.[24] As a general rule, any change in the membership of a

Buhler, 43 Hun (N. Y.) 82, 6 N. Y. St. 578; Pearce v. Ham, 113 U. S. 585, 28 L. ed. 1067, 5 Sup. Ct. 676. And compare Cole v. Moxley, 12 W. Va. 730.

[23] That the dissolution of such a partnership may be accomplished at will, see Solomon v. Kirkwood, 55 Mich. 256, 21 N. W. 336, in which Cooley, C. J., delivering the opinion of the court says: "The rule on this subject is thus stated in an early New York case. The right of a partner to dissolve, it is said, 'is a right inseparably incident to every partnership. There can be no such thing as an indissoluble partnership. Every partner has an indefeasible right to dissolve the partnership, as to all future contracts, by publishing his own volition to that effect; and after such publication the other members of the firm have no capacity to bind him by any contract. Even where the partners covenant with each other that the partnership shall continue several years, either partner may dissolve it the next day by proclaiming his determination for this purpose; the only consequence being that he thereby subjects himself to a claim for damages for a breach of his contract. The power given by one partner to another to make joint contracts for them both is not only a revocable power, but a man can do no act to divest himself of the capacity to revoke it.' Skinner v. Dayton, 19 Johns. 513, 538." And also, Blake v. Dorgan, 1 G. Greene (Iowa) 537; Walker v. Whipple, 58 Mich. 476, 25 N. W. 472; Mason v. Connell, 1 Whart. (Pa.) 381; Bagley v. Smith, 10 N. Y. 489, 19 How. Pr. (N. Y.) 1, 61 Am. Dec. 756; In re Slemmer's Appeal, 58 Pa. St. 168, 98 Am. Dec. 255; Kinloch v. Hamlin, 2 Hill Eq. (S. Car.) 19, 27 Am. Dec. 441. Contra, Howell v. Harvey, 5 Ark. 270, 39 Am. Dec. 376; Ross v. Cornell, 97 Ga. 340, 22 S. E. 394; Hartman v. Woehr, 18 N. J. Eq. 383; Ferrero v. Buhlmeyer, 34 How. Pr. (N. Y.) 33; Smith v. Mulock, 24 N. Y. Super. Ct. 569, 1 Abb. Pr. (N. S.) (N. Y.) 374; Bishop v. Breckels, 1 Hoff. Ch. (N. Y.) 534; Von Tagen v. Roberts, 2 Pearson (Pa.) 137; Hannaman v. Karrick, 9 Utah 236, 33 Pac. 1039, affd. 168 U. S. 328, 42 L. ed. 484, 18 Sup. Ct. 135; Pearpoint v. Graham, 4 Wash. C. C. (U. S.) 232, Fed. Cas. No. 10877; Cole v. Moxley, 12 W. Va. 730.

[24] "Some courts have held that a partner cannot terminate such a partnership [one formed for a specific purpose or for a specified time] at will; but the trend of the authorities now is that it may be done, but, if it is done without legal cause, it will subject the wrongdoer to liability for resulting damages." Beller v. Murphy, 139 Mo. App. 663, 123 S. W. 1029. "There may be cases in which equity would enjoin a dissolution for a time, when the circumstances were such as to make it specially injurious. * * * When one partner becomes dissatisfied there is commonly no legal policy to be subserved by compelling a continuance of the relation, and the fact that a contract will be broken by the dissolution is no argument against the right to dissolve. Most contracts may be broken at pleasure, subject, however, to responsibility in damages. And that responsibility would exist in breaking a contract of partnership as in other cases." Cooley, C. J., in Solomon v. Kirkwood, 55 Mich. 256, 21 N. W. 336; Blake v. Dorgan, 1 G. Green (Iowa) 537; Monroe v. Conner, 15 Maine 178, 32 Am. Dec. 148; Bagley v. Smith, 10 N. Y. 489, 19 How. Pr. 1, 61 Am. Dec. 756; Hagenears v. Herbst, 30 App. Div. (N. Y.) 546, 52 N. Y. S. 360, affd. 164 N. Y. 603, 58 N. E. 1088; Westwood v. Cole, 120 N. Y. S. 884; Skinner v. Dayton, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286; Cockley v. Brucker, 54 Ohio St. 214; Addams v. Tutton, 39 Pa. St. 447; Mason v. Connell, 1 Whart. (Pa.) 381; Karrick v. Han-

firm operates as a dissolution of the same and the formation of a new partnership.[25] Thus, by the weight of authority, the transfer of a partner's interest works a dissolution of the partnership,[26] except, perhaps, when such transfer is contemplated

naman, 168 U. S. 328, 42 L. ed. 484, 18 Sup. Ct. 135; Cole v. Moxley, 12 W. Va. 730. And compare Bishop v. Breckles, 1 Hoff. Ch. (N. Y.) 534.

[25] Hatchett v. Blanton, 72 Ala. 423; Ross v. Cornell, 45 Cal. 133; McCall v. Moss, 112 Ill. 493; Blake v. Sweeting, 21 Ill. 67, 12 N. E. 67; White v. White, 5 Gill (Md.) 359; Arnold v. Brown, 24 Pick. (Mass.) 89, 35 Am. Dec. 296; Houghton v. Bradley, 113 Mich. 599, 71 N. W. 1112; Henry v. Mahone, 23 Mo. App. 83; Mudd v. Bast, 34 Mo. 465; Allen v. Logan, 96 Mo. 591, 10 S. W. 149; Potter v. Moses, 1 R. I. 430; Bank of Mobile v. Andrews, 2 Sneed (Tenn.) 535; Euless v. Tomlinson (Tex. Civ. App.), 38 S. W. 534; Mensing v. Atchison (Tex. Civ. App.), 26 S. W. 509; Shedd v. Brattleboro Bank, 32 Vt. 709; Peters v. McWilliams, 78 Va. 567. See ante, § 4951. And compare Rice v. Maddox, 16 Daly (N. Y.) 156. Apparently, however, a change in the name of the firm without any change in the membership thereof does not work a dissolution of the partnership. Billingsley v. Dawson, 27 Iowa 210; Gill v. Ferris, 82 Mo. 156.

[26] Heath v. Sanson, 4 B. & Ad. 172; Rowe v. Simmons, 113 Cal. 688, 45 Pac. 983; Chapman v. Hughes, 104 Cal. 302, 37 Pac. 1048, 38 Pac. 109; Schurtz v. Romer, 82 Cal. 474, 23 Pac. 118; Miller v. Brigham, 50 Cal. 615; Bradley v. Harkness, 26 Cal. 69; Schleicher v. Walker, 28 Fla. 680, 10 So. 33; Phelps v. State, 109 Ga. 115, 34 S. E. 210; Clark v. Carr, 45 Ill. App. 469; Edens v. Williams, 36 Ill. 252; Summerlot v. Hamilton, 121 Ind. 87, 22 N. E. 973; Barkly v. Tapp, 87 Ind. 25; Love v. Payne, 73 Ind. 80, 38 Am. Rep. 111; Reece v. Hoyt, 4 Ind. 169; Chase v. Scott, 33 Iowa 309; McAdams' Exrs. v. Hawes, 9 Bush (Ky.) 15; Conwell v. Sandidge's Admr., 5 Dana (Ky.) 210; Spaunhorst v. Link, 46 Mo. 197; Freeman v. Hemenway, 75 Mo. App. 611; Tennent v. Guenther, 31 Mo. App. 429; Renton v. Chaplain, 9 N. J. Eq. 62; Mechanics' Bank v. Godwin, 5 N. J. Eq. 334; Schlicher v. Vogel, 61 N. J. Eq. 158, 47 Atl. 448, affd. 65 N. J. Eq. 404, 54 Atl. 1125; De Manderfield v. Field, 7 N. Mex. 17; Comstock v. Buchanan, 57 Barb. (N. Y.) 127, affd. 57 Barb. (N. Y.) 146, and note; Mumford v. McKay, 8 Wend. (N. Y.) 442, 24 Am. Dec. 34; Marquand v. New York Mfg. Co., 17 Johns. (N. Y.) 525; Sistare v. Cushing, 4 Hun (N. Y.) 503; Swoope v. Wakefield, 10 Pa. Super. Ct. 342; In re Horton's Appeal, 13 Pa. St. 67; Power v. Kirk, 1 Pittsb. (Pa.) 510; Wilson v. Waugh, 101 Pa. St. 233; Cochran v. Perry, 8 W. & S. (Pa.) 262; Heck v. McEwen, 12 Lea (Tenn.) 97; Babb v. Mosby, 7 Lea. (Tenn.) 105; Schuster v. Freudenthal, 74 Tex. 53, 11 S. W. 1051; Sanchez v. Goldfrank (Tex. Civ. App.), 27 S. W. 204; Carroll v. Evans, 27 Tex. 262; Moore v. Steele, 67 Tex. 435, 3 S. W. 448; Watson v. McKinnon, 73 Tex. 210, 11 S. W. 197; Kellar v. Self, 5 Tex. Civ. App. 393, 24 S. W. 578; Schneider v. De Smith, 2 Tex. Unrep. Cas. 317; Karrick v. Hannaman, 168 U. S. 328, 42 L. ed. 484, 18 Sup. Ct. 135; Fourth Nat. Bank v. New Orleans &c. R. Co., 11 Wall. (U. S.) 624, 20 L. ed. 82. See Waller v. Davis, 59 Iowa 103, 12 N. W. 798; Wiggin v. Goodwin, 63 Maine 389; Taft v. Buffum, 14 Pick. (Mass.) 322; Davis v. Megroz, 55 N. J. L. 427; Rogers v. Nichols, 20 Tex. 719. And compare Cody v. Cody, 31 Ga. 619; State v. Quick, 10 Iowa 451; Russell v. Leland, 12 Allen (Mass.) 349; Russell v White, 63 Mich. 409, 29 N. W. 865. This, however, does not apparently hold good as to mining partnerships. Settembre v. Putnam, 30 Cal. 490; Skillman v. Lachman, 23 Cal. 198, 83 Am. Dec. 96; Harris v. Lloyd, 11 Mont. 390, 28 Pac. 736, 28 Am. St. 475; Bissell v. Foss, 114 U. S. 252, 29 L. ed. 126, 5 Sup. Ct. 851. "A commercial partnership is dissolved when

by the partnership agreement,[27] but while in some cases it has been held that the formation of a corporation which takes over the business and all the assets of the firm works a dissolution of the partnership, the authorities do not, at first glance, speak as with one voice upon this subject.[28]

§ 4953. By decree.—When a partnership is formed to continue for a specified time and cannot be terminated at will without the risk that the dissolving partner will be liable to respond to his associates in damages, resort may be had to a court of equity

one of the partners disposes of his interest, but a mining partnership, which results from the operation of a mine by some of the joint owners with the consent of the others, is not dissolved by the conveyance by one of these owners of his interest in the mine or the lease to a stranger; but the grantor then ceases to be a member of the copartnership, and the stranger becomes a partner in his place. The delectus personae which is an essential element of an ordinary partnership is not an indispensable attribute of a mining partnership." Loy v. Alston, 172 Fed. 90. See also, Bentley v. Brossard, 33 Utah 396, 94 Pac. 736.

[27] Heck v. McEwen, 12 Lea (Tenn.) 27. And compare Gorder v. Pankonin, 83 Nebr. 204, 119 N. W. 449, 131 Am. St. 629, in which it is said on page 633: "It is said that an assignment of a partner's interest works a dissolution of the firm, and many authorities are cited to sustain this proposition. The reason for the rule is that a partner cannot introduce a new member into the firm without the consent of the other members, nor make them members of another firm; but there is no rule of law which forbids a partnership, with the consent of all its members, to admit a new member, and when members so taken in are recognized and treated by all as partners, and the business is continued with them under the original agreement, this is sufficient to make them partners, and does not work a dissolution of the firm." Ferrero v. Buhlmeyer, 34 How. Pr. (N. Y.) 33.

[28] In a well considered note appended to Seufert v. Gille, 230 Mo. 453, 131 S. W. 102, 31 L. R. A. (N. S.) 471, it is said: "Dissolution of Partnership by Reason of Formation of Corporation. The question indicated by the foregoing title has received a negative answer in some cases and a positive answer in others, but this is due not so much to differences of opinion with respect to the state of the law as variations in state of fact. It is probably safe to say that the mere formation of a corporation does not necessarily terminate the partnership which it succeeds, and that whether it does or not depends on the additional and peculiar facts and circumstances of each case. For instance, in determining this question it is important to observe whether the partners themselves intended the partnership should be dissolved, or whether the firm did in fact cease to do business and was succeeded in all things by the corporation. These and other facts and circumstances go to effect the result in the particular case. This question of the dissolution of a firm by the formation of a corporation has sometimes arisen in cases where no rights of third persons, like creditors, have intervened, and the circumstances of some cases have been held to indicate a dissolution while the circumstances in other cases have been held to negative it." See further Cape Sable Co.'s Case, 3 Bland Ch. (Md.) 606; Coggswell &c. Co. v. Coggswell (N. J. Eq.), 40 Atl. 213; Hennessy v. Griggs, 1 N. Dak. 52, 44 N. W. 1010; Francklin v. Sprague, 121 U. S. 215, 30 Law. Ed. 936, 7 Sup. Ct. 951. And compare Whitely

to decree dissolution.[29] This the court will undoubtedly do when it appears that the party seeking release was induced to become a partner by means of fraud or deceit,[30] or, at the option of the complainant, it will, where there has been no ratification of the partnership agreement after the fraud was discovered,[31] decree a rescission of the same and require the defendants to place their associate in statu quo.[32] So, also, where insanity of a permanent, hopeless nature beclouds the mind of one of the members of the firm, equity may properly dissolve the partnership.[33] Likewise, it has been declared that a bill for dissolution may be predicated on either the ill health, or lack of requisite

v. Bradley, 13 Cal. App. 720, 110 Pac. 596; Pearce v. Sutherland, 164 Fed. 609, 90 C. C. A. 519; Watkins v. Delahunty, 133 App. Div. (N. Y.) 422, 117 N. Y. S. 885; Ruettell v. Greenwich Ins. Co., 16 N. Dak. 546, 113 N. W. 1029; Metz v. Commercial Bank, 45 S. Car. 216, 23 S. E. 13.

[29] Northen v. Tatum, 164 Ala. 368, 51 So. 17; Howell v. Harvey, 5 Ark. 270, 39 Am. Dec. 376; Moran v. Mcinerney, 129 Cal. 29, 61 Pac. 575, 948; Kennedy v. Kennedy, 3 Dana (Ky.) 242; Sieghortner v. Weissenborn, 20 N. J. Eq. 172, revd. 21 N. J. Eq. 483; Berolzheimer v. Strauss, 7 Civ. Proc. (N. Y.) 225, 51 N. Y. Super. Ct. 96; Waterbury v. Merchants' Union Exp. Co., 50 Barb. (N. Y.) 157; Richards v. Baurman, 65 N. Car. 162; Durbin v. Barber, 14 Ohio 311; Fleming v. Carson, 37 Ore. 252; Bank of Mobile v. Andrews, 2 Sneed (Tenn.) 535; Isler v. Baker, 6 Humph. (Tenn.) 85; Swepson v. Davis (Tenn. Ch.), 60 S. W. 619; Daniel v. Gillespie, 65 W. Va. 366, 64 S. E. 254; Wood v. Beath, 23 Wis. 254. Dissolution by contract, however, precludes action for same. Adams v. Carmony, 44 Ind. App. 291, 87 N. E. 708, 89 N. E. 327. See further, Hoffman v. Hauptner, 135 App. Div. (N. Y.) 148, 119 N. Y. S. 1022; Connelley v. Custer, 52 Wash. 697, 100 Pac. 335.

[30] "If he has been induced to enter into the partnership contract through the deceit of his copartner, he may withdraw whenever the fraud practiced upon him becomes known." He is not "required to continue in the firm until the partnership expires by limitation of time, but is at liberty at once to ask for a dissolution and a winding up of the affairs of the partnership." Rosenstein v. Burns, 41 Fed. 841. See further, Howell v. Harvey, 5 Ark. 270, 39 Am. Dec. 376; Hynes v. Stewart, 10 B. Mon. (Ky.) 429; Gibson v. Cunningham, 92 Mo. 131, 5 S. W. 12; Harlow v. La Brum, 82 Hun (N. Y.) 292, 64 N. Y. St. 72, 31 N. Y. S. 487, affd. 151 N. Y. 278, 45 N. E. 859; Oteri v. Soalzo, 145 U. S. 578, 36 L. ed. 824, 12 Sup. Ct. 895.

[31] St. John v. Hendrickson, 81 Ind. 350. And compare Hunter v. Whitehead, 42 Mo. 524.

[32] Newbigging v. Adam, 34 Ch. Div. 582; Mycock v. Beatson, 13 Ch. Div. 384; Pillans v. Harkness, Colles 442; Rawlins v. Wickham, 3 De G. & J. 304; Howell v. Harvey, 5 Ark. 270, 39 Am. Dec. 376; Richards v. Todd, 127 Mass. 167.

[33] "The rule supported by the decided weight of authority, and announcing the correct doctrine, is that the insanity of a partner does not, per se, work a dissolution of the partnership, but may constitute sufficient grounds to justify a court of equity in decreeing its dissolution. But this doctrine must be understood and is applied by courts of equity with appropriate limitations and restrictions; for, while curable, temporary insanity will be sufficient, upon an inquisition, to sustain an adjudication of insanity in the county court, * * * yet it will not authorize a court of chancery to decree a

skill of a partner,[34] or on the fact that loss only will accompany the prosecution of the business should the same be continued until the arrival of the time anteriorly determined upon as that at which the partnership relation was to cease.[35] Again, equity will administer relief to a partner whose associate so conducts himself as to render further concerted action impracticable.[36] Thus it seems that dissolution may be properly decreed on account of bad faith in the matter of the partnership accounts;[37] of the disposition of firm property in settlement of private debts;[38] or

dissolution of a partnership, if the malady be temporary only, with a fair prospect of recovery within a reasonable time." Raymond v. Vaughn, 128 Ill. 256, 21 N. E. 566, 4 L. R. A. 440, 15 Am. St. 112. See further, Jones v. Noy, 2 Myl. & K. 125; Jones v. Lloyd, L. R. 18 Eq. 265; Whitwell v. Arthur, 35 Beav. 140; Kirby v. Carr, 3 Younge & C. 184; Jurgens v. Ittmann, 47 La. Ann. 367, 16 So. 952; Griswold v. Waddington, 15 Johns. (N. Y.) 57, affd. 16 Johns. (N. Y.) 438; Friedburgher v. Jaberg, 20 Abb. N. Cas. (N. Y.) 279.

[34] Casky v. Casky, 5 Ky. L. 775; Barclay v. Barrie, 64 Misc. (N. Y.) 403, 119 N. Y. S. 463. And compare Barclay v. Barrie, 142 App. Div. (N. Y.) 670, 127 N. Y. S. 403, in which it is held that a partnership will not be dissolved because one of the parties suffered a paralytic stroke when there was a probability that he would be able to resume his partnership duties before the expiration of the partnership term.

[35] A partner "is at liberty to withdraw himself and his capital from the concern whenever it becomes reasonably certain that the business can no longer be carried on at a profit, whether through the misconduct of his copartner or from a failure of the business itself." He is not "required to continue in the firm until the partnership expires by limitation of time, but is at liberty at once to ask for a dissolution and a winding up of the affairs of the partnership." Rosenstein v. Burns, 41 Fed. 841. See further Jennings v. Baddeley, 3 Kay & J. 78; Wilson v. Church, 13 Ch. Div. 1; Sieghortner v. Weissenborn, 20 N. J. Eq. 172, revd. 21 N. J. Eq. 483; Holladay v. Elliott, 8 Ore. 84; Heck v. McEwen, 12 Lea (Tenn.) 97.

[36] "But it is not considered to be the duty of the court to enter into partnership squabbles, and it will not dissolve a partnership on the ground of the ill-temper or misconduct of one or more of the partners unless the others are in effect excluded from the concern, or unless the misconduct is of such a nature as utterly to destroy the mutual confidence which must subsist between partners if they are to continue to carry on their business together." Lindley Partn. 580. See further Harrison v. Tennant, 21 Beav. 482; Goodman v. Whitcomb, 1 Jac. & W. 589; Smith v. Jeyes, 4 Beav. 503; Anonymous, 2 Kay & J. 441; Moore v. Price, 116 Ala. 247, 22 So. 531; Howell v. Harvey, 5 Ark. 270, 39 Am. Dec. 376; Rosenstein v. Burns, 41 Fed. 841; Gerard v. Gateau, 84 Ill. 121, 25 Am. Rep. 438; Cash v. Earnshaw, 66 Ill. 402; Levi v. Karrick, 8 Iowa 150; Blake v. Dorgan, 1 G. Greene (Iowa) 537; Groth v. Payment, 79 Mich. 290, 44 N. W. 611; Bishop v. Breckles, Hoff. Ch. (N. Y.) 534; Flammer v. Green, 47 N. Y. Super. Ct. 538; Llorens v. Costa, 5 N. Y. Wkly. Dig. 484; Henn v. Walsh, 2 Edw. Ch. (N. Y.) 129; Berry v. Cross, 3 Sandf. Ch. (N. Y.) 1; Reiter v. Morton, 96 Pa. St. 229; Werner v. Leisen, 31 Wis. 169; Singer v. Heller, 40 Wis. 544.

[37] Cheesman v. Price, 35 Beav. 142; Cottle v. Leitch, 35 Cal. 434; Adams v. Shewalter, 139 Ind. 178, 38 N. E. 607; Werner v. Leisen, 31 Wis. 169; Wood v. Beath, 23 Wis. 254.

[38] Hubbard v. Moore, 67 Vt. 532, 32 Atl. 465.

for breach of the partnership articles.[39] Further, a partner who refuses to consult his associate or allow him to participate in the management of the common business cannot, it seems, successfully resist the termination by a court of equity of the existence of the firm.[40] Where a lack of harmony and agreement impair the carrying out of the purpose for which the partnership was formed, dissolution may undoubtedly be required,[41] as it also may, apparently, when any one of the partners insists upon ignor-

[39] "A partner is under no obligation to continue a member of a partnership when his copartner persistently and willfully violates the essential conditions upon which the contract of the partnership rests. He is not under the necessity of remaining in the firm, and resorting to his action at law upon the partnership contract for redress." Rosenstein v. Burns, 41 Fed. 841. See further Moore v. Price, 116 Ala. 247, 22 So. 531; Breaux v. Le Blanc, 50 La. Ann. 228, 23 So. 281, 69 Am. St. 403; Bruce v. Ross, 18 La. 341; Abbott v. Johnson, 32 N. H. 9; Westwood v. Cole, 66 Misc. (N. Y.) 53, 120 N. Y. S. 884; Durbin v. Barber, 14 Ohio 311.

[40] "If part of the capital of an agreed partnership has been paid, accepted, and used, and the business has been commenced in the name of the firm, he is an actual partner until the partnership is legally dissolved, and a mere exclusion of such person by the others from the business of the firm by illegal acts on their part is not a legal dissolution, but is a ground for an application to a court of equity for a dissolution upon his part." Hartman v. Woehr, 18 N. J. Eq. 383. "If, as alleged, the defendant is insolvent, and has taken possession of the partnership's property and converted the same to his own use, and refused to consult or allow the plaintiff to participate in the management of the firm's business, it is a sufficient ground to dissolve the partnership, and to entitle the plaintiff to the settlement thereof." Havner v. Stephens, 22 Ky. L. 498, 58 S. W. 372; Gorman v. Russell, 14 Cal. 531; Einstein v. Schnebly, 89 Fed. 540; Kennedy v. Kennedy, 3 Dana (Ky.) 239; Beller v. Murphy, 139 Mo. App. 663, 123 S. W. 1029; Nathan v. Bacon, 75 N. J. Eq. 401, 72 Atl. 359; Hartman v. Woehr, 18 N. J. Eq. 383; Wilcox v. Pratt, 52 Hun (N. Y.) 340, 23 N. Y. St. 686, 5 N. Y. S. 361, affd. 125 N. Y. 688, 3 Silvernail Ct. App. (N. Y.) 199, 25 N. E. 1091; Candee v. Baker, 131 App. Div. (N. Y.) 641, 116 N. Y. S. 55; Gowan v. Jeffries, 2 Ashm. (Pa.) 296; Holder v. Shelby (Tex. Civ. App.), 118 S. W. 590; Werner v. Leisen, 31 Wis. 169. And compare Hewitt v. Hayes, 204 Mass. 586, 90 N. E. 985; Karrick v. Hannaman, 168 U. S. 328, 42 L. ed. 484, 18 Sup. Ct. 135.

[41] "That such embittered relations may exist as would render it impracticable to conduct the business, and justify a decree dissolving the partnership, admits of no discussion, on principle as well as upon authority. Permanent mischiefs would be the result, that could only be avoided by a severance of the partnership relations. * * * In all the cases we have examined, where the partnership has been dissolved on account of the unfriendly relations between the partners, it has generally been at the instance of the party who was not himself at fault, and where the estrangement was such as would prevent the successful management of the business. A party who is the author of the ill-feeling between himself and partners ought not to be permitted to make the relation he has induced, the ground of a dissolution of the partnership. His conduct may have been taken with a view to that very result, and it would be inequitable to allow him advantage from his own wrongful acts. It would allow one partner, at his election, to put an end to his own deliberate contract,

ing the business meetings of the firm.[42] On the other hand, a partner will not, it seems, be compelled to suffer the penalty of dissolution by reason of a mere error of judgment,[43] or because of conduct toward some of the customers of the firm which may be deserving of severe criticism, but which involves no permanent injury to the partnership interest.[44] It thus appears that, generally speaking, any circumstance which makes practically impossible the continuation of the partnership or the attainment of its purpose, is sufficient to warrant its dissolution.[45]

§ 4954. Post-dissolution transactions.—That the partnership continues even after dissolution for the purpose of settling its affairs, is so firmly settled that the citation in full of the numerous authorities holding to that effect is practically unnecessary.[46] It has been well said that: "Whenever a partnership is

when the other had been guilty of no wrongful act or omission of duty. The results flowing from the premature dissolution of a partnership might be most disastrous to a partner who had embarked his capital in the enterprise." Gerard v. Gateau, 84 Ill. 121, 25 Am. Rep. 438. See further, Pease v. Hewitt, 31 Beav. 22; Baxter v. West, 1 Drew & Sm. 173; Moore v. Price, 116 Ala. 247, 22 So. 531; Null v. Parsons, 145 Ill. App. 436; Sutro v. Wagner, 23 N. J. Eq. 388, affd. 24 N. J. Eq. 589; Philipp v. Von Raven, 26 Misc. (N. Y.) 552, 57 N. Y. S. 701. And compare Meaher v. Cox, 37 Ala. 201.

[42] De Berenger v. Hamel, 7 Jar. Dyth. (2d ed.) 25.

[43] Cash v. Earnshaw, 66 Ill. 402.

[44] Gerard v. Gateau, 84 Ill. 121, 25 Am. Rep. 438.

[45] "The court will require a strong case to be made, and it is laid down as a general principle, a court of equity has no jurisdiction to declare a separation between partners for trifling causes or temporary grievances, involving no permanent mischiefs." Gerard v. Gateau, 84 Ill. 121, 25 Am. Rep. 438. See further, Jackson v. Deese, 35 Ga. 84; Sebastian v. Booneville Academy Co., 22 Ky. L. 186, 56 S. W. 810; McBurnie v. Semple, 14 Ky. L. 30, 19 S. W. 183.

[46] "I am satisfied that notwithstanding the dissolution of the partnership, yet, for the purpose of fulfilling engagements made during its existence, it had a limited existence legally, and subsisted for such purpose, even after the act of dissolution by the parties." Johnson v. Totten, 3 Cal. 343, 58 Am. Dec. 412. "Upon a dissolution, each partner becomes chargeable with all the debts and claims he owes or is accountable for to the partnership, with all interest accruing upon the same debts and claims." McCoy v. Crosfield, 54 Ore. 591, 104 Pac. 423. "At dissolution, the powers of the partners over the partnership assets continue only so far as is necessary for the purpose of winding up the affairs of the partnership." Nathan v. Bacon, 75 N. J. Eq. 401, 72 Atl. 359. All the partners are still bound after dissolution for the complete execution of a contract made during the existence of the partnership. Burdett v. Hayman (W. Va.), 60 S. E. 497, 15 L. R. A. (N. S.) 1019. See further, Peacock v. Peacock, 16 Ves. Jr. 49-57; Bell v. Morrison, 1 Pet. (U. S.) 351, 7 L. ed. 174; Lockwood v. Comstock, 4 McLean (U. S.) 383, Fed. Cas. No. 8449. See also, Barringer v. Sneed, 3 Stew. (Ala.) 201, 20 Am. Dec. 74; Burr v. Williams, 20 Ark. 171; Whiting v. Farrand, 1 Conn. 60; Smyth v. Harvie, 31 Ill. 62, 83

dissolved the object of the association is terminated, and nothing remains to be done except the arrangement of the affairs of the partnership; and until they are settled, as between the parties, the partnership may be said to continue. Engagements may be contracted which cannot be fulfilled during its existence, exposed as partnerships are to sudden and extraordinary terminations. For the purpose, therefore, of making good outstanding engagements the partnership must in legal contemplation have a continuance, although, as between the parties themselves, it is actually determined."[47] But were an attempt to be made to declare what a partner might, or might not do, in his post-dissolution capacity, it would shortly resolve itself into an effort to outline an indefinite number of acts. A few general statements on this subject must then suffice. It has been said on good authority that the termination of a partnership changes the former general agency of each of the members of the dissolved firm into a special one,[48] but, "if a partnership is dissolved, or one of the

Am. Dec. 202; Needham v. Wright, 140 Ind. 190, 39 N. E. 510; Kemp v. Coffin, 3 G. Greene (Iowa) 190; Isenhart v. Hazen, 10 Kans. App. 577, 63 Pac. 451; Combs v. Boswell, 1 Dana (Ky.) 475; Vancleave v. Nelson, 49 La. Ann. 621, 21 So. 734; Perrin v. Keene, 19 Maine 355, 36 Am. Dec. 759; Seldner v. Mt. Jackson Nat. Bank, 66 Md. 488, 8 Atl. 262, 59 Am. Rep. 190; Marlett v. Jackman, 3 Allen (Mass.) 287; Oliver v. Olmstead, 112 Mich. 483, 70 N. W. 1036; Barton v. Lovejoy, 56 Minn. 380, 57 N. W. 935, 45 Am. St. 482; Port Gibson Bank v. Baugh, 9 Sm. & M. (Miss.) 290; Allen v. Logan, 96 Mo. 591, 10 S. W. 149; Hutchins v. Gilman, 9 N. H. 359; Baldwin v. Johnson, 1 N. J. Eq. 441; Gray v. Green, 142 N. Y. 316, 37 N. E. 124, 40 Am. St. 596; Feigley v. Whitaker, 22 Ohio St. 606, 10 Am. Rep. 778; Jack v. McLanahan, 191 Pa. St. 631, 43 Atl. 356; Galliott v. Planters' & Mechanics' Bank, 1 McMul. (S. Car.) 209, 36 Am. Dec. 256; Anderson v. Norton, 15 Lea (Tenn.) 14, 54 Am. Rep. 400; Baptist Book Concern v. Carswell (Tex. Civ. App.), 46 S. W. 858; Torrey v. Baxter, 13 Vt. 452; Rootes v. Wellford, 4 Munf. (Va.) 215, 6 Am. Dec. 510; Roots v. Mason City Salt & Mining Co., 27 W. Va. 483; Lange v. Kennedy, 20 Wis. 279. See Wilder v. Morris, 7 Bush (Ky.) 420. And compare Stephens v. Orman, 10 Fla. 9. See also, 3 Elliott Ev., § 2572.

[47] Levy v. Cadet, 17 Serg. & R. (Pa.) 126, 17 Am. Dec. 650.

[48] "Before the partnership is dissolved, each member is the agent of the others, and the partnership will be bound by any contract made by a partner within the scope of the partnership business. After the death of one of the partners has dissolved the partnership, this general agency is changed by operation of law to a special agency. That agency is limited to selling the goods of the partnership, collecting the assets, paying the debts, and doing other acts which are necessary or proper to close and wind up the business. The surviving partner or partners have no right or authority after the dissolution to make any new contract to bind the partnership assets." Bass Dry Goods Co. v. Granite City Mfg. Co., 116 Ga. 176, 42 S. E. 415. "After the dissolution of the partnership, neither partner has authority, without special mandate so to do, to bind his former partners, either in

known members retires from the firm, until the dissolution or retirement is duly notified, the power of each to bind the rest remains in full force, although as between the partners themselves a dissolution or a retirement is a revocation of the authority of each to act for the others."[49] Following such notice

the renewal of a partnership debt, the imposition of a new obligation on it, or to in any manner vary the form or character of the obligation already existing." Bank of Monroe v. Drew Inv. Co., 126 La. 1028, 53 So. 129, 32 L. R. A. (N. S.) 255, and note. "It is the rule that each partner is the agent of the partnership, within the scope of the partnership business. * * * Such agency ceases upon dissolution of the copartnership, where notice thereof is given. * * * One member of a partnership after dissolution cannot bind the partnership except so far as necessary for winding up its business. 1 Lindley on Partnership (2d ed.), p. 525, star pp. 218, 219. The rule is stated at star pages 218 and 219, 1 Lindley on Partnership, as follows: 'Other cases, which have been already referred to, clearly show that after the dissolution of an ordinary partnership, no one aware of the dissolution is entitled on any ground of implied agency to hold the members of the late firm responsible for acts done by each other subsequently to the dissolution; and every one must feel the force of Lord Kenyon's observation in Abel v. Sutton, that, if the contrary doctrine were to prevail, a man could never know when he was to be at peace and freed from all concerns of the partnership.'" Harris v. Zier, 43 Wash. 573, 86 Pac. 928. "The rule is well settled that where a partnership is dissolved, or one or more of its members retires from the firm, without giving notice to the party with whom the partnership is dealing, the power of each member to bind the firm remains in full force, although, as between themselves, a dissolution or retirement is a revocation of the authority of each to act for the others." Easton v. Wostenholm, 137 Fed. 524. And compare People v. Devlin, 63 Misc. (N. Y.) 363, 118 N. Y. S. 478.

[49] Lindl. Partn. *214. See further, Stewart v. Sonneborn, 51 Ala. 126; Holland v. Long, 57 Ga. 36; Strecker v. Conn, 90 Ind. 469; Price v. Towsey, 3 Litt. (Ky.) 423, 14 Am. Dec. 81; Hall v. Heck, 92 Mich. 458, 52 N. W. 749; Stoddard Mfg. Co. v. Krause, 27 Nebr. 83, 42 N. W. 913; Ketcham v. Clark, 6 Johns. (N. Y.) 144, 5 Am. Dec. 197; Shamburg v. Ruggles, 83 Pa. St. 148; Anderson v. Clayton, 39 Utah 343, 117 Pac. 41. See also, Lucas v. Bank of Darien, 2 Stew. (Ala.) 280; Grady v. Robinson, 28 Ala. 289; Pyron v. Ruohs, 120 Ga. 1060, 48 S. E. 434; Iddings v. Pierson, 100 Ind. 418; Humphrey v. Mattox, 19 Ky. L. 1053, 42 S. W. 1100; Nevens v. Bulger, 93 Maine 502, 45 Atl. 503; Howe v. Thayer, 17 Pick. (Mass.) 91; Elkinton v. Booth, 143 Mass. 479, 10 N. E. 460; Chamberlain v. Dow, 10 Mich. 319; Comfort v. Lynam, 67 Mo. App. 668; Deering v. Flanders, 49 N. H. 225; Bynum v. Clark, 125 N. Car. 352, 34 S. E. 438; Easton v. Ellis, 1 Handy (Ohio) 70, 12 Ohio Dec. 32; Taylor v. Young, 3 Watts (Pa.) 339; Robinson v. Floyd, 159 Pa. 165, 28 Atl. 258, 33 Wkly. Notes Cas. (Pa.) 409; Dickinson v. Dickinson, 25 Grat. (Va.) 321. And compare Price v. Succession of Mathews, 14 La. Ann. 11; Eustis v. Booles, 146 Mass. 413, 16 N. E. 286, 4 Am. St. 327; Puritan Trust Co. v. Coffey, 180 Mass. 510, 62 N. E. 970; Griswold v. Waddington, 15 Johns. (N. Y.) 57, affd. 16 Johns. (N. Y.) 438; Planters' Bank v. St. John, 1 Woods (U. S.) 585, Fed. Cas. No. 11208. See Jeter v. Burgwyn, 113 N. Car. 157, 18 S. E. 113. See also, as to necessity and nature of such notice to relieve a retiring partner from further liability, 3 Elliott Ev., § 2574. This rule has been held not to obtain where the dissolution has been worked by the marriage of a feme sole partner or by the death of one of the members of the firm (Little v. Hazlett,

a partner cannot, in general, in the absence of any element of ratification or estoppel, issue negotiable paper even of a renewal character, in the firm name so as to bind his former associates.[50] Dissolution likewise seems to preclude a member of the late firm from making a new promise to stop the running of the statute of limitations,[51] and from binding his copartners by an admission of liability.[52]

197 Pa. 591, 47 Atl. 855). See also, Bass Dry Goods Co. v. Granite City Mfg. Co., 116 Ga. 176, 42 S. E. 415.

[50] Lockwood v. Comstock, 4 McLean (U. S.) 383, Fed. Cas. No. 8449; Draper v. Bissel, 3 McLean (U. S.) 275, Fed. Cas. No. 4068; Fraser v. Wolcott, 4 McLean (U. S.) 365, Fed. Cas. No. 5065. See Cunningham v. Bragg, 37 Ala. 436; Burr v. Williams, 20 Ark. 171; Curry v. White, 51 Cal. 530; Macon First Nat. Bank v. Ells, 68 Pa. 192; Bank of Montreal v. Page, 98 Ill. 109; Floyd v. Miller, 61 Ind. 224; Van Valkenburg v. Bradley, 14 Iowa 108; Linn v. Valz, 11 Ky. L. 846; Commercial Bank v. Perry, 10 Rob. (La.) 61, 43 Am. Dec. 168; Dodd v. Bishop, 30 La. Ann. 1178; Perrin v. Keene, 19 Maine 355, 36 Am. Dec. 759; Lumberman's Bank v. Pratt, 51 Maine 563; Ecker's Exr. v. Windsor First Nat. Bank, 59 Md. 291; Hurst v. Hill, 8 Md. 399, 63 Am. Dec. 705; Potter v. Tolbert, 113 Mich. 486, 71 N. W. 849; Bryant v. Lord, 19 Minn. 396; Maxey v. Strong, 53 Miss. 280; Moore v. Lackman, 52 Mo. 323; Fellows v. Wyman, 33 N. H. 351; Farmers' &c. Bank v. Green, 30 N. J. L. 316; Lusk v. Smith, 8 Barb. (N. Y.) 570; Graves v. Merry, 6 Cow. (N. Y.) 701, 16 Am. Dec. 471; Lansing v. Gaine, 2 Johns. (N. Y.) 300, 3 Am. Dec. 422; National Bank v. Norton, 1 Hill (N. Y.) 572; Mitchell v. Ostrom, 2 Hill (N. Y.) 520; Bristol v. Sprague, 8 Wend. (N. Y.) 423; Payne v. Slate, 39 Barb. (N. Y.) 634, affd. 29 N. Y. 146; Gardner v. Conn, 34 Ohio St. 187; Wilson v. Forder, 20 Ohio St. 89, 5 Am. Rep. 627; McCowin v. Cubbison, 72 Pa. St. 358; Galliott v. Planters' & Mechanics' Bank, 1 McMul. (S. Car.) 209, 36 Am. Dec. 256; Isler v. Baker, 6 Humph. (Tenn.) 85; Brown v. Chancellor, 61 Texas 437; Funck v. Heintze (Tex. Civ. App.), 23 S. W. 417; Woodworth v. Downer, 13 Vt. 522, 37 Am. Dec. 611; Commercial Bank v. Miller, 96 Va. 357; Roots v. Mason City Salt & Mining Co., 27 W. Va. 483; Lange v. Kennedy, 20 Wis. 279. And compare Jones v. Thorn, 2 Mart. (N. S.) (La.) 463; Temple v. Seaver, 11 Cush. (Mass.) 314; Gould v. Horner, 12 Barb. (N. Y.) 601, 1 Code Rep. (N. S.) 356; Robinson v. Taylor, 4 Pa. St. 242; Myers v. Huggins, 1 Strob. (S. Car.) 473. See also, 3 Elliott Ev., § 2572.

[51] Tate v. Clements, 16 Fla. 339, 26 Am. Rep. 709; Mayberry v. Willoughby, 5 Nebr. 368, 25 Am. Rep. 491; Shoemaker v. Benedict, 11 N. Y. 176, 62 Am. Dec. 95; Van Keuren v. Parmelee, 2 N. Y. 523, 51 Am. Dec. 322; Kerper v. Wood, 48 Ohio St. 613, 29 N. E. 501, 15 L. R. A. 656n; Bush v. Stowell, 71 Pa. St. 208, 10 Am. Rep. 694; Reppert v. Colvin, 48 Pa. St. 248; Levy v. Cadet, 17 Serg. & R. (Pa.) 126, 17 Am. Dec. 650; Jack v. McLanahan, 191 Pa. St. 631, 43 Atl. 356; Bell v. Morrison, 1 Pet. (U. S.) 351, 7 L. ed. 174; Davis v. Poland, 92 Va. 225, 23 S. E. 292. Compare Forbes v. Garfield, 32 Hun (N. Y.) 389; Clement v. Clement, 69 Wis. 599, 35 N. W. 17. Contra, Beardsley v. Hall, 36 Conn. 270, 4 Am. Rep. 74; Cody v. Shepard, 11 Pick. (Mass.) 400, 22 Am. Dec. 379; Vinal v. Burrill, 16 Pick. (Mass.) 401; Merritt v. Day, 38 N. J. L. 32, 20 Am. Rep. 362; Mills v. Hyde, 19 Vt. 59, 46 Am. Dec. 177; Wheelock v. Doolittle, 18 Vt. 440, 46 Am. Dec. 163.

[52] As a general rule the power of a partner to make admissions binding upon the firm ceases after dissolution. Burdett v. Greer, 63 W. Va. 515, 60 S. E. 497, 15 L. R. A. (N. S.) 1019n, 129 Am. St. 1014. See further, Bar-

§ 4955. Surviving partner.—In general the character of a surviving partner[53] is not so peculiar as to exclude him from the scope and meaning of the principles just noted.[54] Upon such a one devolves the duty of winding up the partnership affairs and of accounting to the personal representative of his deceased associate.[55] As a corollary to this, the law permits a surviving partner to continue the business for a reasonable length of time for the purpose of executing existing firm contracts[56] and, it has

ringer v. Sneed, 3 Stew. (Ala.) 201, 20 Am. Dec. 74; Burns v. McKenzie, 23 Cal. 101; Barnes v. Northern Trust Co., 169 Ill. 112, 48 N. E. 31; Hamilton v. Summers, 12 B. Mon. (Ky.) 11, 54 Am. Dec. 509; Herrick v. Conant, 4 La. Ann. 276; Clarke v. Jones, 1 Rob. (La.) 78; Atwood v. Gillett, 2 Doug. (Mich.) 206; National Bank of Commerce v. Meader, 40 Minn. 325, 41 N. W. 1043; Flowers v. Helm, 29 Mo. 324; Pope v. Risley, 23 Mo. 185; Brady's Admr. v. Hill, 1 Mo. 315, 13 Am. Dec. 503; Vergennes Bank v. Cameron, 7 Barb. (N. Y.) 143; Hart v. Woodruff, 24 Hun (N. Y.) 510; Lansing v. Gaine, 2 Johns. (N. Y.) 300, 3 Am. Dec. 422; Hackley v. Patrick, 3 Johns. (N. Y.) 536; Smith v. Ludlow, 6 Johns. (N. Y.) 267; Hopkins v. Banks, 7 Cow. (N. Y.) 650; Walden v. Sherburne, 15 Johns. (N. Y.) 409; Brisban v. Boyd, 4 Paige Ch. (N. Y.) 17; Hart v. Woodruff, 24 Hun (N. Y.) 510; Mercer v. Sayre, Anth. N. P. (N. Y.) 119, (2d ed 162); Meggett v. Finney, 4 Strob. (S. Car.) 220; Chardon v. Oliphant, 3 Brev. (S. Car.) 183, 6 Am. Dec. 572; White v. Union Ins. Co., 1 Nott & McC. (S. Car.) 556, 9 Am. Dec. 726; Berryhill's Exrs. v. McKee's Exrs., 1 Humph. (Tenn.) 31; Bispham v. Patterson, 2 McLean (U. S.) 87, Fed. Cas. No. 1441. And compare Wood v. Braddick, 1 Taunt. 104; Schoneman v. Fegley, 7 Pa. St. 433. See also, 3 Elliott Ev., § 2573.

[53] For character of words "surviving partner" in pleadings, as descriptio personae, see Swing v. Hill, 44 Ind. App. 140, 88 N. E. 721; Murphy v. Cochran, 146 Iowa 443, 123 N. W. 349.

[54] "The winding up or settling of the partnership affairs after the death of one of the partners may be said to consist, as a general thing, in selling the property, receiving moneys due the firm, paying the firm debts and the advances of the partners, returning the capital contributed by each partner, and dividing the profits." Maynard v. Richards, 166 Ill. 466, 46 N. E. 1138, 57 Am. St. 145.

[55] Tillery v. Tillery, 155 Ala. 495, 46 So. 582; Didlake v. Roden Grocery Co., 160 Ala. 484, 49 S. E. 384; In re Dobert, 165 Fed. 749; Whittaker v. Jordan, 104 Maine 516, 72 Atl. 682; Lanahan v. Lanahan, 110 Md. 176, 72 Atl. 672; Hewitt v. Hayes, 204 Mass. 586, 90 N. E. 985; Drucke v. Boylon (Mich.), 125 N. W. 416; Barton v. Lovejoy, 56 Minn. 380, 57 N. W. 935, 45 Am. St. 482; Weiss v. Hamilton, 40 Mont. 99, 105 Pac. 74; Reinhardt v. Reinhardt, 134 App. Div. (N. Y.) 440, 119 N. Y. S. 285; Joseph v. Herzig, 135 App. Div. (N. Y.) 141, 120 N. Y. S. 34; Russell v. McCall, 141 N. Y. 437, 36 N. E. 498, 38 Am. St. 807; McPherson v. Swift, 22 S. Dak. 165, 116 N. W. 76, 133 Am. St. 907; Goldstein v. Lusholtz, 46 Tex. Civ. App. 582, 105 S. W. 219. However, the "right" of a surviving partner to administer the affairs of the dissolved firm may, it seems, be waived. Barnes v. Stone, 198 Mo. 471, 95 S. W. 915. See further, Welborn v. Coon, 57 Ind. 270. Surviving partner may borrow money when necessary to the winding up of the partnership concerns. Rosenthal v. Hasberg, 84 N. Y. S. 290; Herron v. Wampler, 194 Pa. St. 277, 45 Atl. 81; Kenney v. Howard, 68 Vt. 194, 34 Atl. 700.

[56] Little v. Caldwell, 101 Cal. 553, 36 Pac. 107, 40 Am. St. 89; Jacksonville, M. P. R. & Nav. Co. v.

been declared, for the purpose of disposing of the stock of goods on hand.[57] In him, to the end that he may liquidate the partnership affairs, temporarily reposes the title, legal and equitable respectively, to the personalty and realty formerly belonging to the firm,[58] and it therefore follows that, until he has performed

Warriner, 35 Fla. 197, 16 So. 898; Mason v. Tiffany, 45 Ill. 392; Culbertson v. Salinger (Iowa), 117 N. W. 6; Rust v. Chisolm, 57 Md. 376; Cowham v. Shipman, 151 Mich. 673, 115 N. W. 991; Gaskill v. Weeks, 154 Mich. 223, 117 N. W. 647; Weiss v. Hamilton, 40 Mont. 99, 105 Pac. 74; King v. Leighton, 100 N. Y. 386, 3 N. E. 594; Rowell v. Adams, 83 S. Car. 124, 65 S. E. 207; Denver v. Roane, 90 U. S. 355, 25 L. ed. 476.

[57] Didlake v. Roden Grocery Co., 160 Ala. 484, 49 So. 384.

[58] "It follows that upon the death of Wells, [the managing partner], Bangs as the sole surviving partner at once became the owner of all the partnership property, and charged with the duty of winding up the affairs of the firm, turning its assets into money and applying such money to the payment of its debts. * * * For this purpose he was entitled to demand and receive from the defendants, the executors of the will of his deceased [managing] partner, whatever property of the firm might come into their hands. * * * As was said by Colt, J., in Shearer v. Paine, 12 Allen 289, 291, this right of the surviving partner is 'a right incident to all partnerships and one of which he cannot be deprived by the personal representative of the deceased partner in the absence of any allegation of mismanagement or want of capacity,' and there is no such allegation here. * * * This right extends also to all real estate of the partnership, in whosoever name the legal title may have been, so far as may be necessary to wind up its affairs, pay its debts, and settle the partnership accounts. * * * The surviving partner takes the firm property as its absolute owner, though subject to a liability to account for its proceeds and for their application to the payment of the firm debts and the settlement of the partnership accounts." Hewitt v. Hayes, 204 Mass. 586, 90 N. E. 985, 27 L. R. A. (N. S.) 154. "On the death of a partner the surviving partners succeed to all partnership property, whether real or personal, in trust for the purposes of liquidation, even though the deceased was appointed by agreement sole liquidator." McPherson v. Swift, 22 S. Dak. 165, 116 N. W. 76, 133 Am. St. 907. "The survivors do not take such [personal] assets as trustees, but, as survivors, hold the legal title, subject to such equitable rights as the representatives have in the due application of the proceeds." Wilson v. International Bank, 125 App. Div. (N. Y.) 568, 109 N. Y. S. 1027. "He [the surviving partner] had the legal title to the assets, and he held them as the legal owner, and not as trustee, in the strict sense of that term. In equity, however, he was to be regarded, to some extent, as a trustee. * * * The position is somewhat anomalous —not exactly and wholly a trustee, and yet not a full owner of the assets which he takes or retains possession of by reason of survivorship." Russell v. McCall, 141 N. Y. 437, 36 N. E. 498, 38 Am. St. 807. Quoted with approval in Callanan v. Keeseville &c. R. Co., 48 Misc. (N. Y.) 476, 95 N. Y. S. 513. The right of the surviving partner to the real estate of the copartnership is an equitable right, accompanied by an equitable title. Shanks v. Klein, 104 U. S. 18, 26 L. ed. 635. Cited with approval in Megibben's Admrs. v. Perin, 49 Fed. 183, revd. 53 Fed. 86, 3 C. C. A. 443. See further, Tillery v. Tillery, 155 Ala. 495, 46 So. 582; Rice v. Merchants' & Planters' Nat. Bank, 100 Ala. 617, 13 So. 659; Clay v. Field, 34 Fed. 375; Anderson v. Goodwin, 125 Ga. 663, 54 S. E. 679; Galbraith v. Tracy, 153 Ill. 54, 38 N. E. 937, 28 L. R. A. 129, 46 Am. St. 867; American Bonding Co. v. State, 40 Ind. App. 559, 82 N. E.

his functions, he is entitled to quiet and exclusive possession of all the firm assets.[59] On the dissolution of a partnership by the death of a partner, the sole surviving partner may mortgage the partnership property to secure a partnership debt and when this is done in good faith, it has been held that the mortgage is effectual against the partnership creditors as well as against the representatives of the deceased partner.[60] A mortgage by a surviving partner who is engaged in winding up the firm business is, it seems, valid as to strangers to the partnership affairs and not subject to attack by them.[61] Good faith employment of, and accounting for partnership property in his possession during the period of settlement will undoubtedly relieve a surviving partner from liability for interest and profits.[62] If after the dissolution of a firm by the retirement of one of the partners, a bill or note is re-executed in the firm name by the remaining partner or partners in the usual course of business, the retiring partner cannot set up in defense to an action thereon by a holder for

548; Jones v. Dulaney, 27 Ky. L. 702, 86 S. W. 547; Bassett v. Miller, 39 Mich. 133; Priest v. Chouteau, 85 Mo. 398, 55 Am. Rep. 373; Clark v. Fleischmann, 81 Nebr. 445, 116 N. W. 290; Haggerty v. Bodkin, 72 N. J. Eq. 473, 66 Atl. 420; Callanan v. Keesville &c. R. Co., 48 Misc. (N. Y.) 476, 95 N. Y. S. 513; Fairchild v. Fairchild, 64 N. Y. 471; Hiscock v. Phelps, 49 N. Y. 97; Leary v. Boggs, 41 Hun (N. Y.) 643, 1 N. Y. S. 571; Secor v. Tradesmen's Nat. Bank, 92 App. Div. (N. Y.) 294, 87 N. Y. S. 181; In re Thieriot, 102 N. Y. S. 952; Banchle v. Smylie, 104 App. Div. (N. Y.) 513, 93 N. Y. S. 709; Reinhardt v. Reinhardt, 134 App. Div. (N. Y.) 440, 119 N. Y. S. 285; In re Weir, 59 Misc. (N. Y.) 320, 112 N. Y. S. 278; Betts v. June, 51 N. Y. 274; Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510; Rowell v. Adams, 83 S. Car. 124, 65 S. E. 207; Weld v. Johnson Mfg. Co., 86 Wis. 552, 57 N. W. 374.

[59] Dickens v. Dickens, 160 Ala. 484, 45 So. 630; Evans v. Silvey, 144 Ala. 398, 42 So. 62; Franklin v. Trickey, 9 Ariz. 282, 80 Pac. 352; In re Coe, 157 Fed. 308; Huggins v. Huggins, 117 Ga. 151, 43 S. E. 759; Harrah v. State, 38 Ind. App. 495, 76 N. E. 443, 77 N. E. 747; Whittaker v. Jordan, 104 Maine 516, 72 Atl. 682; Hewitt v. Hayes, 204 Mass. 586, 90 N. E. 985; Barnes v. Stone, 198 Mo. 471, 95 S. W. 915; Reinhardt v. Reinhardt, 134 App. Div. (N. Y.) 440, 119 N. Y. S. 285; In re Thieriot, 102 N. Y. S. 952; Euck v. Gerding, 67 Ohio St. 245, 65 N. E. 880. And compare Flynn v. Seale (Cal. App.), 84 Pac. 263; Campbell v. Hart, 118 La. 871, 43 So. 533. Surviving partners may waive the exclusive right to the possession of the partnership property, to sell and dispose of the same. Welborn v. Coon, 57 Ind. 270. See further, Stubbings v. O'Connor, 102 Wis. 325, 78 N. W. 577. Quære—Has a surviving dormant partner this right of possession and the right to settle the firm business? Johnson v. Ames, 6 Pick. (Mass.) 330.

[60] Burchinell v. Koon, 8 Colo. App. 463, 46 Pac. 932; Bohler v. Tappan, 1 McCrary (U. S.) 134, 1 Fed. 469.

[61] Springfield Grocery Co. v. Shackelford, 56 Mo. App. 642.

[62] Maynard v. Richards, 166 Ill. 466, 46 N. E. 1138, 57 Am. St. 145; Gregory v. Menefee, 83 Mo. 413. See further, Turner v. Turner (Ky.), 16 S. W. 137; Hite's Heirs v. Hite's Exrs., 1 B. Mon. (Ky.) 177.

value and without notice, the fact that the firm has been dissolved, since the authority and obligation of the partners continue until legal notice of the dissolution has been given.[63] "When a partnership has once existed, the presumption is that it still exists until its dissolution is made known, and, until this is done, the public have the right to presume on its continued existence, and when a former member contracts a debt in its name, to allow a retired member to escape liability from its payment would be to allow the perpetration of a fraud. * * * Until notice of the dissolution of a firm is given, the public, who has no such knowledge, may treat the firm as in existence, and a note given by one member of such firm is binding upon all the other members, notwithstanding such dissolution."[64] So where, after the dissolution of a partnership, a note is given by one of the members in the firm name in payment of a firm debt to one who has had no notice of the dissolution, the firm will be held liable thereon.[65] But there can, it seems, be no recovery against a firm on a note given by one of the partners in the firm name after dissolution where the payee knew that it was given for the partner's private debt, and also knew or, what amounts to the same thing, was chargeable with notice of the dissolution.[66]

§ 4956. **Liquidating partner.**—The inherent general agency of a member of a going partnership[67] becomes in a liquidating, as in a surviving partner,[68] a limited and restricted one,[69] an

[63] Marsh v. Wheeler, 77 Conn. 449, 59 Atl. 410, 107 Am. St. 40; Ewing v. Trippe, 73 Ga. 776; Holtgreve v. Wintker, 85 Ill. 470; Stall v. Cassady, 57 Ind. 284; Merrit v. Pollys, 16 B. Mon. (Ky.) 355; Goddard v. Pratt, 16 Pick. (Mass.) 412; Wagner v. Freschl, 56 N. H. 495; Buffalo City Bank v. Howard, 35 N. Y. 500; Van Eps v. Dillaye, 6 Barb. (N. Y.) 244; Hammond v. Aiken, 3 Rich. Eq. (S. Car.) 119; Davis v. Willis, 47 Tex. 154; Clement v. Clement, 69 Wis. 599, 35 N. W. 17, 2 Am. St. 760. Compare Gale v. Miller, 54 N. Y. 536; Woodford v. Dorwin, 3 Vt. 82, 21 Am. Dec. 573.

[64] Ewing v. Trippe, 73 Ga. 776.

[65] Long v. Garnett, 59 Tex. 229.

[66] Lansing v. Gaine, 2 Johns. (N. Y.) 300, 3 Am. Dec. 422.

[67] See ante, § 4925.

[68] See ante, § 4955.

[69] "The dissolution having been by agreement, and the appellant being in possession of the assets for the purpose of realizing upon them, discharging liabilities and distributing surplus, he has the same right as, and occupies a position analogous to that of, a surviving partner." Adams v. Carmony, 44 Ind. App. 291, 87 N. E. 708, 89 N. E. 327. "The duty imposed upon the liquidator is one of agency. He becomes the sole authorized agent of the partnership for the single purpose of winding up and finally settling its affairs. There are elements of trust in his position and duty which lead so often to regard and describe him as a trustee for the creditors on the one hand or

express delegation being necessary in order that he may possess authority in excess of that commonly reposing in each of the one-time partners.[70] Moreover, the appointment of a member of the dissolved firm to liquidate its affairs does not, it seems, in

the retiring partner on the other, and the description is not inappropriate so long as it does not mislead us into the error of regarding the position and duty of the liquidator as that belonging to a direct trust. His authority is not such. No new authority is given to him. What he has is a restricted and narrowed part of that which the partnership conferred. That continues and subsists to the extent necessary for a settlement of the business, and is not a new authority or a direct trust. Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 89 [11 Am. Dec. 417]; Adams v. Taylor, 14 Ark. 66. The liquidator becomes the agent for the partnership for the one specific purpose. His duty is to collect and adjust the debts due to the firm, to turn the assets into money, to pay and discharge the outstanding liabilities, and then to pay over to the other partner his just share of the remaining surplus." Gilmore v. Ham. 142 N. Y. 1, 36 N. E. 826, 40 Am. St. 554.

[70] "Appended to the notice of dissolution signed by the partners, and published in this case, is this clause: 'The remaining unsettled business of the firm will be adjusted by E. Short, who is hereby authorized to close all business transactions of the late firm.' This notice is good evidence of the agreement of the parties, and conclusive in favor of third persons who have dealt with Short, relying upon it. But no one could or had a right to understand it as authorizing Short to do more than to adjust and settle the unfinished business, and close up the transactions of the firm. This power he had without the agreement; it added nothing to the authority which the law gave, and took nothing from it. * * * There is not a word in it to indicate an intention to confer upon him the authority to create new obligations. He is therefore remitted to his power as a partner, and, considered in that light, it is very clear he possessed no such authority. The elementary books and adjudged cases speak an almost uniform language upon the subject." Palmer v. Dodge, 4 Ohio St. 21, 62 Am. Dec. 271. See further, Myatts v. Bell, 41 Ala. 222; Brown v. Bamberger, 110 Ala. 342, 20 So. 114; Bass Dry Goods Co. v. Granite City Mfg. Co., 116 Ga. 176, 42 S. E. 415; Joselove v. Bohrman, 119 Ga. 204, 45 S. E. 982; Bank of Montreal v. Page, 98 Ill. 109; Hamilton v. Seaman, 1 Ind. 185, Smith 129; Van Valkenburg v. Bradley, 14 Iowa 108; Parker v. Macomber, 18 Pick. (Mass.) 505; Smith v. Shelden, 35 Mich. 42, 24 Am. Rep. 529; Hayes v. Heyer, 4 Sandf. Ch. (N. Y.) 485; Hilton v. Vanderbilt, 82 N. Y. 591; Stirnermaun v. Cowing, 7 Johns. Ch. (N. Y.) 275; Gilmore v. Ham, 142 N. Y. 1, 36 N. E. 826, 40 Am. St. 554; Smith v. Proskey, 82 App. Div. (N. Y.) 19, 81 N. Y. S. 424, revd. 177 N. Y. 526, 69 N. E. 1131; Mauney v. Coit, 80 N. Car. 300, 30 Am. Rep. 80; Parker v. Cousins, 2 Grat. (Va.) 372, 44 Am. Dec. 388; Conrad v. Buck, 21 W. Va. 396. And compare, Star Wagon Co. v. Swezy, 52 Iowa 391, 3 N. W. 421, 59 Iowa 609, 13 N. W. 749; Casco Bank v. Hills, 16 Maine 155; Waite v. Foster, 33 Maine 424; Seldner v. Mt. Jackson Nat. Bank, 66 Md. 488, 8 Atl. 262, 59 Am. Rep. 190; Napier v. McLeod, 9 Wend. (N. Y.) 120; Davis's Estate, 5 Whart. (Pa.) 530, 34 Am. Dec. 574; Whitehead v. Pittsburgh Bank, 2 W. & S. (Pa.) 172; Siegfried v. Ludwig, 102 Pa. St. 547; Fulton v. Central Bank, 92 Pa. St. 112; McCowin v. Cubbison, 72 Pa. St. 358; Brown v. Clark, 14 Pa. St. 469; Robinson v. Taylor, 4 Pa. St. 242; Lloyd v. Thomas, 79 Pa. St. 68; Meyran v. Abel, 189 Pa. St. 215, 42 Atl. 122, 69 Am. St. 806; Dundass v. Gallagher, 4 Pa. St. 205; McCoon v. Galbraith, 29 Pa. St. 293; Jack v. McLannahan, 191 Pa. St. 631, 43 Atl. 356; Houser v. Irvine, 3 Watts & S. (Pa.) 345, 38 Am. Dec. 768.

the absence of notice, affect the power of his former associates to bind the partnership.[71] Interest and profits are not, apparently, assessable against a liquidating partner to any further extent than in the case of a surviving one.[72]

[71] Gillilan v. Sun Mut. Ins. Co., 41 N. Y. 376; Clark v. Reed, 31 Leg. Int. (Pa.) 413. See further, Casco Bank v. Hills, 16 Maine 155.

[72] Buckley v. Kelly, 70 Conn. 411, 39 Atl. 601; Randolph v. Inman, 172 Ill. 575, 50 N. E. 104; Macready v. Schenck, 43 La. Ann. 479, 9 So. 470; Dunlap v. Watson, 124 Mass. 305; Fithian v. Jones, 12 Phila. (Pa.) 201; In re Brown's Appeal, 89 Pa. St. 139. See further, Klotz v. Macready, 39 La. Ann. 638.

CHAPTER CLIII.

LIMITED PARTNERSHIPS.

§ 4965. In general.
4966. Liability of partners on contracts.
§ 4967. Dissolution.

§ 4965. In general.—The limited partnership is a child of the statute law,[1] with many of its powers, right and liabilities defined and circumscribed thereby.[2] While there is authority for the proposition that strict construction against limited partners is to be accorded statutes which authorize the association of individuals in this peculiar relationship,[3] it has recently been said that "the courts should adopt and enforce a reasonable construction of the statute which, on the one hand, will not defeat one of the objects of the law, which is to induce the investment of capital in business, and upon the other hand will not under cover of a substantial compliance with the requirements of the statute fritter away the protection which the law has thrown around those who deal with the firm." But good faith and honest intention will not absolve a special partner from gen-

[1] Coope v. Eyre, 1 H. Bl. 37; Peabody v. Oleson, 15 Colo. App. 346, 62 Pac. 234; Clapp v. Lacey, 35 Conn. 463; Safe-Deposit &c. Co. v. Cohn, 102 Md. 530, 62 Atl. 819; Pierce v. Bryant, 5 Allen (Mass.) 91; Lancaster v. Choate, 5 Allen (Mass.) 530; Batchelder v. Altheimer, 10 Mo. App. 181; Van Riper v. Poppenhausen, 43 N. Y. 68; Manhattan Co. v. Laimbeer, 108 N. Y. 578, 15 N. E. 712; Fifth Ave. Bank v. Colgate, 120 N. Y. 381, 24 N. E. 799, 8 L. R. A. 712; Durant v. Abendroth, 41 N. Y. Super. Ct. 53; Jacquin v. Buisson, 11 How. Pr. (N. Y.) 385; Levy v. Lock, 5 Daly (N. Y.) 46, 47 How. Pr. (N. Y.) 394; Ames v. Downing, 1 Bradf. Sur. (N. Y.) 321; Lachaise v. Marks, 4 E. D. Smith (N. Y.) 610; Skolny v. Richter, 139 App. Div. (N. Y.) 534, 124 N. Y. S. 152; Fanshawe v. Lane, 16 Abb. Pr. (N. Y.) 71; Singer v. Kelly, 44 Pa. St. 145; McKnight v. Ratcliff, 44 Pa. St. 156; Tindel v. Park, 154 Pa. St. 36, 26 Atl. 300; Vilas Bank v. Bullock, 10 Phila. (Pa.) 309, 32 Leg. Int. (Pa.) 66, 1 Wkly. Notes Cas. (Pa.) 219; In re Merrill, 12 Blatchf. (U. S.) 221, 13 Nat. Bank. Reg. 91; McArthur v. Chase, 13 Grat. (Va.) 683.

[2] For purposes for which it may be created, manner of creation, matter of name, etc., see the statutes of the various states.

[3] Cummings v. Hayes, 100 Ill. App. 347.

eral liability, any more than will the fact that the creditor has not been injured by the noncompliance with the statute. Yet, on the other hand, actual compliance does not demand that a limited partner be deprived of his rights, as such, by reason of mere formal defects or technical violations.[4] A belief in the truth of the statements which he makes in a renewal certificate does not, however, save him from the penalty attaching to their falsity.[5] It has been said that where no governing statute exists, the rights and liabilities of members of a limited partnership are to be ascertained by reference to those principles of the common law which obtain when those associated in the ordinary partnership relation are involved.[6] But a recent case decided in Michigan reiterates the former holding of the Supreme Court of that state, "that the law governing corporations, rather than the law governing copartnerships, is applicable to a partnership limited."[7]

§ 4966. Liability of partners on contracts. — Ordinarily, compliance with the statutory requirements exempts a special partner from liability on firm contracts in excess of the amount required to be contributed by him.[8] On the other hand, it seems

[4] R. S. Oglesby Co. v. Lindsey, 112 Va. 767, 72 S. E. 672; Ann. Cas. 1913B, 913.

[5] Reitzel v. Haines, 170 Pa. St. 306, 33 Atl. 103, 37 Wkly. Notes Cas. (Pa.) 80. For renewal certificate held sufficient provided the original capital remained intact, although the special partners were named as individuals, instead of a firm as required by statute, see Patterson v. Youngs, 139 N. Y. S. 670.

[6] Jemison v. Dearing's Exrs., 41 Ala. 283; Spalding v. Block, 22 Kans. 55; Safe-Deposit &c. Co. v. Cohn, 102 Md. 530, 62 Atl. 819; Lancaster v. Choate, 5 Allen (Mass.) 530; Nutting v. Ashcroft, 101 Mass. 300; Jaffe v. Krum, 88 Mo. 669; Ames v. Downing, 1 Bradf. Sur. (N. Y.) 321; Continental Nat. Bank v. Strauss, 60 N. Y. Super. Ct. 151, 43 N. Y. St. 68, 17 N. Y. S. 180, affd. 137 N. Y. 148, 32 N. E. 1066; Jacquin v. Buisson, 11 How. Pr. (N. Y.) 385.

[7] Armstrong v. Stearns, 156 Mich. 597, 121 N. W. 312.

[8] Civ. Code Cal. § 2501; Whittemore v. Macdonell 6 U. C. C. P. 550; Patterson v. Holland, 7 Grant Ch. (U. C.) 1; Clapp v. Lacey, 35 Conn. 463; Webster v. Lanum, 137 Fed. 376, 70 C. C. A. 56; Richardson v. Carlton, 109 Iowa 515, 80 N. W. 532; Spalding v. Black, 22 Kans. 55; Sachomette v. Thomas, 5 Rob. (La.) 172; Ulman v. Briggs, 32 La. Ann. 655; Burt v. Laplace, 114 La. 489, 38 So. 429; Safe-Deposit &c. Co. v. Cohn, 102 Md. 530, 62 Atl. 819; Snyder v. Leland, 127 Mass. 291; Jaffe v. Krum, 88 Mo. 669; Levy v. Lock, 5 Daly (N. Y.) 46, 47 How. Pr. (N. Y.) 394; Van Riper v. Poppenhausen, 43 N. Y. 68; George v. Grant, 97 N. Y. 262; Madison County Bank v. Gould, 5 Hill (N. Y.) 309; Jacquin v. Buisson, 11 How. Pr. (N. Y.) 385; Bell v. Merrifield, 28 Hun (N. Y.) 219; Canandaigua First Nat. Bank v. Whitney, 4 Lans. (N. Y.) 38, affd. 53 N. Y. 627; Singer v. Kelly, 44 Pa. St. 145; Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527; In re Merrill, 12 Blatchf. (U.

that where material requirements of the statute have not been met, the liability of a general member of the firm attaches to the special partner, particularly when he has had notice.[9] This must not be construed to mean that the special partner on that account becomes a general one; the noncompliance does not necessarily change his status, but only enlarges his liability.[10] As far as the partners themselves are concerned, they remain bound by the terms of the articles of association.[11] But it has been held that the purchaser of the interest of a special partner in a firm, all of whose members were, through failure to comply with the statutes, liable as general partners, became himself thus liable, even in the absence of all intention on his part to incur such

S.) 221, Fed. Cas. No. 9467. Compare In re Dunn, 115 La. 1084, 40 So. 466.

[9] Benedict v. Van Allen, 17 U. C. Q. B. 234; Patterson v. Holland, 7 Grant Ch. (U. C.) 1; McGehee v. Powell, 8 Ala. 827; In re Thayer, Fed. Cas. No. 13867, 7 Am. L. Rev. 177; Adam v. Musson, 37 Ill. App. 501; Crouch v. Chicago First Nat. Bank, 156 Ill. 358, 40 N. E. 974; Columbia Land &c. Co. v. Daly, 46 Kans. 504; Rayne v. Terrell, 33 La. Ann. 812; Lineweaver v. Slagle, 64 Md. 465, 2 Atl. 693, 54 Am. Rep. 775; Pierce v. Bryant, 5 Allen (Mass.) 91; Lancaster v. Choate, 5 Allen (Mass.) 530; Locke v. Lewis, 124 Mass. 1, 26 Am. Rep. 631; Farnsworth v. Boardman, 131 Mass. 115; Groves v. Wilson, 168 Mass. 370, 47 N. E. 100; Fox v. Graham, Howell N. P. (Mich.) 90; Sarmiento v. The Catherine Co., 110 Mich. 120, 67 N. W. 1085; Matter of Allen, 41 Minn. 430; Perth Amboy Mfg. Co. v. Condit, 21 N. J. L. 659; Beers v. Reynolds, 11 N. Y. 97; Van Ingen v. Whitman, 62 N. Y. 513; Manhattan Co. v. Laimbeer, 108 N. Y. 578, 15 N. E. 712; Fifth Ave. Bank v. Colgate, 120 N. Y. 381, 24 N. E. 799, 8 L. R. A. 712; Buck v. Alley, 145 N. Y. 488, 40 N. E. 236; Hartford Nat. Bank v. Beinecke, 80 App. Div. (N. Y.) 546, 80 N. Y. S. 803; Haviland v. Chace, 39 Barb. (N. Y.) 283; Bell v. Merrifield, 28 Hun (N. Y.) 219; Metropolitan Nat. Bank v. Palmer, 56 Hun (N. Y.) 641, 30 N. Y. St. 509, 9 N. Y. S. 239; First Nat. Bank v. Huber, 75 Hun (N. Y.) 80, 58 N. Y. St. 158, 26 N. Y. S. 961; Loomis v. Hoyt, 52 N. Y. Super. Ct. 287; Outcalt v. Burnet, 1 Handy (Ohio) 404, 12 Ohio Dec. 207; Bergner &c. Brew. Co. v. Cobb, 12 Pa. County Ct. 460; Hogg v. Orgill, 34 Pa. St. 344; Vandike v. Rosskam, 67 Pa. St. 330; Guillon v. Peterson, 89 Pa. St. 163, 9 Phila. (Pa.) 225; Haddock v. Grinnell Mfg. Corp., 109 Pa. St. 372, 1 Atl. 174; Hill v. Stetler, 127 Pa. St. 145, 10 Sad. (Pa.) 90, 13 Atl. 306, 17 Atl. 887; Vanhorn v. Corcoran, 127 Pa. St. 255, 18 Atl. 16; Sheble v. Strong, 128 Pa. St. 315, 18 Atl. 397; Cock v. Bailey, 146 Pa. St. 328; Haslet v. Kent, 160 Pa. St. 85, 28 Atl. 501; Fourth St. Nat. Bank v. Whitaker, 170 Pa. St. 297, 33 Atl. 100; Lee v. Burnley, 195 Pa. St. 58, 45 Atl. 668; Abington Dairy Co. v. Reynolds, 24 Pa. Super. Ct. 632; Chatham Nat. Bank v. Gardner, 31 Pa. Super. Ct. 135; Savage v. Carney (Tenn. Ch.), 47 S. W. 571; Abendroth v. Van Dolsen, 131 U. S. 66, 33 L. ed. 57, 9 Sup. Ct. 619. Compare Rothchild v. Hoge, 43 Fed. 97; De Lizardi v. Gossett, 1 La. Ann. 139; Deckert v. Chesapeake Western Co., 101 Va. 804, 45 S. E. 799.

[10] Abendroth v. Van Dolsen, 131 U. S. 66, 33 L. ed. 57, 9 Sup. Ct. 619. But see Hutchins v. Page, 204 Mass. 284, 90 N. E. 565, 134 Am. St. 656.

[11] Waters v. Harris, 60 N. Y. Super. Ct. 192, 28 Abb. N. C. (N. Y.) 89, 43 N. Y. St. 62, 17 N. Y. S. 370.

liability.[12] On the question as to whether there has been a compliance with the statute, and the limited partner been thereby relieved from general liability, it has been held that it is immaterial that such limited partner has lost all the money he put into the concern, and has never received any dividends from the business.[13] Moreover, it has been held that where the statutes providing for the creation of limited partnerships have not been followed, inequality of interest in the firm does not affect the rights of partnership creditors in the matter of the enforcement of their claims.[14] Again, the law apparently penalizes the act of a special partner in representing himself as a general partner by rendering him liable as such.[15] But it has been held that a special partner does "not transact any partnership business, nor act as agent for that purpose," by merely looking over the business, examining the books, and stating that he expected to close out the business in order to pay creditors, at a time when the general partner is ill.[16] Moreover, the act of a special partner in loaning money, on security or otherwise, to the firm for partnership purposes, or to enable it to carry on the business on a more extended scale, does not render him liable as a general partner under a statute imposing such liability upon the alteration of the nature of the business, capital or shares contributed.[17] Again it has been held that where a limited partnership is, before the expiration of its terms, dissolved by insolvency, general liability is not thereby imposed upon the special partner.[18] Moreover, it has been held that the principles of estoppel will operate to prevent persons who agree to create a limited partnership, and who conduct their business as such from asserting, one against the other, that, by reason of the fact that statutory requirements

[12] Strang v. Thomas, 114 Wis. 599, 91 N. W. 237.

[13] R. S. Oglesby Co. v. Lindsey, 112 Va. 767, 72 S. E. 672.

[14] Peabody v. Oleson, 15 Colo. App. 346, 62 Pac. 234.

[15] Barrows v. Downs, 9 R. I. 446, 11 Am. Dec. 283. See also, Watts v. Taft, 16 U. C. Q. B. 256. Compare Marshall v. Lambeth, 7 Rob. (La.) 471; Taylor v. Rasch, 1 Flipp. (U. S.) 385, Fed. Cas. No. 13800, 11 Nat. Bank. Reg. 91.

[16] Cropper v. Illinois Sew. Mach. Co., 100 Miss. 127, 54 So. 849.

[17] Walkenshaw v. Perzel, 32 How. Pr. (N. Y.) 233, 27 N. Y. Super. Ct. 426. See also, Metropolitan Nat. Bank v. Palmer, 56 Hun (N. Y.) 641, 30 N. Y. St. 509, 9 N. Y. S. 239.

[18] Continental Nat. Bank v. Strauss, 60 N. Y. Super. Ct. 151, 43 N. Y. St. 68, 17 N. Y. S. 188, affd. 137 N. Y. 148, 32 N. E. 1066.

have not been literally met, a complete formation of such partnership has not been accomplished.[19] But it seems that where the remedies against the surviving partners have been exhausted, or such survivors are insolvent, recourse may be had to the estate of the deceased special partner to whom general liability has attached.[20] The purchase by a special partner of property pledged with the firm,[21] or of discounted claims against the latter, has been declared not to be ipso facto invalid.[22] Further, the special partner's joinder in, assent to,[23] or ratification of[24] an assignment for the benefit of creditors, not authorized by the original agreement to be executed by the general partners alone,[25] appears, in general, to be necessary.[26]

§ 4967. **Dissolution.**—A limited partnership desiring to wind up its affairs before the expiration of the term must dissolve the relationship in the manner provided by statute;[27] and the partnership will, as far as creditors are concerned, continue to exist, unless the certificate of dissolution meets the requirements of the statute.[28] As in the case of general partnerships, it has been held that the death of a member of a limited partnership dissolves the firm.[29] So also, a change in the membership of the firm has been held to work a dissolution thereof.[30] More-

[19] Casola v. Vasquez, 164 N. Y. 608, 58 N. E. 1085.

[20] Hotopp v. Huber, 160 N. Y. 524, 55 N. E. 206, affg. 16 App. Div. (N. Y.) 327, 44 N. Y. S. 617, affg. 18 Misc. (N. Y.) 554, 41 N. Y. S. 991. See also, Richter v. Poppenhausen, 42 N. Y. 373.

[21] Lewis v. Graham, 4 Abb. Pr. (N. Y.) 106.

[22] Allison v. Abendroth, 108 N. Y. 470, 15 N. E. 606.

[23] Rothchild v. Hoge, 43 Fed. 97; Matter of Allen, 41 Minn. 430; Robinson v. McIntosh, 3 E. D. Smith (N. Y.) 221; Schulten v. Lord, 4 E. D. Smith (N. Y.) 206; Mills v. Argall, 6 Paige (N. Y.) 577; Deming v. Colt, 3 Sandf. (N. Y.) 284; Darrow v. Bruff, 36 How. Pr. (N. Y.) 479; Waters v. Harris, 60 N. Y. Super. Ct. 192, 28 Abb. N. C. (N. Y.) 89, 43 N. Y. St. 62, 17 N. Y. S. 370; Singer v. Kelly, 44 Pa. St. 145.

[24] Deming v. Colt, 3 Sandf. (N. Y.) 284.

[25] Mills v. Argall, 6 Paige (N. Y.) 577.

[26] Schulten v. Lord, 4 E. D. Smith (N. Y.) 206. See further, Mills v. Argall, 6 Paige (N. Y.) 577; Walkenshaw v. Perzel, 32 How. Pr. (N. Y.) 233, 27 N. Y. Super. Ct. 426. And compare Waters v. Harris, 60 N. Y. Super. Ct. 192, 28 Abb. N. C. (N. Y.) 89, 43 N. Y. St. 62, 17 N. Y. S. 370; Tracy v. Tuffly, 134 U. S. 206, 33 L. ed. 879, 10 Sup. Ct. 527.

[27] Emery v. Kalamazoo &c. Const. Co., 132 Mich. 560, 94 N. W. 19.

[28] In re Terry, 5 Biss. (U. S.) 110, Fed. Cas. No. 13836. See also, Beers v. Reynolds, 11 N. Y. 97.

[29] Jacquin v. Buisson, 11 How. Pr. (N. Y.) 385. See also, Ames v. Downing, 1 Bradf. Sur. (N. Y.) 321.

[30] Outcalt v. Burnet, 1 Handy (Ohio) 404, 12 Ohio Dec. 207.

over, where the statute provides that every alteration which is made in the names of the partners, the nature of the business, or any other matter specified in the original certificate, must be deemed a dissolution of the partnership, the abandonment of the business by the general partners and their departure from the state, whereby the special partner is left to settle the partnership affairs, has been held to dissolve the firm.[31] Notwithstanding ground for dissolution is contained in the act of a general partner in engaging in a competing business without the consent or over the objections of his special copartner, the latter may, in the absence of statutory provisions to the contrary, engage in such business without thereby incurring the penalty of dissolution.[32] Although a "limited partner" became such in order that there might be the three persons, necessary to form a limited partnership, this will not deprive him of his right to share in the profits of the firm upon dissolution.[33]

[31] Andrews v. Schott, 10 Pa. 47.
[32] Skolny v. Richter, 139 App. Div. (N. Y.) 534, 124 N. Y. S. 152.
[33] Sturgeon v. Apollo Oil &c. Co., 203 Pa. 369, 53 Atl. 189.

TITLE FIFTEEN

SALES.

CHAPTER CLIV.

ELEMENTS AND FORMATION OF THE CONTRACT.

§ 4980. Definition.
4981. Essential elements.
4982. Further definitions and explanation of terms.
4983. Sale distinguished from other things.
4984. Making the contract — Offer and acceptance.
§ 4985. Subject of sale.
4986. Subject of sale—Where it has been destroyed or ceased to exist.
4987. Subject-matter—Goods "to arrive".
4988. The price.

§ 4980. **Definition.**—A sale is a transfer of the property in a thing for a price.[1] In other words, "a transfer by or under a contract of the property in goods for a price is called a sale."[2] The contract for the transfer of property in personalty for a price in money paid or agreed to be paid is also frequently called a sale,[3] but if the legal effect of the contract is that the title or property in the goods does not pass immediately but is only to pass at a future time or on certain conditions inconsistent with

[1] Benj. Sales, § 1. See also, People v. Law & Order Club, 203 Ill. 127, 67 N. E. 855, 62 L. R. A. 884, and State v. Colonial Club, 154 N. Car. 177, 69 S. E. 771, 31 L. R. A. (N. S.) 387, Ann. Cas. 1912A, 1079, 1081, where substantially the above definition is given, together with others; and notes in 94 Am. St. 209, 210, and 26 L. R. A. (N. S.) 5. "A sale is a transfer of the absolute or general property in a thing for a price in money." Foley v. Felrath, 98 Ala. 176, 13 So. 485, 39 Am. St. 39.

[2] Benj. Princ. Sales 1, Rule 1 (a).

[3] Noble v. Ft. Smith Wholesale Grocery Co. (Okla.), 127 Pac. 14; Huthmacher v. Harris's Admrs., 38 Pa. St. 491, 80 Am. Dec. 502; Williamson v. Berry, 8 How. (U. S.) 495, 12 L. ed. 1170. See Tiedeman Sales, § 1. The "essential idea," it is said, "is that of an agreement or meeting of minds by which a title passes from one, and vests in another." Butler v. Thompson, 92 U. S. 412, 23 L. ed. 684. See also, Koehler v. St. Mary's Brewing Co., 228 Pa. St. 648, 77 Atl. 1016, 139 Am. St. 1024, and definitions there quoted.

an immediate transfer, it is an executory rather than an executed or complete sale, and is more specifically and properly designated as "an agreement to sell."[4]

§ 4981. **Essential elements.**—The essential elements of an ordinary sale are: (1) a mutual agreement; (2) competent parties; (3) a money consideration or price; (4) a transfer of the absolute or general property in the subject of the sale from the seller to the buyer.[5] Who are competent parties is a subject that has already been fully considered in another part of this work.[6] The other elements of a sale have also received some consideration in a general way, but they will be more fully and specifically treated under this title.

§ 4982. **Further definitions and explanation of terms.**—Delivery of the goods is not absolutely essential to the transfer of property in them, and "sale" includes a "bargain and sale" as well

[4] Bonham v. Hamilton, 66 Ohio St. 82, 63 N. E. 597; Hatch v. Standard Oil Co. of Cleveland, 100 U. S. 124, 25 L. ed. 554. See also, Loval v. Wolf (Ala.), 60 So. 299; Branigan v. Hendrickson, 17 Ind. App. 198, 46 N. E. 560. The use of the present tense, as "A sells," or the word "sold" or the like, is not always conclusive of an immediate transfer, as such words may be controlled by other provisions and circumstances showing that there was not a completed sale or immediate transfer. As in other cases, the manifest intention of the parties usually governs. Moakes v. Nicholson, 19 C. B. (N. S.) 290, 115 E. C. L. 290; Blackwood v. Cutting Packing Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. 199; Kost v. Reilly, 62 Conn. 57, 24 Atl. 519; Platter v. Acker, 13 Ind. App. 417, 41 N. E. 832; Sherwin v. Mudge, 127 Mass. 547; Brock v. O'Donnell, 45 N. J. L. 441; Decker v. Furniss, 14 N. Y. 611; Anderson v. Reed, 106 N. Y. 333, 13 N. E. 292, revg. 51 N. Y. Super. Ct. 326; Elgee Cotton Cases, 22 Wall. (U. S.) 180, 22 L. ed. 863, 10 Ct. Cl. (U. S.) 181. See also, Perkins v. Mettler, 126 Cal. 100, 58 Pac. 384; Levy v. Scott, 115 Cal. 39, 46 Pac. 892; Callaghan v. Myers, 89 Ill. 566; Lester v. East, 49 Ind. 588; Wind v. Iler, 93 Iowa 316, 61 N. W. 1001, 27 L. R. A. 219; Weed v. Boston &c. Ice Co., 12 Allen (Mass.) 377. So on the other hand such an expression as A. "agrees to sell," or the like, may likewise be controlled by other provisions showing a complete sale. Martin v. Adams, 104 Mass. 262; Bangs v. Friezen, 36 Minn. 423, 32 N. W. 173; Barber v. Andrews, 29 R. I. 51, 69 Atl. 1, 26 L. R. A. (N. S.) 1, and note on p. 7; Hatch v. Standard Oil Co. of Cleveland, 100 U. S. 124, 25 L. ed. 554; Anderson v. Land, 5 Wash. 493, 32 Pac. 107, 34 Am. St. 875. In the Uniform Sales Act a sale of goods is defined as an agreement whereby the seller transfers the property in the goods to the buyer for a consideration called the price, and a contract to sell is defined as a contract whereby the seller agrees to transfer the property in the goods to the buyer for a consideration called the price. Uniform Sales Act, § 1.

[5] 3 Elliott Ev., § 2616; Tiedeman Sales, § 2; Cannelton v. Collins, 172 Ind. 193, 88 N. E. 66. See also, In re Columbus Buggy Co., 143 Fed. 859, 74 C. C. A. 611; Gardner v. Lane, 12 Allen (Mass.) 39.

[6] See Vol. 1, Ch. X to XV.

as sale and delivery.[7] A contract "on sale and return" is defined as an agreement by which goods are delivered by a wholesale dealer to a retail dealer to be paid for at a certain rate if sold again by the latter, and, if not sold, to be returned within a reasonable time if no time is specified.[8] A conditional sale is one in which the passing of the title or property, depends upon some condition; or, in other words, it is one in which the ultimate title or ownership is made to depend upon the happening or not happening of some contingency.[9]

§ 4983. Sale distinguished from other things.—A sale is distinguished from a bailment in that a sale is a transfer of the ownership or absolute property while a bailment is a transfer only of the possession or special property in the thing.[10] This

[7] Alexander v. Gardner, 1 Bing. N. Cas. 671; Turley v. Bates, 2 H. & C. 200; Wade v. Moffett, 21 Ill. 110, 74 Am. Dec. 79; Mitchell v. Le Clair, 165 Mass. 308, 43 N. E. 117; Wood v. Michaud, 63 Minn. 478, 65 N. W. 963; Doremus v. Howard, 23 N. J. L. 390. See also, Benedict & B. Mfg. Co. v. Jones, 64 Mo. App. 218; Hatch v. Oil Co., 100 U. S. 124, 25 L. ed. 554; note in 26 L. R. A. (N. S.) 21. Compare State v. Wingfield, 115 Mo. 428, 22 S. W. 363, 37 Am. St. 406.

[8] Story on Sales, § 249; House v. Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. 307. See also, Hatch v. Standard Oil Co. of Cleveland, 100 U. S. 124, 25 L. ed. 554. In such case the property in the goods passes to the purchaser subject to an option in him to return them within the proper time. House v. Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. 307. Childs v. O'Donnell, 84 Mich. 533, 47 N. W. 1108; Quinn v. Stout, 31 Mo. 160. See also, Moss v. Sweet, 20 L. J. Q. B. 167; Newburger v. Hoyt, 86 Ga. 508, 12 S. E. 925; Jameson v. Gregory's Exr., 4 Metc. (Ky.) 363; Ray v. Thompson, 12 Cush. (Mass.) 281, 59 Am. Dec. 187. It is distinguished from an option to purchase in Hunt v. Wyman, 100 Mass. 198. Compare also, Stevens v. Hertzler, 109 Ala. 423, 19 So. 838, with Wailes v. Howison, 93 Ala. 375, 9 So. 594. For transaction held a mere option to purchase or return as distinguished from a contract of "sale or return," see Gottlieb v. Rinaldo, 78 Ark. 123, 93 S. W. 750, 6 L. R. A. (N. S.) 273.

[9] Story on Sales, § 246; Dunlop v. Mercer, 156 Fed. 545, 86 C. C. A. 435. It is "one by which the right of property in chattels is made to vest, to be modified or defeated upon the happening or not happening of some event." Tiedeman on Sales, § 200. As to distinction between conditional sales and other somewhat similar contracts or transactions, see note to 94 Am. St. 210, et seq., and notes in 6 L. R. A. 643 (distinguished from chattel mortgage); 10 L. R. A. 233 (distinguished from bailment or lease). See note in 94 Am. St. 210; Frick & Co. v. Hilliard, 95 N. Car. 117.

[10] See, for the distinction and test, Patrick v. Colorado Smelting Co., 20 Colo. 268, 38 Pac. 236; Barrows v. Wampler, 24 Ind. App. 472, 56 N. E. 935; Sattler v. Hallock, 160 N. Y. 291, 54 N. E. 667, 46 L. R. A. 679, 73 Am. St. 686; Sturm v. Boker, 150 U. S. 312, 37 L. ed. 1093, 14 Sup. Ct. 99, and see note in 10 L. R. A. 233. As held in these and other cases the usual test is whether the identical thing, even though in an altered form, is to be returned. See also, note in 94 Am. St. 216-226. And the name given the transaction is not conclusive. In re Wells, 140 Fed. 752. See also, for distinction be-

also distinguishes a sale from a pledge, as a pledge is a mere bailment. So, a lease or hiring of personal property is only a temporary transfer and hence a bailment and not a sale.[11] And while a chattel mortgage may pass the title its purpose is to secure the payment of a debt and it is subject to a reverter so that it is, at most, in the nature of a conditional sale and not an absolute sale.[12] A consignment to a factor or commission merchant is also ordinarily a bailment and not a sale.[13] And the same is true of a con-

tween a sale and a bailment with right to purchase, Humphries v. Carvalho, 16 East 45; Neate v. Ball, 2 East 117; Johnson v. McLane, 7 Blackf. (Ind.) 501, 43 Am. Dec. 102; Chamberlain v. Smith, 44 Pa. St. 431; Hamilton v. Billington, 163 Pa. St. 76, 29 Atl. 904, 43 Am. St. 780; Schlesinger v. Stratton, 9 R. I. 578. Compare also, Gottlieb v. Rinaldo, 78 Ark. 123, 93 S. W. 750, 7 L. R. A. (N. S.) 273 and note; and see note in 94 Am. St. 227. As to when deposit with warehouseman is a bailment and when a sale, see ante, § 3007.

[11] Smith v. Niles, 20 Vt. 315, 49 Am. Dec. 782. See also, Parke & Lacy Co. v. White River Lumber Co., 101 Cal. 37, 35 Pac. 442; Case v. L'Oeble, 84 Fed. 582; Wickes v. Hill, 115 Mich. 333, 73 N. W. 375; Morgan-Gardner Electric Co. v. Brown, 193 Pa. St. 351, 44 Atl. 459. See also, Rich v. Utah Commercial & Sav. Bank, 30 Utah 334, 84 Pac. 1105; Manti City Sav. Bank v. Peterson, 30 Utah 475, 86 Pac. 414, 116 Am. St. 862. But see as to things bought on the instalment plan payable as rent, Lucas v. Campbell, 88 Ill. 447, 31 Am. Rep. 81; Singer Mfg. Co. v. Graham, 8 Ore. 17, 34 Am. Rep. 572; Hervey v. R. I. Locomotive Works 93 U. S. 664, 23 L. ed. 1003, and the subject of "conditional sales" hereinafter considered. See further as to contracts of lease as conditional sales, Hays v. Jordan, 85 Ga. 741, 11 S. E. 833, 9 L. R. A. 373, and note; Fleet v. Hertz, 201 Ill. 594, 66 N. E. 858, 94 Am. St. 192, and note 248-254.

[12] Fleisher v. Hinde, 93 S. W. 1126, affd. 122 Mo. App. 218, 99 S. W. 25. See note in 94 Am. St. 234. Noble v. Ft. Smith Wholesale Grocery Co. (Okla.), 127 Pac. 14. See as to what may be considered as tending to show a sale, Eby v. Winters, 51 Kans. 777, 33 Pac. 471. And compare Washburn v. Inter-Mountain Mining Co., 56 Ore. 578, 109 Pac. 382, Ann. Cas. 1912C, 357 and note. See also, ante, § 4606 (distinguishing chattel mortgage from conditional sale).

[13] Johnson v. Allen, 70 Conn. 738, 40 Atl. 1056; Atlas Glass Co. v. Ball Bros. Glass. Mfg. Co., 87 Fed. 418; Fleet v. Hertz, 201 Ill. 594, 66 N. E. 858, 94 Am. St. 192, and note; Meldrum v. Snow, 9 Pick. (Mass.) 441, 20 Am. Dec. 489; Keystone Watch Case Co. v. Fourth St. Nat. Bank, 194 Pa. St. 535, 45 Atl. 328. But it may be a sale where it is for account of consignee and he is bound to pay consignee a fixed price. Towle v. White, 21 W. R. 465, 29 L. T. (N. S.) 78; Peoria Mfg. Co. v. Lyons, 153 Ill. 427, 38 N. E. 661; Reissner v. Oxley, 80 Ind. 580; Granite Roofing Co. v. Casler, 82 Mich. 466, 46 N. W. 728; Yoder v. Haworth, 57 Nebr. 150, 77 N. W. 377, 73 Am. St. 496; Weston v. Brown, 158 N. Y. 360, 53 N. E. 36; Halliday v. Hamilton, 11 Wall. (U. S.) 560, 20 L. ed. 214. See also, as to evidence (broker's letter-head), Simpson v. Pegram, 108 N. Car. 407, 13 S. E. 7. As to when contract or transaction is one of sale or one of agency, see Columbus Const. Co. v. Crane Co., 52 Fed. 635, 3 C. C. A. 216; Lenz v. Harrison, 148 Ill. 598, 36 N. E. 567; Whitman Agricultural Co. v. Hornbrook, 24 Ind. App. 255, 55 N. E. 502; Richardson Drug Co. v. Oberfelder, 58 Nebr. 822, 80 N. W. 50; State v. Colonial Club, 154 N. Car.

tract to manufacture and return where the identical thing is to be returned though in an altered form;[14] but if other articles are to be returned, and not the same, though of the same kind and made out of other material of the same kind the transaction may be either an exchange or sale, according to the contract or circumstances, and not a bailment.[15] The term sale is sometimes used as including an exchange or a barter, but in a stricter sense it does not include a mere exchange or barter, at least where the price is not fixed.[16] So, as a sale must be supported by a consideration it is thus distinguished from an ordinary gift which is without consideration.[17]

§ 4984. **Making the contract—Offer and acceptance.**—The manner of making a contract and what is necessary to constitute a contract are matters that have been fully treated in another volume of this work, and many illustrations have been given relating to contracts of sale[18] as well as other contracts, so that little is now

177, 69 S. E. 771, 31 L. R. A. (N. S.) 387, Ann. Cas. 1912 A, 1079 and note.

[14] Bulkley v. Andrews, 39 Conn. 70; Ashby v. West, 3 Ind. 170; Schenck v. Saunders, 13 Gray (Mass.) 37; Mack v. Snell, 140 N. Y. 193, 35 N. E. 493, 37 Am. St. 534; Mallory v. Willis, 4 N. Y. 76; Westcott v. Thompson, 18 N. Y. 363. See also, as to distinction between sale and contract to manufacture or for work and labor, Central Lithographing &c. Co. v. Moore, 75 Wis. 170, 43 N. W. 1124, 6 L. R. A. 788, 17 Am. St. 186, and note.

[15] See Ewing v. French, 1 Blackf. (Ind.) 353; Smith v. Clark, 21 Wend. (N. Y.) 83, 34 Am. Dec. 213; Jenkins v. Eichelberger, 4 Watts (Pa.) 121, 28 Am. Dec. 691. Wright v. Barnard, 89 Iowa 166, 56 N. W. 424; Jones v. Kemp, 49 Mich. 9, 12 N. W. 890; Reherd's Admr. v. Clem, 86 Va. 374, 10 S. E. 504; Powder Co. v. Burkhardt, 97 U. S. 110, 24 L. ed. 973.

[16] Gunter v. Leckey, 30 Ala. 591; Slayton v. McDonald, 73 Maine 50; Lucas v. County Recorder of Cass County, 75 Nebr. 351, 106 N. W. 217; Mitchell v. Gile, 12 N. H. 390; Jenkins v. Mapes, 53 Ohio St. 110, 41 N. E. 137; Loomis v. Wainwright, 21 Vt. 520.

[17] Cochrane v. Moore, 25 Q. B. Div. 57; Williams v. Chamberlain, 165 Ill. 210, 46 N. E. 250; Slade v. Mutrie, 156 Mass. 19, 30 N. E. 168; Flanders v. Blandy, 45 Ohio St. 108, 12 N. E. 321. An unexplained delivery of personal property to another at his request has been held to raise a presumption or an inference of a sale rather than a gift. Dant v. State, 106 Ind. 79, 5 N. E. 870 (glass of liquor delivered by barkeeper).

[18] See Vol. 1, §§ 57, 58. See also, Miller v. Sharp (Ind. App.), 100 N. E. 108 (acceptance must be as broad as offer); Owens v. Wright (N. Car.), 76 S. E. 735. Where a seller's telegram purported to accept a proposal, but stated that a contract was being mailed, it was held that the acceptance was thus qualified and there was no contract until it was executed. Houston & B. V. Co. v. Jos. Joseph & Bros. (Mo. App.), 152 S. W. 394, citing Runyon v. Wilkinson, 57 N. J. L. 420, 31 Atl. 390; Sparks v. Pittsburgh Co., 159 Pa. St. 295, 28 Atl. 152. In Gaunt v. Ralston Purina Co., 198 Fed. 60, although the letters of offer and acceptance of grain to be delivered referred in different terms

required to be added. As a general rule it may be said that, subject to the statute of frauds when applicable,[19] a contract of sale may be made in writing, or orally, or partly in writing and partly by word of mouth, or it may be implied from the acts and conduct of the parties. The written part may be merely a written acceptance of an oral offer or an order for goods referring to and based upon prior oral negotiations or conversations and understanding;[20] or there may be an oral acceptance of a written offer.[21] So, "there may be a consensus between the parties far short of a complete mode of expressing it, and that consensus may be discovered from letters or from other documents of an imperfect and incomplete description * * * as regards form."[22] The delivery of goods upon an order may complete a sale of them;[23] and even where there is no express order a sale will be implied where one merchant sends goods to another with an invoice and the latter receives and uses them.[24] So, it has been held that a sale

to the inspection which should govern, it was held that this did not prevent them from constituting a contract where it appeared that there was but one official inspection at the place and this was accepted by both parties so far as deliveries were made. But where one party made a counter proposition which the original offerer refused and the former then undertook to accept the original offer it was held that there was no contract. Shaw v. Ingram-Day Lumber Co. (Ky.), 153 S. W. 431.

[19] The statute of frauds is fully treated in vol. 2, ch. xxx. See particularly §§ 1291-1343.

[20] Lockett v. Nicklin, 2 Exch. 93. See also, Penn v. Smith, 93 Ala. 476, 9 So. 609; Pacific Iron Works v. Newhall, 34 Conn. 67; Routledge v. Worthington Co., 119 N. Y. 592, 23 N. E. 1111. In Hitner v. Diamond State Steel Co., 197 Fed. 850, it is held that an order consistent with and confirmatory of the oral agreement did not change the contract nor permit the buyer, after it was executed, to demand inconsistent conditions. The written part may be merely given in part performance of an entire contract. Clarke v. Tappin, 32 Conn. 56; Bradshaw v. Combs, 102 Ill. 428; Barker v. Bradley, 42 N. Y. 316, 1 Am. Rep. 521.

[21] A contract partly oral and partly in writing is generally regarded as an oral contract. Board of Commissioners of Marion County v. Shipley, 77 Ind. 553; Hulbert v. Atherton, 59 Iowa 91, 12 N. W. 780. But a writing purporting to be a complete and final contract is treated as a written contract in a proper case though signed by only one of the parties. Ames v. Moir, 130 Ill. 582, 22 N. E. 535, affd. 138 U. S. 306, 34 L. ed. 951, 11 Sup. Ct. 311; Memory v. Niepert, 131 Ill. 623, 23 N. E. 431.

[22] Brogden v. Metropolitan R. Co., 2 App. Cas. 666. See also, vol. 1, § 26, and compare Spence Drug Co. v. American Soda Fountain Co. (Ga. App.), 75 S. E. 817.

[23] Taylor v. Jones, 1 C. P. Div. 87; Rickey v. Stewart, 45 Minn. 437, 48 N. W. 22. See also, Crystal Case Co. v. Arnett, 73 Kans. 774, 85 Pac. 302; National Cash Register Co. v. Dehn, 139 Mich. 406, 102 N. W. 965. As to the difference between a mere order and a contract, see American Seeding &c. Co. v. Commonwealth (Ky.), 153 S. W. 92.

[24] Hobbs v. Massasoit Whip Co., 158 Mass. 194, 33 N. E. 495; Indiana

in response to a mail order is completed, without any communication accepting the order, when the goods are delivered to the carrier for transportation to the buyer.[25] But it is also held in a recent case that a drummer, merely by virtue of his employment as such is not authorized to make an absolute contract of sale, and that a dealer who receives an order for goods subject to approval is entitled to a reasonable time in which to determine whether to accept or reject the order, and the mere fact that immediately on receipt of an order accompanied by a check he deposits the check for collection does not of itself constitute an acceptance of the order.[26]

§ 4985. Subject of sale.—Almost anything may be the subject of a sale. If it has an actual value, however intangible, it may be sold.[27] Thus, patents, trademarks and copyrights,[28] the good will of a trade or business,[29] and the route of a newspaper

Mfg. Co. v. Hayes, 155 Pa. St. 160, 26 Atl. 6; Bartholomae v. Paull, 18 W. Va. 771; Wellauer v. Fellows, 48 Wis. 105, 4 N. W. 114. See also, Orme v. Cooper, 1 Ind. App. 449, 27 N. E. 655; Masterson v. Heitmann, 38 Tex. Civ. App. 476, 87 S. W. 227. Where, according to usage of the parties, cross-ties were deposited along the line of a railroad for inspection and acceptance by the company, it was held that this amounted to a proposal to sell and that subsequent appropriation of them by the company amounted to an acceptance and completed the sale. Kinney v. South & N. A. R. Co., 82 Ala. 368, 3 So. 113.

[25] State v. Kelley, 123 Tenn. 556, 133 S. W. 1011, 36 L. R. A. (N. S.) 171. See also, Sheridan Coal Co. v. C. W. Hull Co., 87 Nebr. 117, 127 S. W. 218, 138 Am. St. 435n. And compare Minneapolis Threshing Mach. Co. v. Zemanek, 130 Iowa 120, 106 N. W. 512.

[26] L. A. Becker Co. v. Clardy, 96 Miss. 301, 51 So. 211, Ann. Cas. 1912 B. 355. See also, Gross v. Arnold, 177 Ill. 575, 52 N. E. 867. And as to the right to revoke a sale on approval before acceptance, see Thompson Mfg. Co. v. Perkins, 97 Iowa 607, 66 N. W. 874. See also, Martin v. Wilms, 61 Ill. App. 108; Bauman v. McManus, 75 Kans. 106, 89 Pac. 15, 10 L. R. A. (N. S.) 1139, and note; J. L. Owens Co. v. Bemis (N. Dak.), 133 N. W. 59, 37 L. R. A. (N. S.) 232. As to acceptance held too indefinite, see Parks v. Griffith & Boyd Co. (Md.), 83 Atl. 559. Compare also, Gould v. Cater Chair Co., 147 Ala. 629, 41 So. 675. In L. A. Becker Co. v. Alvey, 27 Ky. L. 832, 86 S. W. 974, the buyer was held not bound by an order given to a traveling salesman until after acceptance by the seller.

[27] See note in 4 L. R. A. 398, 399; Reed v. Golden, 28 Kans. 632, 42 Am. Rep. 180; Montgomery v. Multnomah R. Co., 11 Ore. 344, 3 Pac. 435; Johnston v. Cowan, 59 Pa. St. 275. See as to sale of mere expectancy, note in 25 L. R. A. (N. S.) 436, and compare also, Dargin v. Hewlitt, 115 Ala. 510, 22 So. 128.

[28] 2 Bl. Comm. 405; Pepper v. Labrot, 3 Ky. L. 125, 8 Fed. 29; Warren v. Warren Thread Co., 134 Mass. 247; Brooks v. Byam, 2 Story (U. S.) 525, Fed. Cas. No. 1948.

[29] Story Partn. (7th ed.), § 99; Tweed v. Mills, L. R. 1 C. P. 39; Barber v. Connecticut Mutual Life Ins. Co., 15 Fed. 312.

carrier[30] have each and all been held susceptible of sale. As a general rule, the goods or thing constituting the subject of a present sale must be in existence, and owned or possessed by the seller.[31] There may, however, be a present sale of a growing crop,[32] and things to be manufactured or acquired by the seller may be the subject of an agreement to sell.[33] So, if the things have a potential existence, that is, if they would be the increase or product of something already belonging to the seller, such, for instance, as the wool to be grown on his own sheep or the crops to be grown on his own land for a definite and reasonable time[34] the property therein passes to the buyer as soon at least as they come into actual existence.[35] But, as elsewhere shown, a contract

[30] Hathaway v. Bennett, 10 N. Y. 108, Seld. Notes (N. Y.) 222, 61 Am. Dec. 739. See also, Senter v. Davis, 38 Cal. 450; Clute v. Loveland, 68 Cal. 254, 9 Pac. 133 (seat in stock exchange). But compare McFarland v. Stewart, 2 Watts (Pa.) 111, 26 Am. Dec. 109.

[31] Lunn v. Thornton, 1 C. B. 379; Congreve v. Evetts, 10 Exch. 298, 23 L. J. Exch. 273; Ingraham v. Whitmore, 75 Ill. 24; Wheeler's Exrs. v. Wheeler, 2 Metc. (Ky.) 474, 74 Am. Dec. 421; Hamilton v. Rogers, 8 Md. 301; Wilson v. Wilson, 37 Md. 1, 11 Am. Rep. 518; Williams v. Briggs, 11 R. I. 476, 23 Am. Rep. 518. But property owned by the seller though not in his actual possession may be sold. Tome v. Dubois, 6 Wall. (U. S.) 548, 18 L. ed. 943. See also, Howe v. Johnson, 117 Cal. 37, 48 Pac. 978; O'Keefe v. Kellogg, 15 Ill. 347; Shipp v. Bowen, 25 Ind. 44, note in 26 L. R. A. (N. S.) 47. Where the contract is for the sale of a crop to be grown on specific land there is said to be an implied condition that such a crop should be in existence at the proper time, and where it fails without fault of the seller he is held not liable for nondelivery of such part of it as has failed. Howell v. Coupland, L. R. 9 Q. B. 462, 1 Q. B. Div. 258. See also, Rice v. Weber, 48 Ill. App. 573.

[32] Graff v. Fitch, 58 Ill. 373, 11 Am. Rep. 85; Hansen v. Dennison, 7 Ill. App. 73; Northern v. State, 1 Ind. 113, Smith (Ind.) 71; Mabry v. Harp, 53 Kans. 398, 36 Pac. 743. But this is not true, it seems, of fish to be caught in the sea. Low v. Pew, 108 Mass. 347, 11 Am. Rep. 357. See, however, Story Sales (4th ed.), § 185; Watts v. Friend, 10 B. & C. 446.

[33] Hibblewhite v. M'Morine, 5 Mees. & W. 462; Reed v. Blades, 5 Taunt. 212; Ajello v. Worsley, (1898) 1 Ch. 274; Wolcott v. Heath, 78 Ill. 433; Logan v. Musick, 81 Ill. 415; Whitehead v. Root, 2 Metc. (Ky.) 584; Sawyer v. Taggart, 14 Bush (Ky.) 727; Stanton v. Small, 5 N. Y. Super. Ct. 230. Such a contract is held to be executory in Coplay Iron Co. v. Pope, 108 N. Y. 232, 15 N. E. 335. So a sale of goods to be delivered in the future may be valid even though there is an option or election as to time of delivery. White v. Barber, 123 U. S. 392, 31 L. ed. 243, 8 Sup. Ct. 221; Gruner v. Stucken, 39 La. Ann. 1076.

[34] Booker v. Jones' Admx., 55 Ala. 266; Pennington v. Jones, 57 Iowa 37, 10 N. W. 274; Shaw v. Gilmore, 81 Maine 396, 17 Atl. 314; Loftin v. Hines, 107 N. Car. 360, 12 S. E. 197, 10 L. R. A. 490.

[35] Grantham v. Hawley, Hobart 132 (wool to be sheared); Petch v. Tutin, 15 M. & W. 110; Van Hoozer v. Cory, 34 Barb. (N. Y.) 9; McCaffrey v. Woodin, 65 N. Y. 459, 22 Am. Rep. 644; Fonville v. Casey, 1 Murphy (N. Car.) 389, 4 Am. Dec. 559; Williams v. Chapman, 118 N. Car. 943, 24 S. E. 810 (future product of

apparently for the sale of an article, which, however, the seller can only acquire by purchase, is illegal as in the nature of a gambling venture, where the parties do not contemplate any purchase and delivery to fill the contract and are merely risking the difference between the contract-price and the market-price at a future day so that one would win what the other would lose.[36] And it is generally essential to an executed sale that the thing sold be identified,[37] for the legal title to personalty does not pass by a contract of sale unless it is in some way identified or at least capable of being identified by parol evidence.[38] Thus, it is a general rule that there is no complete sale transferring title

mill); Philadelphia, W. & B. R. Co. v. Woelpper, 64 Pa. St. 366, 3 Am. Rep. 596; Butt v. Ellett, 19 Wall. (U. S.) 544, 22 L. ed. 183; Briggs v. United States, 143 U. S. 346, 36 L. ed. 180, 12 Sup. Ct. 391 (crops to be grown). See also, Arques v. Wasson, 51 Cal. 620, 21 Am. Rep. 718; Hull v. Hull, 48 Conn. 250, 40 Am. Rep. 165; Gundy v. Biteler, 6 Ill. App. 510; Consolidated Tank Line Co. v. Collier, 148 Ill. 259, 35 N. E. 756, 39 Am. St. 181; Headrick v. Brattain, 63 Ind. 438; Norris v. Hix, 74 Iowa 524, 38 N. W. 395; Dickey v. Waldo, 97 Mich. 255, 56 N. W. 608, 23 L. R. A. 449, and note; McCown v. Mayer, 65 Miss. 537, 5 So. 98. But compare Paden v. Bellinger, 87 Ala. 575, 6 So. 351; Hutchinson v. Ford, 9 Bush (Ky.) 318, 15 Am. Rep. 711; Orcutt v. Moore, 134 Mass. 48, 45 Am. Rep. 278. And see generally the note in 23 L. R. A. 449. See also as to subsequently acquired rolling stock and accessions to a railroad, Buck v. Seymour, 46 Conn. 156; Morrill v. Noyes, 56 Maine 458, 96 Am. Dec. 486; Shaw v. Bill, 95 U. S. 10, 24 L. ed. 333. See also, 1 Elliott R. R. (2d ed.), § 497.

[36] Ante vol. 2, § 996, and see especially Grizewood v. Blane, 11 C. B. 538; Jamieson v. Wallace, 167 Ill. 388, 47 N. E. 762, 59 Am. St. 302; Pope v. Hanke, 155 Ill. 617, 40 N. E. 839, 28 L. R. A. 568; Schneider v. Turner, 130 Ill. 28, 22 N. E. 497, 6 L. R. A. 164; Pearce v. Foote, 113 Ill. 228, 55 Am. Rep. 414; Pickering v. Cease, 79 Ill. 328; Irwin v. Williar, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. 160. See also, Cunningham v. Nat. Bank, 71 Ga. 400, 51 Am. Rep. 266; Sondheim v. Gilbert, 117 Ind. 71, 18 N. E. 687, 5 L. R. A. 432, 10 Am. St. 23; Pearce v. Dill, 149 Ind. 136, 48 N. E. 788; First Nat. Bank of Lyons v. The Oskaloosa Packing Co., 66 Iowa 41; Counselman v. Reichart, 103 Iowa 430, 72 N. W. 490; Billingslea v. Smith, 77 Md. 504, 26 Atl. 1077; Harvey v. Merrill, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. 159; Mohr v. Miesen, 47 Minn. 228, 49 N. W. 862; Lester v. Buel, 49 Ohio St. 240, 30 N. E. 821, note in 1 L. R. A. 140, 34 Am. St. 556; Brua's Appeal, 55 Pa. St. 294; Kirkpatrick v. Bonsall, 72 Pa. St. 155; Gaw v. Bennett, 153 Pa. St. 247, 25 Atl. 1114, 34 Am. St. 699; Wagner v. Hildebrand, 187 Pa. St. 136, 41 Atl. 34; Embrey v. Jemison, 131 U. S. 336, 33 L. ed. 172, 9 Sup. Ct. 776. If, however, one of them acts in good faith, with the intention and expectation of delivering or receiving the goods, the transaction as to him may be valid. Pixley v. Boynton, 79 Ill. 351; Whitesides v. Hunt, 97 Ind. 191, 49 Am. Rep. 441; Murray v. Ochel-tree, 59 Iowa 435, 13 N. W. 411; Cockrell v. Thompson, 85 Mo. 510; Taylor & Co.'s Estate, 192 Pa. St. 309, 43 Atl. 975; Bibb v. Allen, 149 U. S. 481, 37 L. ed. 819, 13 Sup. Ct. 950.

[37] Shepard v. King, 96 Ga. 81, 23 S. E. 113.

[38] Browning v. Hamilton, 42 Ala. 484. See generally as to identification the note in 26 L. R. A. (N. S.) 15, et seq.

as long as anything remains to be done to identify the subject of the sale,[39] and in the case of the sale of an article to be manufactured or the like, the rule has often been stated and applied to the effect that ordinarily "no title passes until the thing is completely done and notice given the vendee, or some act done by the vendor designating it as the article sold, either by setting it apart, marking it, or some similar act."[40] And as a general rule, as stated by Professor Benjamin,[41] the strict legal title or property in law in goods to be afterward acquired by the seller does not pass to the buyer "unless and until the seller does some act, after their acquisition, appropriating them to the contract,[42] or the buyer takes possession of them with the consent of the seller,[43] or under a license to seize, which is equivalent to a delivery by the seller."[44] But that is certain which can be made certain and equity treats that as done which ought to be done, in a proper case, so that the equitable title may pass as between the parties,[45] subject, however, to be defeated or affected, while the seller remains in possession, by a bona fide purchaser from the seller,[46] or an attaching or execution creditor.[47]

[39] Swanwick v. Sothern, 9 Ad. & El. 895; Magee v. Billingsley, 3 Ala. 679; Cloke v. Shafroth, 137 Ill. 393, 27 N. E. 702, 31 Am. St. 375; Welch v. Spies, 103 Iowa 389, 72 N. W. 548; Williams v. Sayers, 79 Miss. 50, 29 So. 995; American Metal Co. v. Daugherty, 204 Mo. 71, 102 S. W. 538; Kein v. Tupper, 52 N. Y. 550; Hood v. Bloch, 29 W. Va. 244, 11 S. E. 910.

[40] Fordice v. Gibson, 129 Ind. 7, 28 N. E. 303. See also, McFadden v. Henderson, 128 Ala. 221, 29 So. 640; Blackwood v. Cutting Packing Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. 199; Moline Scale Co. v. Beed, 52 Iowa 307, 3 N. W. 96, 35 Am. Rep. 272; First Nat. Bank v. Crowley, 24 Mich. 492, note in 26 L. R. A. (N. S.) 1. But compare Wright v. Frank A. Andrews Co. (Mass.), 98 N. E. 798.

[41] Benj. Princ. Sales (2d ed.) 15.

[42] Lunn v. Thornton, 1 C. B. 379; Hurst v. Bell, 72 Ala. 336.

[43] Rowley v. Rice, 11 Metc. (Mass.) 333; Chapman v. Weimer, 4 Ohio St. 481.

[44] Hope v. Hayley, 5 El. & Bl. 830; Calkins v. Lockwood, 16 Conn. 276, 41 Am. Dec. 143; Tennis v. Midkiff, 55 Ill. App. 642; Deering v. Cobb, 74 Maine 332, 43 Am. Rep. 596; Chase v. Denny, 130 Mass. 566; Blanchard v. Cooke, 144 Mass. 207, 11 N. E. 83; Bennett v. Bailey, 150 Mass. 257, 22 N. E. 916; McCaffrey v. Woodin, 65 N. Y. 459, 22 Am. Rep. 644.

[45] Borden v. Croak, 131 Ill. 68, 22 N. E. 793, 19 Am. St. 23; note to Kimball v. Gafford, 78 Iowa 65, 42 N. W. 583, 4 L. R. A. 398; Phillips v. Winslow, 18 B. Mon. (Ky.) 431, 68 Am. Dec. 729; McCaffrey v. Woodin, 65 N. Y. 459, 22 Am. Rep. 644; Philadelphia, W. & B. R. Co. v. Woelpper, 64 Pa. St. 366, 3 Am. Rep. 596; Mitchell v. Winslow, 2 Story (U. S.) 630, Fed. Cas. No. 9673; Pennock v. Coe, 23 How. (U. S.) 117, 16 L. ed. 436. See also, Holroyd v. Marshall, 10 H. L. Cas. 191; Blackmore v. Shelby, 8 Humph. (Tenn.) 439.

[46] Joseph v. Lyons, 15 Q. B. Div. 280; Hallas v. Robinson, 15 Q. B. Div. 288; Deering v. Cobb, 74 Maine 332, 43 Am. Rep. 596.

[47] Gregg v. Sanford, 24 Ill. 17, 76 Am. Dec. 719; Gittings v. Nelson, 86

§ 4986. Subject of sale—Where it has been destroyed or ceased to exist.—Where there is a sale of specific goods the parties must have contemplated that there was something in existence to be sold,[48] and, if goods agreed to be sold perish or are destroyed without fault of the buyer or seller, before the risk passes to the buyer, the agreement is thereby avoided.[49] In some cases it is said that there is an implied warranty of the existence of the thing sold and it has also been said that there is no sale if it does not exist because of a want of mutual assent; but the true ground would seem to be that first stated in this section, and there being no subject-matter, an essential element of a valid sale is lacking.[50]

§ 4987. Subject-matter—Goods "to arrive."—Where the contract is for the sale of goods "to arrive" or "on arrival" either generally or by a particular vessel or by a specified time, or the like, it is held that this does not amount to a stipulation on the part of the seller that the goods shall so arrive.[51] On the contrary the contract is deemed to be upon the contingency, or double

Ill. 591; Blanchard v. Cooke, 144 Mass. 207, 11 N. E. 83; Welter v. Hill, 65 Minn. 273, 68 N. W. 26; Looker v. Peckwell, 38 N. J. L. 253, affd. 39 N. J. L. 134; Rochester Distilling Co. v. Rasey, 142 N. Y. 570, 37 N. E. 632, 40 Am. St. 635.

[48] Couturier v. Hastie, 5 H. L. Cas. 673, ante; Bates v. Smith, 83 Mich. 347, 47 N. W. 249; Jacksonville M. P. R. & Nav. Co. v. Hooper, 160 U. S. 514, 40 L. ed. 515, 16 Sup. Ct. 379; Allen v. Hammond, 11 Pet. (U. S.) 63, 9 L. ed. 633.

[49] Thompson v. Gould, 20 Pick. (Mass.) 134, and cases cited in last preceding note. In some cases it is said that there is an implied condition that the parties shall be excused if performance thus becomes impossible. See Wells v. Calnan, 107 Mass. 514, 9 Am. Rep. 65. See Gould v. Murch, 70 Maine 288, 35 Am. Rep. 325; Dexter v. Norton, 41 N. Y. 62, 7 Am. Rep. 415; McMillan v. Fox, 90 Wis. 173, 62 N. W. 1052. See also, Lile v. Hopkins, 12 Sm. & M. (Miss.) 299, 51 Am. Dec. 115. See generally, Tillson v. United States, 129 U. S. 101, 32 L. ed. 636; Kelly v. Bliss, 54 Wis. 187, 11 N. W. 488.

[50] Strickland v. Turner, 7 Exch. 208; Gardner v. Lane, 12 Allen (Mass.) 39; Allen v. Hammond, 11 Pet. (U. S.) 63, 9 L. ed. 633. So, there must be a meeting of minds as to the subject-matter. Chapman v. Cole, 12 Gray (Mass.) 141, 71 Am. Dec. 739; Harvey v. Harris, 112 Mass. 32; Utley v. Donaldson, 94 U. S. 29, 24 L. ed. 54. And sale of an article containing a secret treasure is not a sale of the treasure. Evans v. Barnett, 6 Pennew. (Del.) 44, 63 Atl. 770; Bowen v. Sullivan, 62 Ind. 281, 30 Am. Rep. 172; Livermore v. White, 74 Maine 452, 43 Am. Rep. 600; Huthmacher v. Harris' Admrs., 38 Pa. St. 491, 80 Am. Dec. 502; Durfee v. Jones, 11 R. I. 588, 23 Am. Rep. 528.

[51] Unless such appears to be the intention: Hale v. Rawson, 4 C. B. (N. S.) 85. See also, 2 Schouler's Personal Prop. (3d ed.), § 314; ante vol. 2, § 1589.

contingency, of the arrival of the vessel with the goods within the time limited, if any, in the ordinary course of navigation.[52]

§ 4988. The price.—As already stated, the price is the consideration and must, in strictness, be in money or fixed and stated in money terms. Thus, it is held in a recent case that a sale contemplates a money return for the thing transferred and that a consideration in the shape of a mortgage bond does not satisfy the requirement.[53] But the price may be promised or part paid and part promised as well as all paid. As shown in another place,[54] there must be a meeting of minds, and not a material misunderstanding, in regard to the price as well as in regard to other matters.[55] But it may be fixed in some manner specified in the contract of sale, as by reference to reports of sales at a designated time and place,[56] or the amount of a resale,[57] or by the valuation of a third party;[58] or it may be determined by the course

[52] Vernede v. Weber, 1 H. & N. 311; Johnson v. Macdonald, 9 M. & W. 600; Neldon v. Smith, 36 N. J. L. 148; Shields v. Pettie, 4 N. Y. 122; Rogers v. Woodruff, 23 Ohio St. 632, 13 Am. Rep. 276. See also, Boyd v. Siffkin, 2 Campb. 326; Hooper v. Chicago & N. W. R. Co., 27 Wis. 81, 9 Am. Rep. 431, and ante vol. 2, § 1589. See, as to transhipment, Harrison v. Fortlage, 161 U. S. 57, 40 L. ed. 616, 16 Sup. Ct. 488; Lovatt v. Hamilton, 5 M. & W. 639; Iasigi v. Rosenstein, 141 N. Y. 414, 36 N. E. 509.

[53] Koehler v. St. Mary's Brewing Co., 228 Pa. St. 648, 77 Atl. 1016, 139 Am. St. 1024 (holding that for this reason where the consideration for a conveyance of corporate property consisted of mortgage bonds of another corporation, instead of money, a dissatisfied stockholder was entitled to be paid off in cash according to the ratio of his stock to the value that would be his proportion of the bonds).

[54] Ante vol. 1, § 107.

[55] B. F. Bigger & Sons v. Johnson (Ark.), 152 S. W. 291; Rovegno v. Defferari, 40 Cal. 459; Rupley v. Daggett, 74 Ill. 351; Hand v. Gas Engine & Power Co., 167 N. Y. 142, 60 N. E. 425; Bigley v. Risher, 63 Pa. St. 152. And compare Estey Organ Co. v. Lehman, 132 Wis. 144, 111 N. W. 1097, 122 Am. St. 951.

[56] Daniel v. Hannah, 106 Ga. 91, 31 S. E. 734; Richardson v. Olmstead, 74 Ill. 213; Lund v. McCutchen, 83 Iowa 755, 49 N. W. 998; Lucas Coal Co. v. Delaware & H. Canal Co., 148 Pa. St. 227, 23 Atl. 990; Ames v. Quimby, 96 U. S. 324, 24 L. ed. 635.

[57] Foster v. Magill, 119 Ill. 75, 8 N. E. 771; Phifer v. Erwin, 100 N. Car. 59, 6 S. E. 672.

[58] Tew v. Harris, 11 Q. B. 7, 63 E. C. L. 7; Willingham v. Veal, 74 Ga. 755; Norton v. Gale, 95 Ill. 533, 35 Am. Rep. 173; Brown v. Bellows, 4 Pick. (Mass.) 179; New England Trust Co. v. Abbott, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271. If without fault of the parties such third person cannot or does not make a valuation, the sale contract cannot be enforced. Thurnell v. Balbirnie, 2 M. & W. 786; Vickers v. Vickers, L. R. 4 Eq. 529. See also, Elberton Hardware Co. v. Hawed, 122 Ga. 858, 50 S. E. 964 (even though one of the parties is the cause of such failure). But if the buyer has received and appropriated the goods or any part, he may be required to pay a reasonable price therefor. Clarke v. Westrope,

of dealing between the parties;[59] or, in the absence of anything else, the law by implication may fix the price at what the article is reasonably worth at the time or under the circumstances.[60] In the latter case, the usual or market-price is generally the criterion.[61] But not, ordinarily, where it is shown to be unnaturally inflated or depressed.[62] And what is a reasonable price has been held to be a question of fact depending upon the circumstances of the particular case.[63]

18 C. B. 765; Kenniston v. Ham, 29 N. H. 561. See also, Estey Organ Co. v. Lebman, 132 Wis. 144, 111 N. W. 1097, 122 Am. St. 951.

[59] Walsh v. Myers, 92 Wis. 397, 66 N. W. 250. Compare Llewellyn Steam Condenser Mfg. Co. v. Malter, 76 Cal. 242, 18 Pac. 271.

[60] Valpy v. Gibson, 4 C. B. 837; Acebal v. Levy, 10 Bing. 376; S. F. Bowser & Co. v. Marks, 96 Ark. 113, 131 S. W. 334, 32 L. R. A. (N. S.) 429n, Ann. Cas. 1912 B., 357, and note; Prenatt v. Runyon, 12 Ind. 174; Taft v. Travis, 136 Mass. 95; Lovejoy v. Michels, 88 Mich. 15, 49 N. W. 901, 13 L. R. A. 770; Stout v. Caruthersville Hardware Co., 131 Mo. App. 520, 110 S. W. 619; Livingston v. Wagner, 23 Nev. 53, 42 Pac. 290.

[61] Smith v. State, 9 Ga. App. 230, 70 S. E. 969; McEwen v. Morey, 60 Ill. 32; Konitzky v. Meyer, 49 N. Y. 571; Althouse v. Alvord, 28 Wis. 577. If there is no ascertainable market-price it has been held proper to inquire what others would be likely to give under the circumstances. Morrison v. Smith, 130 Ill. 304, 23 N. E. 241. And the price paid for other orders of the same article may be competent. Julius King Optical Co. v. Treat, 72 Mich. 599, 40 N. W. 912. See also, 3 Elliott Ev., § 2625.

[62] Lovejoy v. Michels, 88 Mich. 15, 49 N. W. 901, 13 L. R. A. 770. See also, Deutsch v. Pratt, 149 Mass. 415, 21 N. E. 1072; Deck's Admr. v. Feld, 38 Mo. App. 674.

[63] Acebal v. Levy, 10 Bing. 376, 25 E. C. L. 376. See also, Gallup v. Fox, 64 Conn. 491, 30 Atl. 756; Jenkins v. Richardson, 6 J. J. Marsh. (Ky.) 441, 22 Am. Dec. 82. And see where risk is on buyer but price can not be precisely ascertained because the thing sold has been destroyed, Martineau v. Kitching, L. R. 7 Q. B. 436.

CHAPTER CLV.

ELEMENTS AND FORMATION OF CONTRACTS—CONDITIONS AND WARRANTIES.

§ 4995. Conditions and warranties defined and distinguished.
4996. When stipulation is of the essence.
4997. Severable and entire contracts.
4998. Waiver of condition by buyer.
4999. Express conditions and warranty.
5000. Evidence of oral condition or warranty not admissible when contract is written.
5001. Known or obvious defects—Special and general warranties.
5002. When new consideration is essential to warranty.
§ 5003. Implied conditions and warranties—Title.
5004. When there is no implied warranty as to title.
5005. Sale of goods by description—Implied condition or warranty.
5006. Implied warranty or condition as to quality or fitness—Caveat emptor.
5007. Exceptions—When there is an implied condition or warranty as to fitness.
5008. Implied conditions or warranties in sale by sample.
5009. When implied warranty is negatived by express warranty.

§ 4995. Conditions and warranties defined and distinguished.—Continuing the consideration of the contract before treating specifically of its effect or of performance or rights and remedies, the next phase of the subject, in logical order, would seem to be conditions and warranties, and this is the order of treatment in the English "Sale of Goods Act." By a condition as distinguished from a warranty is usually meant a condition precedent whose fulfilment is treated as of the essence of the contract, that is, as essential to a transfer of the property in the goods or thing.[1] A warranty in its broadest sense may include any stipulation, express or implied, as to the title, quality or fitness of the thing for a particular purpose;[2] but in its strict and proper sense it is defined as "an express or implied statement of something which the party undertakes shall be part of the contract; and though part of the contract, yet collateral to the express object of it,"[3] namely, collateral to the transfer of the property in the goods

[1] Benj. Princ. Sales, 25, Rule 8.
[2] Benj. Princ. Sales, 28, Rule 11.
[3] Chanter v. Hopkins, 4 M. & W. 399, approved in Stuckey v. Bailey,

or thing. As a general rule, a breach of warranty, without fraud, in many jurisdictions at least, simply gives rise to an action for damages,[4] while the entire contract is avoided by the breach of a condition.[5] But a stipulation may be a condition though called a warranty in the contract; and the same stipulation may be both a condition and a warranty, in the broad sense, while the contract is still executory,[6] and become a warranty in the strict sense when the contract is executed by the transfer of the property in the thing to the buyer.[7]

§ 4996. When stipulation is of the essence.—Unless a different intention appears from the terms of the contract[8] (or the circumstances of the case[9]), stipulations as to time of payment are not deemed of the essence of the contract.[10] But, as will be

3 F. & F. 1. See also, Cleveland Linseed Oil Co. v. Buchanan, 120 Fed. 906, 57 C. C. A. 498; Reynolds v. Palmer, 21 Fed. 433; Fairbank Canning Co. v. Metzger, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. 753; McFarland v. Newman, 9 Watts (Pa.) 55, 34 Am. Dec. 497.

[4] Tiedeman on Sales, § 180. See also, Street v. Blay, 2 B. & Ad. 456; Clark v. Wooster, 79 Conn. 126, 64 Atl. 10; Crabtree v. Kile, 21 Ill. 180; Hoover v. Sidener, 98 Ind. 290; Marsh v. Low, 55 Ind. 271; Briggs v. Hilton, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; Muller v. Eno, 14 N. Y. 597; Thornton v. Wynn, 12 Wheat. (U. S.) 183, 6 L. ed. 595. See as to rescission for breach of warranty, note in 4 L. R. A. 370.

[5] Tiedeman on Sales, § 180; Dorr v. Fisher, 1 Cush. (Mass.) 271. See also, Accumulator Co. v. Dubuque St. R. Co., 64 Fed. 70, 12 C. C. A. 37; Columbia Iron Works v. Douglass, 84 Md. 44, 34 Atl. 1118, 33 L. R. A. 103, 57 Am. St. 362. The buyer may refuse to accept the goods because of a breach or nonfulfilment of such condition precedent. Jones v. United States, 96 U. S. 24, 24 L. ed. 644, 13 Ct. Cl. (N. S.) 524; Pope v. Allis, 115 U. S. 363, 29 L. ed. 393, 6 Sup. Ct. 69.

[6] Pope v. Allis, 115 U. S. 363, 371, 29 L. ed. 393, 6 Sup. Ct. 69; Forbes v. Pausinsky, 14 Ill. App. 17. See also, as to waiver of stipulation as to quality by acceptance, Brooks v. Laurens Mill Co., 78 S. Car. 200, 58 S. E. 806, 125 Am. St. 780.

[7] Behn v. Burness, 3 B. & S. 751; Morse v. Moore, 83 Maine 473, 22 Atl. 362, 13 L. R. A. 224, 23 Am. St. 783; Wolcott v. Mount, 36 N. J. L. 262, 13 Am. Rep. 438, affd. 38 N. J. L. 496, 20 Am. Rep. 425; Morse v. Union Stock Yard Co., 21 Ore. 289, 28 Pac. 2, 14 L. R. A. 157. Compare also, Edgar v. Breck, 172 Mass. 581, 52 N. E. 1083; Hoffman v. Dixon, 105 Wis. 315, 81 N. W. 491, 76 Am. St. 916. And it is held in some cases that an action for breach of warranty will not lie before transmission of title. Bunday v. Columbus Mach. Co., 143 Mich. 10, 106 N. W. 397, 5 L. R. A. (N. S.) 475. See Frye v. Milligan, 10 Ont. 509.

[8] Bishop v. Shillito, 2 B. & Ald. 329n; Miller v. Steen, 30 Cal. 402, 89 Am. Dec. 124; Hess Co. v. Dawson, 149 Ill. 138, 36 N. E. 557. See also, Daugherty v. Fowler, 44 Kans. 628, 25 Pac. 40, 10 L. R. A. 314.

[9] Reybold v. Voorhees, 30 Pa. St. 116.

[10] Martindale v. Smith, 1 Q. B. 389; Anglo-Am. & Co. v. Prentiss, 57 Ill. App. 507, affd. 157 Ill. 506, 42 N. E. 157; Myer v. Wheeler, 65 Iowa 390, 21 N. W. 692; Winchester v. Newton, 2 Allen (Mass.) 492; Peirson v. Duncan, 162 Pa. St. 187, 29 Atl. 733; Norrington v. Wright, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. 12. See also,

hereafter shown, delivery of the goods and payment of the price, unless otherwise agreed, are usually concurrent duties. Whether other stipulations as to time are of the essence of the contract or not depends upon the terms and construction of the contract.[11] Ordinarily, however, in mercantile contracts, the goods must answer to the description, or be of the kind stipulated, and such a stipulation or one as to the time and place of shipment is usually regarded as a condition precedent, the nonfulfilment of which may justify a repudiation of the entire contract.[12]

§ 4997. **Severable and entire contracts.**—It is provided in the English Sale of Goods Act that "where a contract of sale is not severable and the buyer has accepted the goods, or part thereof or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any conditions to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect."[13] But, as will hereafter be shown,

Godwin v. Phifer, 51 Fla. 441, 41 So. 597, ante, vol. 2, §§ 1551, 1552.

[11] Wilson v. Roots, 119 Ill. 379, 10 N. E. 204; Rommel v. Wingate, 103 Mass. 327; Higgins v. Delaware &c. R. Co., 60 N. Y. 553. See English Sale of Goods Act, § 10.

[12] Reuter v. Sala, 4 C. P. D. 239; Bowes v. Shand, 2 App. Cas. 455; Hoare v. Rennie, 5 H. & N. 19; Ellinger v. Comstock, 13 Ind. App. 696, 41 N. E. 351; Rhoades v. Cotton, 90 Maine 453, 38 Atl. 367; Catlin v. Tobias, 26 N. Y. 217, 84 Am. Dec. 183; Clark v. Fey, 121 N. Y. 470, 24 N. E. 703; King Phillip Mills v. Slater, 12 R. I. 82, 34 Am. Rep. 603; Cleveland Rolling Mill Co. v. Rhodes, 121 U. S. 255, 30 L. ed. 920, 7 Sup. Ct. 882; Filley v. Pope, 115 U. S. 213, 29 L. ed. 372, 6 Sup. Ct. 19. See also, Vigers v. Sanderson, 70 L. J. K. B. 383, (1901) 1 K. B. 608; Drummond v. Van Ingen, 12 App. Cas. 284, 56 L. J. Q. B. 563; Hubbard v. George, 49 Ill. 275; Bollman v. Burt, 61 Md. 415; T. Wilce Co. v. Kelley Shingle Co., 130 Mich. 319, 89 N. W. 957; Blum v. Daly, 22 Misc. (N. Y.) 342, 49 N. Y. S. 136; O'Donohue v. Leggett, 134 N. Y. 40, 31 N. E. 269. But see Jonassohn v. Young, 4 B. & S. 296; Mersey Steel Co. v. Naylor, 9 App. Cas. 434; Neill v. Whitworth, L. R. 1 C. P. 684, 18 C. B. (N. S.) 435; Blackburn v. Reilly, 47 N. J. L. 290, 1 Atl. 27, 54 Am. Rep. 159; Gerli v. Poidebard Silk Mfg. Co., 57 N. J. L. 432, 31 Atl. 401, 30 L. R. A. 61, 51 Am. St. 611; Rogers v. Woodruff, 23 Ohio St. 632, 13 Am. Rep. 276; Scott v. Kittanning Coal Co., 89 Pa. St. 231, 33 Am. Rep. 753, note in 21 Am. L. Reg. (N. S.) 398. "Month" prima facie means calendar month. English Sale of Goods Act, § 10; Churchill v. Merchants' Bank, 19 Pick. (Mass.) 532. See also, Reg. v. Chawton, 1 Q. B. 247. Compare, however, Benj. Sales, § 684. See generally as to when time is of the essence and as to computation of time, Vol. 2, §§ 1549-1557, 1820.

[13] English Sale of Goods Act, § 11. See also, Arnall-Couch-Powers Co. v. National Discount Co. (Ga. App.), 75 S. E. 816. This, as will hereafter be shown, is the rule in many jurisdictions in this country, at least

the Uniform Sales Act in this country is more liberal in allowing rescission, and where it has not been adopted there is considerable difference of opinion in different jurisdictions. The question as to when contracts are to be deemed severable has been considered in another volume.[14] It may be said here in a general way that if but one consideration is paid for all the articles sold, so that the particular amount of the consideration for each cannot be determined,[15] or if the purchase is of goods as a particular lot, even if the price is to be determined by the number of pounds, barrels, or the like, in the lot,[16] it is an entire and not a severable contract; but, though several different articles are sold at the same time and are of the same general description, yet if they are sold for distinct prices the contract may usually be treated as severable and the buyer may accept such of them as comply with the contract and reject the others.[17]

§ 4998. Waiver of condition by buyer.—A condition of the contract to be fulfilled by the seller may be waived by the buyer, or he may elect to treat the breach thereof as a breach of warranty and not as a ground for treating the contract as repudiated.[18] Acceptance of the goods by the buyer usually consti-

where the acceptance is with full knowledge or means of ascertaining whether the goods conform to the contract. See §§ 4996 and 4998. In some states, however, a warranty may be treated as a condition subsequent and the sale rescinded by the buyer for its breach. Bryant v. Isburgh, 13 Gray (Mass.) 607, 74 Am. Dec. 655. See also, Thompson v. Harvey, 86 Ala. 519, 5 So. 825; Upton Mfg. Co. v. Huiske, 69 Iowa 557, 29 N. W. 621; Gale Sulky Harrow Mfg. Co. v. Stark, 45 Kans. 606, 26 Pac. 8, 23 Am. St. 739; Franklin v. Long, 7 Gill & J. (Md.) 407; Boothby v. Scales, 27 Wis. 626.

[14] See ante, § 1543, et seq.

[15] Norris v. Harris, 15 Cal. 226; Roddin v. Shurley, 66 Ill. 25; Miner v. Bradley, 22 Pick. (Mass.) 457.

[16] Craig v. Lane (Mass.), 98 N. E. 685; Clark v. Baker, 5 Metc. (Mass.) 452. See also, Williams v. Robb, 104 Mich. 242, 62 N. W. 352; Peycke v. Shinn, 76 Nebr. 364, 107 N. W. 386.

[17] Herzog v. Purdy, 119 Cal. 99, 51 Pac. 27; Rubin v. Sturtevant, 80 Fed. 930, 26 C. C. A. 259; Keeler v. Clifford, 165 Ill. 544, 46 N. E. 248; Young & Conant Mfg. Co. v. Wakefield, 121 Mass. 91; Ming v. Corbin, 142 N. Y. 334, 37 N. E. 105. See also, Cohen v. Pemberton, 53 Conn. 221, 2 Atl. 315, 5 Atl. 682, 55 Am. Rep. 101; Peoria Mfg. Co. v. Bain Mfg. Co., 76 Mo. App. 76; Buckeye Buggy Co. v. Montana Stables, 43 Wash. 49, 85 Pac. 1077, 117 Am. St. 1032; Schiller v. Blyth &c. Co., 15 Wyo. 304, 88 Pac. 648, 8 L. R. A. (N. S.) 1167n. As said in McGrath v. Cannon, 55 Minn. 457, 57 N. W. 150: "Whether a contract is entire or severable, like most questions of construction, depends on the intention of the parties, and must be determined in each case by considering the language employed, the subject-matter of the contract, and how the parties themselves treated it."

[18] Behn v. Burness, 3 B. & S.

tutes such a waiver of the condition in so far as it gives a right to repudiate yet at the same time may leave a right to treat the breach as in the nature of a breach of warranty, or, in other words, the warranty survives acceptance.[19] But acceptance may be such, or under such circumstances, as to operate also as a waiver of a warranty or right to allege its breach.[20]

§ 4999. Express conditions and warranty.—A condition or a warranty may be either express or implied. No particular form of words is required[21] and the good or bad faith of the seller is usually immaterial.[22] As a general rule, it may be said that any affirmation or representation of a material fact by the seller during the negotiations for the sale in regard to the title, quality, or fitness of the goods or article sold for a particular purpose, showing an intention to assure the buyer of the truth of such fact, and so received and relied on by the buyer, is an express condition or warranty, as the case may be, provided it is not an expression of mere opinion.[23]

751; Defenbaugh v. Weaver, 87 Ill. 132; Wolcott v. Mount, 36 N. J. L. 262, 13 Am. Rep. 438, affd. 38 N. J. L. 496, 20 Am. Rep. 425; Morse v. Union Stock-Yard Co., 21 Ore. 289, 28 Pac. 2, 14 L. R. A. 157; Jones v. United States, 96 U. S. 24, 24 L. ed. 644, 13 Ct. Cl. (U. S.) 524. See also, Hitz v. Warner, 47 Ind. App. 612, 93 N. E. 1005.

[19] Last two cases in last preceding note; also Morse v. Moore, 83 Maine 473, 22 Atl. 362, 13 L. R. A. 224, 23 Am. St. 783; Fairbank Canning Co. v. Metzger, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. 753. See also, Central Trust Co. v. Mfg. Co., 77 Md. 202, 26 Atl. 493, and North Alaska Salmon Co. v. Hobbs, 159 Cal. 380, 113 Pac. 870, 120 Pac. 27, 35 L. R. A. (N. S.) 501 and note.

[20] Bullock v. Consumers' Lumber Co., 96 Cal. 17, 31 Pac. 367. See also, Northwestern Cordage Co. v. Rice, 5 N. Dak. 432, 67 N. W. 298, 57 Am. St. 563; Brooke v. Laurens Milling Co., 78 S. Car. 200, 58 S. E. 806, 125 Am. St. 780; Mitchell v. McBee, 1 McMul. (S. Car.) 267, 36 Am. Dec. 264. Where one party prevents fulfilment of a condition by the other the former may be deemed to have waived it. Mackay v. Diak, 6 App. Cas. 251; McPherson v. Walker, 40 Ill. 371; United States v. Peck, 102 U. S. 64, 26 L. ed. 46, 15 Ct. Cl. (U. S.) 622. See also, Tennessee & C. R. Co. v. Danforth, 112 Ala. 80, 20 So. 502; Vandergrift v. Cowles Engineering Co., 161 N. Y. 435, 55 N. E. 941, 48 L. R. A. 685.

[21] Jones v. Bright, 5 Bing. 533, 15 E. C. L. 533; Polhemus v. Heiman, 45 Cal. 573; Reed v. Hastings, 61 Ill. 266; Jones v. Quick, 28 Ind. 125; Kircher v. Conrad, 9 Mont. 191, 23 Pac. 74, 7 L. R. A. 471, 18 Am. St. 731; Roberts v. Morgan, 2 Cow. (N. Y.) 438; note in 11 Am. St. 879.

[22] Williamson v. Allison, 2 East 446; Tyler v. Moody, 111 Ky. 191, 23 Ky. L. 584, 63 S. W. 433, 54 L. R. A. 417, 98 Am. St. 406; Brisbane v. Parsons, 33 N. Y. 332; Gartner v. Corwine, 57 Ohio St. 246, 48 N. E. 945; Shippen v. Bowen, 122 U. S. 575, 30 L. ed. 1172, 7 Sup. Ct. 1283; Hoffman v. Dixon, 105 Wis. 315, 81 N. W. 491, 76 Am. St. 916.

[23] 30 Am. & Eng. Ency. of Law (2d ed.) 129, 136; Benj. Princ. Sales, 34, Rule 13. See also, De Lassalle v.

§ 5000. **Evidence of oral condition or warranty not admissible when contract is written.**—But where the entire contract has been reduced to writing, it, of course, governs, and parol evidence of an oral express warranty is not admissible.[24] If, however, the writing indicates that it does not include or embrace the entire agreement, as is usually the case where it is a mere receipt or bill of parcels, this rule excluding parol evidence does not apply.[25] So, there are cases where the warranty is an independent agreement and as such may be shown by parol notwithstanding the contract of sale is in writing.[26]

Guildford (1901), 2 K. B. 215; Robinson v. Harvey, 82 Ill. 58; Kenner v. Harding, 85 Ill. 264, 28 Am. Rep. 615; Jones v. Quick, 28 Ind. 125; Hastings v. Lovering, 2 Pick. (Mass.) 214, 13 Am. Dec. 420; J. I. Case Threshing Machine Co. v. McKinnon, 82 Minn. 75, 84 N. W. 646; Chapman v. Murch, 19 Johns. (N. Y.) 290, 10 Am. Dec. 227; Drew v. Edmunds, 60 Vt. 401, 15 Atl. 100, 6 Am. St. 122; Hobart v. Young, 63 Vt. 363, 21 Atl. 612, 12 L. R. A. 693; notes in 86 Am. Dec. 757. See, as to what is a mere expression of opinion, Tabor v. Peters, 74 Ala. 90, 49 Am. Rep. 804; Towell v. Gatewood, 2 Scam. (Ill.) 22, 33 Am. Dec. 437; McComas v. Haas, 93 Ind. 276; Tewkesbury v. Bennett, 31 Iowa 83; Bryant v. Crosby, 40 Maine 9; Deming v. Darling, 148 Mass. 504, 20 N. E. 107, 2 L. R. A. 743; Collins v. Jackson, 54 Mich. 186, 19 N. W. 947; Titus v. Poole, 145 N. Y. 414, 40 N. E. 228. To the effect that there need not be an actual intent on the part of the seller to warrant if such is the effect of his affirmation, see McClintock v. Emick, 87 Ky. 160, 9 Ky. L. 995, 7 S. W. 903; Hoffman v. Dixon, 105 Wis. 315, 81 N. W. 491, 76 Am. St. 916.

[24] 1 Elliott Ev., §§ 580, 611; Harnor v. Groves, 15 C. B. 667; Robinson v. McNeill, 51 Ill. 225; Conant v. National &c. Bank, 121 Ind. 323, 22 N. E. 250; McCormick Harvesting Mach Co. v. Yoeman, 26 Ind. App. 415, 59 N. E. 1069; McCray Refrigerator & Cold Storage Co. v. Woods, 99 Mich. 269, 58 N. W. 320, 41 Am. St 599; McNaughton v. Wahl, 99 Minn. 92, 108 N. W. 467, 116 Am. St. 389; Naumberg v. Young, 44 N. J. L. 331, 43 Am. Rep. 380; Eighmie v. Taylor, 98 N. Y. 288; Seitz v. Brewers' Refrigerator Mach. Co., 141 U. S. 510, 35 L. ed. 837, 12 Sup. Ct. 46; Dewitt v. Berry, 134 U. S. 306, 33 L. ed. 896, 10 Sup. Ct. 536; Milwaukee Boiler Co. v. Duncan, 87 Wis. 120, 58 N. W. 232, 41 Am. St. 33.

[25] Towell v. Gatewood, 2 Scam. (Ill.) 22, 33 Am. Dec. 437; Ruff v. Jarrett, 94 Ill. 475; Jackson v. Mott, 76 Iowa 263, 41 N. W. 12; Leavitt v. Fiberloid Co., 196 Mass. 440, 82 N. E. 682, 15 L. R. A. (N. S.) 855n; Atwater v. Clancy, 107 Mass. 369; Perrine v. Cooley, 39 N. J. L. 449; Filkins v. Whyland, 24 N. Y. 338; Sturm v. Boker, 150 U. S. 312, 37 L. ed. 1093, 14 Sup. Ct. 99; Nauman v. Ullman, 102 Wis. 92, 78 N. W. 159. But an instrument in the form of a receipt may contain the entire contract. Schultz v. Coon, 51 Wis. 416, 8 N. W. 285, 37 Am. Rep. 839.

[26] Storer v. Taber, 83 Maine 387, 22 Atl. 256; Chapin v. Dobson, 78 N. Y. 74, 34 Am. Rep. 512; Bannon v. Aultman, 80 Wis. 307, 27 Am. St. 37 (subsequent express agreement). See to the effect that this is so where there are fraudulent misrepresentations and the action is not on the warranty but for the fraud or deceit, Antle v. Sexton, 32 Ill. App. 437, affd. 137 Ill. 410, 27 N. E. 691; Esterly v. Eppelsheimer, 73 Iowa 260, 34 N. W. 846; Da Lee v. Blackburn, 11 Kans. 190; Salem India-Rubber Co. v. Adams, 23 Pick. (Mass.) 256. Compare also, Aultman v. Falkum, 51 Minn. 562, 53 N. W. 875.

§ 5001. Known or obvious defects—Special and general warranties.—A general warranty does not ordinarily extend to defects known or plainly apparent and obvious to the buyer;[27] but it is usually otherwise where it requires special skill or experience to discover or understand the defect,[28] or where the seller conceals it by artifice.[29] So, there may be a special warranty against a specified defect;[30] and even where the purchaser exercises his own judgment he may desire and obtain a special warranty,[31] but in such a case this must be sufficiently explicit.

§ 5002. When new consideration is essential to warranty.—A warranty made at the time and as part of the contract of sale is supported by the original consideration,[32] and it has been so held where the warranty was after delivery but before the price

[27] Hoffman v. Oates, 77 Ga. 701; Ragsdale v. Shipp, 108 Ga. 817, 34 S. E. 167; Scott v. Geiser Mfg. Co., 70 Kans. 498, 78 Pac. 823, affd. 70 Kans. 800, 80 Pac. 955; Day v. Mapes-Reeve Const. Co., 174 Mass. 412, 54 N. E. 878; McCormick v. Kelly, 28 Minn. 135, 9 N. W. 675; Moore v. Koger, 113 Mo. App. 423, 87 S. W. 602; Leavitt v. Fletcher, 60 N. H. 182; Bennett v. Buchan, 76 N. Y. 386; Fisher v. Pollard, 2 Head (Tenn.) 314, 75 Am. Dec. 740; Drew v. Edmunds, 60 Vt. 401, 15 Atl. 100, 6 Am. St. 122. See also, Coolins v. Tigner, 5 Pennew. (Del.) 345, 60 Atl. 978; Harwood v. Breese, 73 Nebr. 521, 103 N. W. 55 (where buyer knows of defect).

[28] Margetson v. Wright, 8 Bing. 454; House v. Fort, 4 Blackf. (Ind.) 293; Meickley v. Parsons, 66 Iowa 63, 23 N. W. 265, 55 Am. Rep. 261; Storrs v. Emerson, 72 Iowa 390, 34 N. W. 176; Brown v. Bigelow, 10 Allen (Mass.) 242; Leitch v. Gillette-Herzog Mfg. Co., 64 Minn. 434, 67 N. W. 352; Shewalter v. Ford, 34 Miss. 417. See also, Jordan v. Foster, 11 Ark. 139.

[29] Chadsey v. Greene, 24 Conn. 562; Kenner v. Harding, 85 Ill. 264, 28 Am. Rep. 615; Robertson v. Clarkson, 9 B. Mon. (Ky.) 506. See also, Henshaw v. Robins, 9 Metc. (Mass.) 83, 43 Am. Dec. 367.

[30] Fitzgerald v. Evans, 49 Minn. 541, 52 N. W. 143; Watson v. Roode, 30 Nebr. 264, 46 N. W. 491, affd. 43 Nebr. 348, 61 N. W. 625; Pinney v. Andrus, 41 Vt. 631. See also, First National Bank of Kansas City v. Grindstaff, 45 Ind. 158; Columbian Iron Works v. Douglas, 84 Md. 44, 34 Atl. 1118, 33 L. R. A. 103, 57 Am. St. 362; Gould v. Stein, 149 Mass. 570, 22 N. E. 47, 5 L. R. A. 213, 14 Am. St. 455.

[31] Eureka Fertilizer Co. v. Baltimore Copper &c. Co., 78 Md. 179, 27 Atl. 1035; Smith v. Hale, 158 Mass. 178, 33 N. E. 493, 35 Am. St. 485; Meyer v. Hill (Tex. Civ. App.), 45 S. W. 333. See also, Snowden v. Waterman, 105 Ga. 384, 31 S. E. 110; Hitz v. Warner, 47 Ind. App. 612, 93 N. E. 1005; Eagle Iron Works v. Des Moines Suburban R. Co., 101 Iowa 289, 70 N. W. 193; Mitchell v. Pinckney, 127 Iowa 696, 104 N. W. 286; Samuels v. Guin's Estate, 49 Mo. App. 8. And compare Thompson v. Harvey, 86 Ala. 519, 5 So. 825; Woods v. Thompson, 114 Mo. App. 38, 88 S. W. 1126; Walker v. Ayer, 80 S. Car. 292, 61 S. E. 557.

[32] Standard Underground Cable Co. v. Denver Consol. Electric Co., 76 Fed. 422, 22 C. C. A. 258; Morris v. Bradley Fertilizer Co., 64 Fed. 55, 12 C. C. A. 34; Wilmot v. Hurd, 11 Wend. (N. Y.) 584; Wightman v. Carlisle, 14 Vt. 296, and authorities in next note following.

had been agreed upon.[33] Where, however, a warranty is made after the completion of the sale it must be supported by a new consideration.[34]

§ 5003. Implied conditions and warranties—Title.—The most general rule as to implied conditions and warranties is stated as follows in the "English Sale of Goods Act:"[35] "In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is (1) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass,[36] (2) an implied warranty that the buyer shall have and enjoy quiet possession of the goods,[37] (3) an implied warranty

[33] Vincent v. Leland, 100 Mass. 432. Or after part payment of price and before delivery, Douglass v. Moses, 89 Iowa 40, 56 N. W. 271, 48 Am. St. 353. So, where the warranty was put in writing a day or two after delivery of a bill of sale but in pursuance of the original contract, Spalding v. Conant, 146 Mass. 292, 15 N. E. 638; Collette v. Weed, 68 Wis. 428, 32 N. W. 753.

[34] Roscorla v. Thomas, 3 Q. B. 234, 43 E. C. L. 713; Collins v. Tigner, 5 Pen. (Del.) 345, 60 Atl. 978; Summers v. Vaughan, 35 Ind. 323, 9 Am. Rep. 741; White v. Oakes, 88 Maine 367, 34 Atl. 175, 32 L. R. A. 592; Hogins v. Plympton, 11 Pick. (Mass.) 97; McGaughey v. Richardson, 148 Mass. 608, 20 N. E. 202; Cady v. Walker, 62 Mich. 157, 28 N. W. 805, 4 Am. St. 834; Brewster v. Countryman, 12 Wend. (N. Y.) 446; Fletcher v. Nelson, 6 N. Dak. 94, 69 N. W. 53. It has been held, however, that the new consideration may be the acceptance of goods which the buyer has a right to reject for default of the seller. Congar v. Chamberlain, 14 Wis. 258. See also, Porter v. Pool, 62 Ga. 238.

[35] Sale of Goods Act, § 12. See also, ante, vol. 1, § 129; and Uniform Sales Act, § 13.

[36] Eicholz v. Bannister, 17 C. B. (N. S.) 708, 112 E. C. L. 708; Morris v. Thompson, 85 Ill. 16; Marshall v. Duke, 51 Ind. 62; Brown v. Pierce, 97 Mass. 46, 93 Am. Dec. 57; Croly v. Pollard, 71 Mich. 612, 39 N. W. 853; Matheny v. Mason, 73 Mo. 677, 39 Am. Rep. 541; Smith v. Fairbanks, 27 N. H. 521; Gould v. Bourgeois, 51 N. J. L. 361, 18 Atl. 64; Burt v. Dewey, 40 N. Y. 283, 100 Am. Dec. 482; Sherman v. Champlain Transp. Co., 31 Vt. 162. See also, The Electron, 74 Fed. 689, 21 C. C. A. 12. See also, Houser v. United States, 39 Ct. Cl. (U. S.) 508. But in many of the states there is held to be no implied warranty of goods not in possession of the seller either actual or constructive as by his agent or bailee. Lackey v. Stouder, 2 Ind. 376; Norton v. Hooten, 17 Ind. 365; Huntington v. Hall, 36 Maine 501, 58 Am. Dec. 765; Budd v. Power, 8 Mont. 380, 20 Pac. 820, affd. 9 Mont. 99, 22 Pac. 499; Hopkins v. Grinell, 28 Barb. (N. Y.) 533; Scott v. Hix, 2 Sneed (Tenn.) 192, 62 Am. Dec. 458. Tiedeman on Sales, § 185; Story on Sales (4th ed.), § 367. See however, Gould v. Bourgeois, 51 N. J. L. 361, 18 Atl. 64.

[37] Jeffers v. Easton, 113 Cal. 345, 45 Pac. 680; The Electron, 74 Fed. 689, 21 C. C. A. 12; Linton v. Porter, 31 Ill. 107; Mayor of New York v. Mabie, 13 N. Y. 151, 64 Am. Dec. 538; McGiffin v. Baird, 62 N. Y. 329. But there is no such warranty against

that the goods shall be free from any charge or encumbrance in favor of any third party, not declared or known to the buyer before or at the time when the contract is made."[38]

§ 5004. When there is no implied warranty as to title.—As shown in the note to the last preceding section, the prevailing rule in this country seems to be that there is, ordinarily, no implied warranty as to title where the goods are not in the possession, either actual or constructive, of the seller,[39] although the English rule seems to be the better on principle, unless, perhaps, where the goods are at the time claimed by another or the like. So, there is no such implied warranty where the contract shows a contrary intention, as where the transaction is and purports to be in effect merely an assignment of such title or interest as the seller has in the goods,[40] nor where the goods are sold with notice to the buyer of the outstanding interest.[41] It is well settled that there is no such warranty where goods are sold at judicial sale;[42] and it may be stated as a general rule that in sales by executors or

unjust and illegal interference. Curtes v. Imeranty, 6 How. (U. S.) 146, 12 L. ed. 380.

[38] Close v. Crossland, 47 Minn. 500, 50 N. W. 694; Sargent v. Currier, 49 N. H. 310, 6 Am. Rep. 524; Dresser v. Ainsworth, 9 Barb. (N. Y.) 619; Clevenger v. Lewis, 20 Okla. 837, 95 Pac. 230, 16 L. R. A. (N. S.) 410n; Baker v. McAllister, 2 Wash. Ter. 48, 3 Pac. 581. See also, Lane v. Romer, 2 Pinney (Wis.) 404. But see Flandrow v. Hammond, 148 N. Y. 129, 42 N. E. 511. See generally, ante, vol. 1, §§ 128, 129.

[39] Scranton v. Clark, 39 N. Y. 220, 100 Am. Dec. 430; Balte v. Bedemiller, 37 Ore. 27, 60 Pac. 601, 82 Am. St. 737. Constructive possession has often been held sufficient. St. Anthony &c. Elevator Co. v. Dawson, 20 N. Dak. 18, 126 N. W. 1013, Ann. Cas. 1912B, 1337; Reynolds v. Roberts, 57 Vt. 392. See also, Shattuck v. Green, 104 Mass. 42.

[40] Morley v. Attenborough, 3 Exch. 500; Chapman v. Speller, 14 Q. B. 621; Jones v. Huggeford, 3 Metc. (Mass.) 515; Gould v. Bourgeois, 51 N. J. L. 361, 18 Atl. 64; Krumbhaar v. Birch, 83 Pa. St. 426; Cogar v. Burns Lumber Co., 46 W. Va. 256, 33 S. E. 219. See also, as to other circumstances, Miller v. Van Tassel, 24 Cal. 459 (refusal to warrant); Paulsen v. Hall, 39 Kans. 365, 18 Pac. 225; Edgerton v. Michels, 66 Wis. 124, 26 N. W. 748, 28 N. W. 408. No such warranty where the buyer evidently assumes all the risk as to the title: McCoy v. Artacher, 3 Barb. (N. Y.) 323; Porter v. Bright, 82 Pa. St. 441.

[41] Bogert v. Chrystie, 24 N. J. L. 57; Barbee v. Williams, 4 Heisk. (Tenn.) 522.

[42] The Monte Allegre, 9 Wheat (U. S.) 616, 6 L. ed. 174. See also, Danley v. Rector, 10 Ark. 211, 50 Am. Dec. 242; Bartholomew v. Warner, 32 Conn. 98, 85 Am. Dec. 251; Worthy v. Johnson, 8 Ga. 236, 52 Am. Dec. 399; Morgan v. Fencher, 1 Blackf. (Ind.) 10; Estes v. Alexander, 90 Mo. 453, 2 S. W. 414; Hoe v. Sanborn, 21 N. Y. 552, 78 Am. Dec. 163; Jones v. Burr, 5 Strob. L. (S. Car.) 147, 53 Am. Dec. 699; Evans v. Dendy, 2 Spears L. (S. Car.) 9, 42 Am. Dec. 356.

administrators,[43] guardians,[44] or others acting in an official or a known representative capacity,[45] there is no implied warranty of title.

§ 5005. Sale of goods by description—Implied condition or warranty.—Where there is a contract for the sale of goods by description there is an implied condition[46] or warranty[47] that the goods shall correspond with the description, at least where there has been no opportunity to inspect them.[48] And where the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample, if the goods do not also correspond with the description.[49]

[43] Bingham v. Maxcy, 15 Ill. 295; Mockbee's Admr. v. Gardner, 2 Har. & G. (Md.) 176. See also, Weyer v. Second Nat. Bank, 57 Ind. 198; Cogan v. Frisby, 36 Miss. 178.

[44] Storm v. Smith, 43 Miss. 497.

[45] Cohn v. Amidon, 120 N. Y. 398, 24 N. E. 944 (mortgage trustee). See also, Page v. Cowasjee, L. R. 1 P. C. 127; Morley v. Attenborough, 3 Exch. 500; Wood v. Baxter, 49 L. T. 45; Harris v. Lynn, 25 Kans. 281, 37 Am. Rep. 253; Irwin v. Thompson, 27 Kans. 643 (agent known to be acting as such); Fuller v. Fowler, 1 Bailey (S. Car.) 75; Road Comrs. v. Macon, 2 Brev. (S. Car.) 105.

[46] Bowes v. Shand, 46 L. J. Q. B. 561, 2 App. Cas. 455; Josling v. Kingsford, 13 C. B. (N. S.) 447; Columbia Iron &c. Co. v. Douglas, 84 Md. 44, 34 Atl. 1118, 33 L. R. A. 103, 57 Am. St. 363; Patrick v. Norfolk Lumber Co., 81 Nebr. 267, 115 N. W. 780; Morse v. Union Stock-Yard Co., 21 Ore. 289, 28 Pac. 2, 14 L. R. A. 157; Pope v. Allis, 115 U. S. 363, 29 L. ed. 393, 6 Sup. Ct. 69; Springfield Shingle Co. v. Edgecomb Mill Co., 52 Wash. 620, 101 Pac. 233, 35 L. R. A. (N. S.) 258, and note. See also, Wallis v. Pratt, (1911) A. C. 394; Varley v. Whipp (1900), 1 Q. B. 513; Bagley v. Cleveland Rolling-Mill Co., 21 Fed. 159; Elgin Jewelry Co. v. Estes, 122 Ga. 807, 50 S. E. 939; Waeber v. Tablot, 167 N. Y. 48, 60 N. E. 288, 82 Am. St. 712.

[47] Foos v. Sabin, 84 Ill. 564; Richmond Trading & Mfg. Co. v. Farquar, 8 Blackf. (Ind.) 89; Timken Carriage Co. v. Smith, 123 Iowa 554, 99 N. W. 183; Winsor v. Lombard, 18 Pick. (Mass.) 57; Gould v. Stein, 149 Mass. 570, 22 N. E. 47, 5 L. R. A. 213, 14 Am. St. 455. See also, Wieler v. Schilizzi, 17 C. B. 619; Jones v. Just, 9 B. & S. 141; White v. Miller, 71 N. Y. 118, 27 Am. Rep. 13; Bowman Lumber Co. v. Anderson, 70 Ohio St. 16, 70 N. E. 503; Lenz v. Blake-McFall Co., 44 Ore. 569, 76 Pac. 356. But compare Seixas v. Woods, 2 Caines (N. Y.) 48, 2 Am. Dec. 215; Swett v. Colgate, 20 Johns. (N. Y.) 196, 11 Am. Dec. 266; Rollins v. Northern Land & Logging Co., 134 Wis. 447, 114 N. W. 819.

[48] It is held in some cases that the warranty (further at least than as to identity) does not ordinarily arise or is waived where there is full opportunity to inspect, but there are other cases to the contrary. See Springfield Shingle Co. v. Edgecomb Mill Co., 52 Wash. 620, 101 Pac. 233, and note in 35 L. R. A. (N. S.) 258n, 271 et seq., for review of cases on both sides and upon this entire subject.

[49] Miamisburg Twine & Cordage Co. v. Wohlhuter, 71 Minn. 484, 74 N. W. 175. And see, to the same effect, Gould v. Stein, 149 Mass. 570, 22 N. E. 47, 5 L. R. A. 213, 14 Am. St. 455, and Nichol v. Godts, 10 Exch. 191. See also, Drummond v. Van Ingen, 12 App. Cas. 284; Bach v. Levy, 101 N. Y. 511, 5 N. E. 345; Henry v. Talcott, 175 N. Y. 385, 67

§ 5006. Implied warranty or condition as to quality or fitness—Caveat emptor.—As a general rule,—subject to some exceptions, the most important of which are stated in the next following section—there is no implied warranty or condition as to quality[50] or fitness for any particular purpose.[51] Caveat emptor is the common-law rule in such cases,[52] and this is the rule in this country[53] in all but one or two states.[54]

§ 5007. Exceptions—When there is an implied condition or warranty as to fitness.—Where the buyer, expressly or by implication,[55] makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment,[56] and the goods are of a

N. E. 617. But compare Meyer Bros. Drug Co. v. Puckett, 139 Ala. 331, 35 So. 1019.

[50] Moore v. McKinlay, 5 Cal. 471; Drew v. Roe, 41 Conn. 41; Morris v. Thompson, 85 Ill. 16; Court v. Snyder, 2 Ind. App. 440, 28 N. E. 718, 50 Am. St. 247; Mixer v. Coburn, 11 Metc. (Mass.) 559, 45 Am. Dec. 230; Weimer v. Clement, 37 Pa. St. 147, 78 Am. Dec. 411; Ryan v. Ulmer, 108 Pa. St. 332, 56 Am. Rep. 210, notes in 43 Am. Dec. 676, and 6 Am. Dec. 113, and in 102 Am. St. 608.

[51] Remy v. Healy, 161 Mich. 266, 126 N. W. 202, 29 L. R. A. (N. S.) 139, and note; McQuaid v. Ross, 85 Wis. 492, 55 N. W. 705, 22 L. R. A. 187, and note. See Davis v. Galyx Drill Co. v. Mallory, 137 Fed. 332, 69 L. R. A. 373; note in 35 L. R. A. (N. S.) 286 (collecting authorities to this effect where the article is a specific known one or under a definite and specific description); also, Mark v. H. D. Williams Cooperage Co., 204 Mo. 242, 103 S. W. 20; Rollins Engine Co. v. Eastern Forge Co., 73 N. H. 92, 59 Atl. 382, 68 L. R. A. 441.

[52] Parkinson v. Lee, 2 East 314. See also, Benj. Sales (7th ed.), § 644, ante, vol. 1, §§ 128, 129; Barr v. Gibson, 3 M. & W. 390; Bridge v Wain, 1 Stark 504, 2 E. C. L. 192; Barnard v. Kellogg, 10 Wall. (U. S.) 383, 19 L. ed. 987.

[53] Davis v. Murphy, 14 Ind. 158; National Oil Co. v. Rankin, 68 Kans. 679, 75 Pac. 1013; Grojean v. Darby, 135 Mo. App. 586, 116 S. W. 1062; Wright v. Hart, 18 Wend. (N. Y.) 449; Hargons v. Stoue, 5 N. Y. 73. See 1 Parson Cont. *577, and authorities cited in first note to this section. But see where there is fraud, Puls v. Hornbeck, 24 Okla. 288, 103 Pac. 665, 29 L. R. A. (N. S.) 202.

[54] Louisiana is a civil law state, and South Carolina courts seem to take the view that a sound price requires sound property. Timrod v. Schoollred, 1 Bay (S. Car.) 324, 1 Am. Dec. 620; Bulwinkle v. Cramer, 27 S. Car. 376, 3 S. E. 776, 13 Am. St. 645, and note.

[55] Drummond v. Van Ingen, 12 App. Cas. 284; Jones v. Padgett, 24 Q. B. Div. 650. See also, Preist v. Last (1903), 2 K. B. 148.

[56] Brown v. Edgington, 2 Man. & G. 279; Cleveland Linseed Oil Co. v. Buchanan, 120 Fed. 806, 57 C. C. A. 498; Edwards v. Dillon, 147 Ill. 14, 35 N. E. 135, 37 Am. St. 199; H. B. Smith Co. v. Williams, 29 Ind. App. 336, 63 N. E. 318; Skinner v. E. F. Kerwin &c. Glass Co., 103 Mo. App. 650, 77 S. W. 1011; Bierman v. City Mills Co., 151 N. Y. 482, 45 N. E. 856, 37 L. R. A. 799, 56 Am. St. 635; Rodgers v. Niles, 11 Ohio St. 48, 78 Am. Dec. 290; Kellog Bridge Co. v. Hamilton, 110 U. S. 108, 28 L. ed. 86, 3 Sup. Ct. 537. It is generally otherwise where the purchaser does not rely on the seller's

description which it is in the course of the seller's business to supply (whether he be the manufacturer or not),[57] there is usually an implied condition or warranty that the goods shall be reasonably fit for such purpose;[58] but in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.[59] So, where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or

judgment but upon his own. Curwen v. Quill, 165 Mass. 373, 43 N. E. 203; McKinnon Mfg. Co. v. Alpena Fish Co., 102 Mich. 221, 60 N. W. 472; Holt v. Sims, 94 Minn. 157, 102 N. W. 386; Miller v. Raymond, 85 Nebr. 543, 123 N. W. 1019, 31 L. R. A. (N. S.) 783, and note; Thompson v. Miser, 82 Ohio St. 289, 92 N. E. 420; Thompson Mfg. Co. v. Gunderson, 106 Wis. 449, 82 N. W. 299, 49 L. R. A. 859.

[57] Jones v. Just, L. R. 3 Q. B. 197, 9 Best & S. 141; Baer v. Mobile Cooperage &c. Co., 159 Ala. 491, 49 So. 92; S. F. Bowser & Co. v. Kilgore, 100 Ark. 17, 139 S. W. 541; Bobrick Chemical Co. v. Prest-O-Lite Co., 160 Cal. 209, 116 Pac. 747; Hoult v. Baldwin, 67 Cal. 610, 8 Pac. 440, and note; Dodge v. Dickson Mfg. Co., 113 Fed. 218, 51 C. C. A. 175; Edwards v. Dillon, 147 Ill. 14, 35 N. E. 135, 37 Am. St. 199; Oil-Well Supply Co. v. Priddy, 41 Ind. App. 200, 83 N. E. 623; Blizzard v. Growers' Canning Co., 152 Iowa 257, 132 N. W. 66; Shaw v. Smith, 45 Kans. 334, 25 Pac. 886, 11 L. R. A. 681; Little v. Van Syckle, 115 Mich. 480, 73 N. W. 554; Van Wyck v. Allen, 69 N. Y. 61, 25 Am. Rep. 136; Lenz v. Blake-McFall Co., 44 Ore. 569, 76 Pac. 356; Best v. Flint, 58 Vt. 543, 5 Atl. 192. But see Remy v. Healy, 161 Mich. 266, 126 N. W. 202, 29 L. R. A. (N. S.) 139, and note, and compare McCaa v. Elam Drug Co., 114 Ala. 74, 21 So. 479, 62 Am. St. 88. See generally, the notes in 22 L. R. A. 187; 15 L. R. A. (N. S.) 855, 868, 884; 31 L. R. A. (N. S.) 783, 102 Am. St. 619, 620, et seq.

[58] Jones v. Bright, 5 Bing. 533; Rendall v. Newson, 2 Q. B. Div. 102 (pole for carriage); McClamrock v. Flint, 101 Ind. 278 (windmill for a certain place); Johnston Bros. Clay Works v. Hall (Iowa), 136 N. W. 671 (brick tile for building); Fisk v. Tank, 12 Wis. 276, 78 Am. Dec. 737 (engine for steamboat). See also, Curtis Mfg. Co. v. Williams, 48 Ark. 325, 3 S. W. 517; Fuhrman v. Interior Warehouse Co., 64 Wash. 159, 116 Pac. 666, 37 L. R. A. (N. S.) 89 (seed), with which compare Leonard Seed Co. v. Crary Can Co., 147 Wis. 166, 132 N. W. 902, 37 L. R. A. (N. S.) 79, and note.

[59] Davis Calyx Drill Co. v. Mallory, 137 Fed. 332, 69 C. C. A. 662, 69 L. R. A. 973; De Loach Mill Mfg. Co. v. Tutewiler Coal &c. Co., 2 Ga. App. 493, 58 S. E. 790; Fuchs & Lang Mfg. Co. v. Kittredge, 242 Ill. 88, 89 N. E. 723; Ehrsman v. Brown, 76 Kans. 206, 91 Pac. 179, 15 L. R. A. (N. S.) 877, and cases cited in opinion; Lombard Water-Wheel Governor Co. v. Great Northern Paper Co., 101 Maine 114, 63 Atl. 555, 6 L. R. A. (N. S.) 180n; Gossler v. Eagle Sugar Co., 103 Mass. 331; McCray Refrigerator & Cold Storage Co. v. Woods, 99 Mich. 269, 55 N. W. 320, 41 Am. St. 599; John A. Roebling's Sons Co. v. American Amusement & Construction Co., 231 Pa. St. 261, 80 Atl. 647; Jarecki Mfg. Co. v. Kerr, 165 Pa. St. 529, 30 Atl. 1019, 44 Am. St. 674; Obenchain v. Roff, 29 Okla. 211, 116 Pac. 782; Stanford v. Nat. Drill &c. Co., 28 Okla. 441, 114 Pac. 734; note in 102 Am. St. 618, 619; Seitz v. Brewers' &c. Mach. Co., 141 U. S. 510, 35 L. ed. 837, 12 Sup. Ct. 46. But it is held in Nettograph Mach. Co. v. Brown, 28 Okla. 436, 114 Pac. 1102, 34 L. R. A. (N. S.) 737n, that the law implies a warranty in the sale of a patented machine that it is reasonably adapted to the purpose for which it is made.

not),[60] there is ordinarily an implied condition or warranty that the goods shall be of merchantable quality;[61] but if the buyer has examined the goods, there is no implied condition as regards defects which such examination ought to have revealed.[62] And

[60] Truschel v. Dean, 77 Ark. 546, 92 S. W. 781; Blackwood v. Cutting Pack. Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. 199; Babcock v. Trice, 18 Ill. 420, 68 Am. Dec. 560; Brantley v. Thomas, 22 Tex. 270, 73 Am. Dec. 264; Hood v. Bloch, 29 W. Va. 244, 11 S. E. 910; Merriam v. Field, 39 Wis. 578, note in 102 Am. St. 611, 612. As between dealer and consumer there is generally held to be an implied warranty that food sold for domestic consumption is wholesome. Wiedeman v. Keller, 171 Ill. 93, 49 N. E. 210. See also, Frost v. Aylesbury Dairy Co. (1905), 1 K. B. 608; Winsor v. Lombard, 18 Pick. (Mass.) 57-62; Craft v. Parker, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139. But the weight of authority is otherwise as between dealer and middleman or one dealer and another. Hanson v. Hartse, 70 Minn. 282, 73 N. W. 163, 68 Am. St. 527; Tomlinson v. Armour, 74 N. J. L. 274, 65 Atl. 883; Kinch v. Haynes, 58 Misc (N. Y.) 499, 111 N. Y. S. 618; Warren v. Buch, 71 Vt. 44, 42 Atl. 979, 76 Am. St. 754. See generally, Farrell v. Manhattan Market Co., 198 Mass. 271, 84 N. E. 481, 15 L. R. A. (N. S.) 884, and note.

[61] Baer v. Mobile Cooperage &c. Co., 159 Ala. 491, 49 So. 92; Hansen v. United States Brewing Co., 70 Ill. App. 265; Loxtercamp v. Lininger Implement Co., 147 Iowa 29, 125 N. W. 830; Alden v. Hart, 161 Mass. 576, 37 N. E. 742; Murchie v. Cornell, 155 Mass. 60, 29 N. E. 207, 14 L. R. A. 492, 31 Am. St. 526; Gould v. Banks, 8 Wend. (N. Y.) 562, 24 Am. Dec. 90; Howard v. Hoey, 23 Wend. (N. Y.) 350, 35 Am. Dec. 572; Lewis v. Rountree, 78 N. Car. 323; Holloway v. Jacoby, 120 Pa. St. 583, 15 Atl. 487, 6 Am. St. 737. See also, Gardiner v. Gray, 4 Campb. 144; Jones v. Just, L. R. 3 Q. B. 197. There is some difference of opinion, however, as to this and the fitness for a particular purpose, especially where the seller is not the manufacturer or the like and the defect is latent. See Parkinson v. Lee, 2 East 314; Dickenson v. Gay, 7 Allen (Mass.) 29, 83 Am. Dec. 656; McKinnon Mfg. Co. v. Alpena Fish Co., 102 Mich. 221, 60 N. W. 472; Otts v. Alderson, 10 Sm. & M. (Miss.) 476; Reynolds v. Mayor, 39 App. Div. (N. Y.) 218, 57 N. Y. S. 106; Hoe v. Sanborn, 21 N. Y. 552, 78 Am. Dec. 163; Eagan v. Call, 34 Pa. St. 236, 75 Am. Dec. 653, and compare Robinson Mach. Works v. Chandler, 56 Ind. 575. But it would seem clear that where an article is bought from the manufacturer there is an implied warranty that it is free from latent defects arising from the unskillfulness of the manufacturer, and, in general, that it is fit for the usual purpose of such an article. Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 28 L. ed. 86, 3 Sup. Ct. 537. See Randall v. Newson, 2 Q. B. Div. 102; Shepherd v. Pybus, 3 Man. & Gr. 68; Snow v. Schomaker Mfg. Co., 69 Ala. 111, 44 Am. Rep. 509; Nashua Iron & Steel Co. v. Brush, 91 Fed. 213, 33 C. C. A. 456; Poland v. Miller, 95 Ind. 387, 48 Am. Rep. 730; Brenton v. Davis, 8 Blackf. (Ind.) 317, 44 Am. Dec. 769; Downing v. Dearborn, 77 Maine 457, 1 Atl. 407; Carleton v. Lombard, 149 N. Y. 137, 43 N. E. 422; Rodgers v. Niles & Co., 11 Ohio St. 48, 78 Am. Dec. 290; Dwight Bros. Paper Co. v. Western Paper Co., 114 Wis. 414, 90 N. W. 444. See also, Queen City Glass Co. v. Pittsburg Clay Pot Co., 97 Md. 429, 55 Atl. 447; West Michigan Furniture Co. v. Diamond Glue Co., 127 Mich. 651, 87 N. W. 92; ante, vol. 1, § 129.

[62] It is held in many cases that where the purchaser and seller have equal means of knowledge and there is an opportunity to suspect, there is no implied condition or warranty as to quality and fitness. Young v. Plattner Imp. Co., 41 Colo. 65, 91 Pac. 1109; Telluride Power Transmission Co. v. Crane Co., 208 Ill.

an implied condition or warranty as to quality or fitness may be annexed by a usage of trade.[63] But it must be known,[64] and not inconsistent with the terms of the contract and its legal effect.[65] And there are some decisions that apparently deny altogether the right to give parol evidence of a usage to establish an implied warranty.[66]

§ 5008. Implied conditions or warranties in sale by sample. —In the case of a contract for sale by sample there is an implied condition or warranty that the bulk shall correspond with and be equal to the sample.[67] And where the sale is by the manufacturer it is generally held that the law implies a warranty that the article is merchantable as against a latent defect which could not have been discovered by the purchaser in the exercise of reasonable dili-

218, 70 N. E. 319; Burnett v. Hensley, 118 Iowa 575, 92 N. W. 678; White v. Oakes, 88 Maine 367, 34 Atl. 175, 32 L. R. A. 592; Colchord Mach. Co. v. Loy-Wilson &c. Co., 131 Mo. App. 540, 110 S. W. 630; Mine Supply Co. v. Columbia Min. Co., 48 Ore. 391, 86 Pac. 789. See Dorsey v Watkins, 151 Fed. 340; note in 35 L. R. A. (N. S.) 258; note in 102 Am. St. 607, 608, and as will be seen from the cases and notes referred to, it is often so held, no matter whether the defect was patent or latent, in cases where the seller was not the manufacturer or the like. See ante, vol. 1, § 129.

[63] Jones v. Bowden, 4 Taunt. 847; Hutton v. Warren, 1 M. & W. 466; Sumner v. Tyson, 20 N. H. 384; Fatman v. Thompson, 2 Disney (Ohio) 482, 13 Ohio Dec. 295; Hostetter v. Park, 137 U. S. 30, 34 L. ed. 568, 11 Sup. Ct. 1. This is clearly so where it plainly appears, even by the acts of the parties, that they have contracted with special reference to it. Conestoga Cigar Co. v. Finke, 144 Pa. St. 159, 22 Atl. 868, 13 L. R. A. 438.

[64] Murray v. Brooks, 41 Iowa 45; Barnard v. Kellog, 10 Wall. (U. S.) 383, 19 L. ed. 987.

[65] Dickinson v. Gay, 7 Allen (Mass.) 29, 83 Am. Dec. 656; Whitmore v. South Boston Iron Co., 2 Allen (Mass.) 52; Van Hoesen v. Cameron, 54 Mich. 609, 20 N. W. 609; Remy v. Healy, 161 Mich. 266, 126 N. W. 202, 29 L. R. A. (N. S.) 139n. See also, Chicago Pack. Co. v. Tilton, 87 Ill. 547; Marshall v. Perry, 67 Maine 78; Murray v. Bogert, 14 Johns. (N. Y.) 318, 7 Am. Dec. 466; Beirne v. Dord, 5 N. Y. 95, 55 Am. Dec. 321; Thompson v. Ashton, 14 Johns. (N. Y.) 316; Stamps v. Tennessee &c. Marble Co. (Tenn. Ch.), 59 S. W. 769.

[66] Polhemus v. Heiman, 50 Cal. 438; Baird v. Matthews, 6 Dana (Ky.) 129; Wetherill v. Neilson, 20 Pa. St. 448, 54 Am. Dec. 741.

[67] Parker v. Palmer, 4 B. & Ald. 387, note in 102 Am. St. 612, 613; Magee v. Billingsley, 3 Ala. 679; Love v. Barnesville Mfg. Co., 3 Pennew. (Del.) 152, 50 Atl. 536; Hanson v. Busse, 45 Ill. 496; Brigham v. Retelsdorf, 73 Iowa 712, 36 N. W. 715; Bradford v. Manly, 13 Mass. 139, 7 Am. Dec. 122; Texas Fruit Co. v. Lane, 101 Mo. App. 712, 74 S. W. 400; Waring v. Mason, 18 Wend. (N. Y.) 425; Bloom v. Reisman, 135 N. Y. S. 547; E. F. Main Co. v. Field, 144 N. Car. 307, 56 S. E. 943, 119 Am. St. 956; Dayton v. Hoogland, 39 Ohio St. 671; Pontiac Shoe Mfg. Co. v. Hamilton, 18 Tex. Civ. App. 283, 44 S. W. 405; Schuchardt v. Allens, 1 Wall. (U. S.) 359, 17 L. ed. 642.

gence, even though the defect was also in the sample.[68] But where the sale is not by the manufacturer, the weight of authority is to the effect that there is no such implied warranty even as to a latent defect when it is common to both sample and bulk.[69] There is also an implied condition that the buyer shall have a right of inspection or reasonable opportunity to compare the bulk with the sample.[70]

§ 5009. When implied warranty is negatived by express warranty.—An express warranty or condition as to title does not negative an implied warranty as to quality or fitness.[71] Nor does an express warranty or provision as to quality or fitness necessarily negative an implied warranty when it appears that it was not intended to do so.[72] Thus, an express warranty or provision in an executory contract as to one matter does not negative an implied warranty as to another.[73] But, as a general rule, an

[68] Drummond v. Van Ingen, 12 App. Cas. 284; Heilbutt v. Hickson, L. R. 7 C. P. 438; Leggett v. Young, 29 N. Bruns. 675; Nixa Canning Co. v. Lehmann-Higginson Grocer Co., 70 Kans. 664, 79 Pac. 141, 70 L. R. A. 653; Bierman v. City Mills Co., 151 N. Y. 482, 45 N. E. 856, 37 L. R. A. 799, 56 Am. St. 635. See also, Pratt v. Metzger, 78 Ark. 177, 95 S. W. 451; Studer v. Bleistein, 115 N. Y. 316, 22 N. E. 243, 5 L. R. A. 702.

[69] Parkinson v. Lee, 2 East 314; Price v. Kohn, 99 Ill. App. 115; Dickinson v. Gay, 7 Allen (Mass.) 29, 83 Am. Dec. 656; Remy v. Healy, 161 Mich. 266, 126 N. W. 202, 29 L. R. A. (N. S.) 139n. See also, Worcester Mfg. Co. v. Waterbury Brass Co., 73 Conn. 554, 48 Atl. 422. But see Nichol v. Goldts, 10 Exch. 191; Josling v. Kingsford, 13 C. B. (N. S.) 447; Mody v. Gregson, L. R. 4 Exch. 49. Compare Bierman v. City Mills Co., 151 N. Y. 482, 45 N. E. 856, 37 L. R. A. 799, 56 Am. St. 635.

[70] Lorymer v. Smith, 1 B. & C. 1; Love v. Barnerville Mfg. Co., 3 Pennew. (Del.) 152, 50 Atl. 536; McNeal v. Braun, 53 N. J. L. 617, 23 Atl. 687, 26 Am. St. 441; Wall Rice Mill Co. v. Continental Supply Co., 36 Utah 121, 103 Pac. 242, 140 Am. St. 815. See also, Meyer v. Everett Pulp &c. Co., 193 Fed. 857; Deutsch v. Dunham, 72 Ark. 141, 78 S. W. 767, 105 Am. St. 21; Kuppenheimer v. Wertheimer, 107 Mich. 77, 64 N. W. 952, 61 Am. St. 317; Eaton v. Blackburn, 52 Ore. 300, 96 Pac. 870, 132 Am. St. 705, and note in 27 L. R. A. (N. S.) 922. See generally on the subject of this section, ante, vol. 1, § 129.

[71] Jackson v. Langston & Crane, 61 Ga. 392; Trimmier v. Thomson, 10 S. Car. 164; Merriam v. Field, 24 Wis. 640.

[72] Mody v. Gregson, L. R. 4 Exch. 53; Bigge v. Parkinson, 7 H. & N. 955; Drummond v. Van Ingen, 12 App. Cas. 284; Elgin Jewelry Co. v Estes, 122 Ga. 807, 50 S. E. 939; Aultman Miller &c. Co. v. Hunter, 82 Mo. App. 632; Hooven Co. v. Wirtz, 15 N. Dak. 447, 107 N. W. 1078; Buick Motor Co. v. Reid Mfg. Co., 150 Mich. 118, 113 N. W. 591.

[73] Blackmore v. Fairbanks, 79 Iowa 282, 44 N. W. 548; Ideal Heating Co. v. Kramer, 127 Iowa 137, 102 N. W. 840. See also, Hawley Down Draft Furnace Co. v. E. Van Winkle Gin & Machine Works, 4 Ga. App. 85, 60 S. E. 1008. Compare Bucy v. Pitts Agricultural Works, 89 Iowa 464, 56 N. W. 541.

express warranty as to quality or fitness in a written contract does negative an implied warranty as to the same.[74]

[74] Reynolds v. General Electric Co., 141 Fed. 551, 73 C. C. A. 23; Reeves v. Byers, 155 Ind. 535, 58 N. E. 713; Lombard Water-Wheel Governor Co. v. Great Northern Paper Co., 101 Maine 114, 63 Atl. 555, 6 L. R. A. (N. S.) 180n; G. Ober & Sons Co. v. Blalock, 40 S. Car. 31, 18 S. E. 264; De Wit v. Barry, 134 U. S. 306, 313, 10 Sup. Ct. 536; Dwight Bros. Paper Co. v. Western Paper Co., 114 Wis. 414, 90 N. W. 444. See also, Oil Creek Gold Min. Co. v. Fairbanks, 19 Colo. App. 142, 74 Pac. 543; Malsby v. Young, 104 Ga. 205, 30 S. E. 854; White v. Gresham, 52 Ill. App. 399; Dowagiac Mfg. Co. v. Mahon, 13 N. Dak. 516, 101 N. W. 903. See ante, vol. 1, § 129.

CHAPTER CLVI.

EFFECTS OF THE CONTRACT—TRANSFER OF PROPERTY AS BETWEEN SELLER AND BUYER.

§ 5015. Transfer of title—Unascertained goods—Part of uniform bulk.
5016. Transfer of title—Specific goods—Intention.
5017. Rules to ascertain intention—Goods in a deliverable state.
5018. Title does not pass where seller is bound to do something to put in deliverable state.
5019. Title does not pass where seller is bound to weigh, measure, count or the like to determine the price.
§ 5020. Passing of title where goods are delivered on approval or the like.
5021. Transfer of title to unascertained goods—Appropriation—Delivery to carrier.
5022. Seller may reserve right of disposal—Title does not pass until condition is performed—Statutes.
5023. Right of disposal deemed reserved where goods are shipped with bill of lading making them deliverable to order of seller or his agent.
5024. Risk of loss.

§ 5015. Transfer of title—Unascertained goods—Part of uniform bulk.—As a general rule where the contract is for the sale of unascertained goods the property in the goods does not pass to the buyer unless and until the goods are ascertained.[1] But in many jurisdictions in this country it is held, largely because commercial interests are deemed to demand it, that if the contract is for a certain quantity of a larger mass of ascertained

[1] Stock v. Inglis, 9 Q. B. D. 708; Heilbutt v. Hickson, 7 C. P. 438; Fry v. Mobile Sav. Bank, 75 Ala. 473; Warten v. Strane, 82 Ala. 311, 8 So. 231; Beller v. Block, 19 Ark. 566; Callender v. McLeod, 74 Cal. 376, 16 Pac. 194; Love v. State, 78 Ga. 66, 3 S. E. 893, 6 Am. St. 234; Amlap v. Berry, 4 Scam. (Ill.) 327, 39 Am. Dec. 413; Doan v. Dunham, 65 Ill. 512; Lawry v. Ellis, 85 Maine 500, 27 Atl. 518; Gardner v. Lane, 9 Allen (Mass.) 492, 85 Am. Dec. 779; New England Dressed Meat & Wool Co. v. Standard Worsted Co., 165 Mass. 328, 43 N. E. 112, 52 Am. St. 516; Smith v. Sparkman, 55 Miss. 649, 30 Am. Rep. 537; Robinson v. Stricklin, 73 Nebr. 242, 102 N. W. 479; Ockington v. Richey, 41 N. H. 275; Joyce v. Adams, 8 N. Y. 291, Seld. Notes 136; Lighthouse v. Third Nat. Bank, 25 App. Div. (N. Y.) 630, 52 N. Y. S. 488, revd. 162 N. Y. 336, 56 N. E. 738; Ormsbee v. Machir, 20 Ohio St. 295; Hubler v. Gaston, 9 Ore. 66, 42 Am. Rep. 794; Elace Cotton Case, 22 Wall. (U. S.) 180, 22 L. ed. 863; Robbins v. Chipman, 1 Utah 335. So as to goods to be manufactured. Mucklow v. Mangles, 1 Taunt. 318; Seath v.

goods uniform in kind and quality,[2] the property will pass, where such is the intention, even though there is no separation of the quantity sold from the common lot.[3] The English rule, however, does not recognize this qualification or modification of the general rule requiring the goods to be designated or separated;[4] and many of our own courts refuse to adopt it.[5]

Moore, 11 App. Cas. 350; Updike v. Henry, 14 Ill. 378; Wilkins v. Holmes, 5 Cush. (Mass.) 147; American White Bronze Co. v. Gillette, 88 Mich. 231, 26 Am. St. 286; Andrews v. Durant, 11 N. Y. 35, 62 Am. Dec. 55; Johnson v. Hunt, 11 Wend. (N. Y.) 135; Goldberg v. Bussey (Tex.), 47 S. W. 49; Clarkson v. Stevens, 106 U. S. 505, 27 L. ed. 139, 1 Sup. Ct. 200; Steaubli v. Blaine Nat. Bank, 11 Wash. 426, 39 Pac. 814. See also, generally, the cases cited by states in the note in 26 L. R. A. (N. S.) 55.

[2] Pierson v. Metropolitan Bank, 106 La. Ann. 298, 30 So. 885; Hahn v. Fredericks, 30 Mich. 223, 18 Am. Rep. 119; Smart v. Batchelder, 57 N. H. 140; Stephens v. Santee, 49 N. Y. 35; Hoffman v. King, 58 Wis. 314, 17 N. W. 136. See also, Lauber v. Johnston, 54 Wash. 59, 102 Pac. 873; State v. Wharton, 117 Wis. 558, 94 N. W. 359. But compare Horr v. Barker, 8 Cal. 603, 11 Cal. 393, 75 Am. Dec. 791; Watts v. Hendry, 13 Fla. 523. The goods must be uniform in kind and quality and not of different kinds or grades and value in order to come within this qualification or modification of the general rule. Chapman v. Shepard, 39 Conn. 413.

[3] Chapman v. Shepard, 39 Conn. 413; Kingman v. Holmquist, 36 Kans. 735, 14 Pac. 168, 59 Am. Rep. 604; Croze v. St. Mary's Mineral &c. Co., 143 Mich. 514, 107 N. W. 92; Nash v. Brewster, 39 Minn. 530, 41 N. W. 105, 2 L. R. A. 409; Mackellar v. Pillsbury, 48 Minn. 396, 51 N. W. 222; Lamprey v. Sargent, 58 N. H. 241; Hurff v. Hires, 40 N. J. L. 581, 29 Am. Rep. 282; Kimberly v. Patchin, 19 N. Y. 330, 75 Am. Dec. 334; O'Keefe v. Leistikow, 14 N. Dak. 355, 104 N. W. 515, 9 Am. & Eng. Ann. Cas. 25; Pleasants v. Pendleton, 6 Rand. (Va.) 473, 18 Am. Dec. 726. See also, Cloke v. Shafroth, 137 Ill. 393, 27 N. E. 702, 31 Am. St. 375; Waldron v. Chase, 37 Maine 414, 59 Am. Dec. 56; Brownfield v. Johnson, 128 Pa. St. 254, 18 Atl. 543, 6 L. R. A. 48; Barber v. Andrews, 29 R. I. 51, 69 Atl. 1, 26 L. R. A. (N. S.) 1, and note.

[4] Wallace v. Breeds, 13 East 522; Gillett v. Hill, 2 C. & M. 531; White v. Wilks, 5 Taunt. 176, 23 Eng. Rul. Cas. 252; Austen v. Craven, 4 Taunt. 644; Boswell v. Kilborn, 15 Moore P. C. 309; Jackson v. Anderson, 4 Taunt. 24.

[5] Commercial Nat. Bank v. Gillette, 90 Ind. 268, 46 Am. Rep. 222 (criticizing it and giving reasons for adhering to the general rule as in England); Harrick v. Weddington, 73 Iowa 300, 34 N. W. 868; Ferguson v. Northern Bank, 14 Bush (Ky.) 555, 29 Am. Rep. 418; Mercer Nat. Bank v. Hawkins & Co.'s Assignee, 104 Ky. 171, 20 Ky. L. 534, 46 S. W. 717; Stone v. Peacock, 35 Maine 385; Scudder v. Worster, 11 Cush. (Mass.) 573; Ropes v. Lane, 9 Allen (Mass.) 502; New England Dressed Meat & Wool Co. v. Standard Worsted Co., 165 Mass. 328, 43 N. E. 112, 52 Am. St. 516. See also, McLaughlin v. Piatti, 27 Cal. 451-463; Fleming v. State, 106 Ga. 359, 32 S. E. 338; Morrison v. Woodley, 84 Ill. 192; Augustine v. McDowell, 120 Iowa 401, 94 N. W. 918; Courtright v. Leonard, 11 Iowa 32; England v. Cortland, 9 Mo. App. 578; Fuller v. Bean, 34 N. H. 290; Waldo v. Belcher, 33 N. Car. 609; Woods v. McGee, 7 Ohio 467 (but compare Newhall v. Langdon, 39 Ohio St. 87, 48 Am. Rep. 426); Haldeman v. Duncan, 51 Pa. St. 66; Hutchinson v. Hunter, 7 Pa. St. 140; Anderson v. Crisp, 5 Wash. 178, 31 Pac. 638, 18 L. R. A. 419.

§ 5016. Transfer of title—Specific goods—Intention.—Where the contract is for the sale of specific or ascertained goods the general rule is that the property in them is transferred to the buyer at such time as the parties intend it to be transferred.[6] For the purpose of ascertaining or determining the intention regard is had to the terms of the contract, the conduct of the parties, and the circumstances of the case.[7] It is not always easy, however, to determine the intention of the parties, and to aid in so doing certain rules have been adopted which are generally applied, whenever a different intention does not appear.[8]

§ 5017. Rules to ascertain intention—Goods in a deliverable state.—Where there is an unconditional contract of sale of specific goods, in a deliverable state, the general rule is that the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.[9] Goods may be said to

[6] Moakes v. Nicholson, 19 C. B. N. S. 290, 115 E. C. L. 290; Turley v. Bates, 2 H. & C. 200; Foster v. Magill, 119 Ill. 75, 8 N. E. 771; Gibson v. Chicago Packing & Provision Co., 108 Ill. App. 100; First Nat. Bank v. Reno, 73 Iowa 145, 34 N. W. 796; O'Farrel v. McClure, 5 Kans. App. 880, 47 Pac. 160; Riddle v. Varnum, 20 Pick. (Mass.) 280; Smith v. Edwards, 156 Mass. 221, 30 N. E. 1017; Wilkinson v. Holiday, 33 Mich. 386; Kerr v. Henderson, 62 N. J. L. 724, 42 Atl. 1073; Andrews v. Durant, 11 N. Y. 35, 62 Am. Dec. 55; Decker v. Furniss, 14 N. Y. 611; Hurd v. Cook, 75 N. Y. 454; Gonser v. Smith, 115 Pa. St. 452, 8 Atl. 770; Clarkson v. Stevens, 106 U. S. 505, 27 L. ed. 139, 1 Sup. Ct. 200; Latch v. Standard Oil Co. of Cleveland, 100 U. S. 124, 25 L. ed. 554. See also, Farmers' Nat. Bank v. Coyner, 44 Ind. App. 335, 88 N. E. 856; Seldomridge v. Farmers' &c. Bank, 87 Nebr. 531, 127 N. W. 871, 130 N. W. 848, 30 L. R. A. (N. S.) 337; Fromme v. O'Donnell, 124 Wis. 529, 103 N. W. 3, and authorities cited in following note; also note in 26 L. R. A. (N. S.) 7.

[7] Kost v. Reilly, 62 Conn. 57, 24 Atl. 519; Callahan v. Myers, 89 Ill. 566; Foster v. Ropes, 111 Mass. 10; Lingham v. Eggleston, 27 Mich. 324; Bank of Litchfield v. Elliott, 83 Minn. 469, 86 N. W. 454; Cornell v. Clark, 104 N. Y. 451, 10 N. E. 888; Winslow v. Leonard, 24 Pa. St. 14, 62 Am. Dec. 354; Shock v. Gowing (W. Va.), 76 S. E. 441; Smith v. Wisconsin Inv. Co., 114 Wis. 151, 89 N. W. 829. See also, Merchants' Exchange Bank v. McGraw, 59 Fed. 972, 8 C. C. A. 420; Farmers' Nat. Bank v. Coyner, 44 Ind. App. 335, 88 N. E. 856; Beatty v. Miller, 47 Ind. App. 494, 94 N. E. 897; Gray v. Peterson, 64 Nebr. 671, 90 N. W. 559; G. Ober & Sons Co. v. Ketzenstein (N. Car.), 76 S. E. 476; State v. Patterson, 138 Wis. 475, 120 N. W. 227.

[8] See Benj. Sales (6th ed.), § 309, and authorities cited in notes to following sections herein.

[9] Tarling v. Baxter, 6 Barn. & Cr. 360; Gilmour v. Supple, 11 Moore P. C. 551; Pilgreen v. State, 71 Ala. 368; Montgomery Furniture Co. v. Hardaway, 104 Ala. 100, 16 So. 29; Sutherland v. Brace, 73 Fed. 624, 19 C. C. A. 589; Wade v. Moffett, 21 Ill. 110, 74 Am. Dec. 79; Barrow v. Window, 71 Ill. 214; Bertelson v. Bower, 81 Ind. 512; Thompson v. Brannin, 94 Ky. 490, 15 Ky. L. 36, 21 S. W. 1057; Morse v. Sherman, 106

be in a "deliverable state" within the meaning of this and the following rules when they are in such a state that the buyer would, under the contract, be bound to accept or take delivery of them.[10]

§ 5018. Title does not pass where seller is bound to do something to put in deliverable state.—But where the seller is bound to do something to the goods in order to put them in a deliverable state the property does not ordinarily pass until such thing is done.[11] As already shown, however, one may buy goods in an unfinished condition and the parties may agree that possession shall be retained by the seller for such purpose[12] or that something else shall be done by the seller after the transfer of the title or ownership,[13] upon such terms or under such circumstances as

Mass. 430; Folsom v. Cornell, 150 Mass. 115, 22 N. E. 705; Baker v. McDonald, 74 Nebr. 595, 104 N. W. 923, 1 L. R. A. (N. S.) 474; Olyphant v. Baker, 5 Denio (N. Y.) 379; Van Brocklen v. Smeallie, 140 N. Y. 70, 35 N. E. 415; Bowen v. Burk, 13 Pa. St. 146; Boyle v. Rankin, 22 Pa. St. 168; Janney v. Howard, 150 Pa. St. 339, 24 Atl. 740; Croft v. Jennings, 173 Pa. St. 216, 33 Atl. 1026; Hatch v. Standard Oil Co. of Cleveland, 100 U. S. 124, 25 L. ed. 554; Briggs v. United States, 143 U. S. 346, 26 L. ed. 180, 12 Sup. Ct. 391, 27 Ct. Cl. (U. S.) 564; Arkansas Valley Land & Cattle Co. v. Mann, 130 U. S. 69, 32 L. ed. 854, 9 Sup. Ct. 458; Moore v. Patchin (W. Va.), 76 S. E. 426.

[10] Benj. Princ. Sales (2d ed.), 69. See also, Wilson v. Shaver, 3 Ont. L. 110; Meeker v. Johnson, 3 Wash. 247, 28 Pac. 542. But as already shown, the parties may agree as between themselves that the property shall pass though not in a deliverable state. See also, Cowgill v. Ford, 2 Houst. (Del.) 164; Wollensak v. Briggs, 119 Ill. 453, 10 N. E. 23. It is held, however, in some cases at least, that it is against the policy of the law to permit the owner of goods in the known and exclusive adverse possession of another claiming absolute title to transfer the legal title so as to enable the buyer to maintain in his own name an action against such claimant. Goodwyn v. Lloyd, 8 Port. (Ala.) 237; O'Keefe v. Kellogg, 15 Ill. 347; Young v. Ferguson, 1 Litt. (Ky.) 298; Gardner v. Adams, 12 Wend. (N. Y.) 297; Overton v. Williston, 31 Pa. St. 155.

[11] Acraman v. Morrice, 8 C. B. 449; Simmons v. Swift, 5 Barn. & Cr. 857; Rugg v. Minett, 11 East 210; Cook v. Logan, 7 Iowa 142; Crawford v. Smith, 7 Dana (Ky.) 59; Foster v. Ropes, 111 Mass. 10; Yockey v. Norn, 101 Mich. 193, 60 N. W. 685, 26 L. R. A. 145; Day v. Gravel, 72 Minn. 159, 75 N. W. 1; Hamilton v. Gordan, 22 Ore. 557, 30 Pac. 495; Miller v. Seaman, 176 Pa. St. 291, 35 Atl. 134; Elgee Cotton Cases, 22 Wall. (U. S.) 180, 22 L. ed. 863, 10 Ct. Cl. (U. S.) 181; Kitson Mach. Co. v. Holden, 74 Vt. 104, 52 Atl. 271. See also, McFadden v. Henderson, 128 Ala. 221, 29 So. 640; Clarke v. Wolfe, 115 Ga. 320, 41 S. E. 581; Sempel v. Northern Hardware & Lumber Co., 142 Iowa 586, 121 N. W. 23; Stone v. Peacock, 35 Maine 385; Fuller v. Bean, 34 N. H. 290; note in 26 L. R. A. (N. S.) 11, 14, 15, 17, and authorities in notes to following sections.

[12] Young v. Mathews, L. R. 2 C. P. 127; Butterworth v. McKinly, 11 Humph. (Tenn.) 206. See also, Burkirk Bros. v. Peck, 57 W. Va. 360, 50 S. E. 432.

[13] Logan v. Le Mesurier, 6 Moore P. C. 116; McElwee v. Metropolitan Lumber Co., 69 Fed. 302, 306, 16 C. C. A. 232, 37 U. S. App. 266; Martz v. Putnam, 117 Ind. 392, 20 N. E. 270; Welch v. Spies, 103 Iowa 389,

show an intention that the title shall pass, and the presumption that it did not pass may be thus overcome or the case not fall within this rule.[14]

§ 5019. Title does not pass where seller is bound to weigh, measure, count or the like to determine the price.—Where the contract is for the sale of specific goods in a deliverable state and the seller is bound to weigh, measure, count, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done,[15] unless a contrary intention is shown. But the parties may agree that the title shall pass immediately,[16] and where the goods are delivered to the buyer the presumption usually is that the property should pass at once.[17] So, if the

72 N. W. 548; Bethel Steam Mill Co. v. Brown, 57 Maine 9; Beecher v. Mayall, 16 Gray (Mass.) 376; Marble v. Moore, 102 Mass. 443; Smith v. Sparkman, 55 Miss. 649, 30 Am. Rep. 537; Terry v. Wheeler, 25 N. Y. 520; Sanger v. Waterbury, 116 N. Y. 371, 22 N. E. 404.

[14] Loval v. Wolf (Ala.), 60 So. 298; Martz v. Putnam, 117 Ind. 392, 20 N. E. 270; Trigg v. Bucyrus, 104 Va. 79, 51 S. E. 174.

[15] Magee v. Billingsley, 3 Ala. 679; Priest v. Hodges, 90 Ark. 131, 118 S. W. 253; Frost v. Woodruff, 54 Ill. 155; Pittsburgh, C. & St. L. R. Co. v. Heck, 50 Ind. 303, 19 Am. Rep. 713; Augustine v. McDowell, 120 Iowa 401, 94 N. W. 918; Hagins v. Combs, 102 Ky. 165, 43 S. W. 222; Morrison v. Dingley, 63 Maine 553; Reeder v. Machen, 57 Md. 56; Wesoloski v. Wysoski, 186 Mass. 495, 71 N. E. 982; Restad v. Engemoen, 65 Minn. 148, 67 N. W. 1146; Williams v. Sayers, 79 Miss. 50, 29 So. 995; Kein v. Tupper, 52 N. Y. 550; Burrows v. Whitaker, 71 N. Y. 291, 27 Am. Rep. 42; Smith v. Wisconsin Inv. Co., 114 Wis. 151, 89 N. W. 829. See also, Swanwick v. Sothern, 9 Ad. & El. 895; Hanson v. Meyer, 6 East 614. But compare Lassing v. James, 107 Cal. 348, 40 Pac. 534; Farmers' Phosphate Co. v. Gill, 69 Md. 537, 16 Atl. 214, 1 L. R. A. 767, 9 Am. St. 443; Boaz v. Schneider, 69 Tex. 128, 6 S. W. 402.

[16] Batre v. Simpson, 4 Ala. 305; O'Keefe v. Kellogg, 15 Ill. 347; Luthy v. Waterbury, 140 Ill. 664, 30 N. E. 351; Hagins v. Combs, 102 Ky. 165, 43 S. W. 222; Reeder v. Machen, 57 Md. 56; Blossom v. Shotter, 59 Hun (N. Y.) 481, 36 N. Y. St. 653, 13 N. Y. S. 523, affd. 128 N. Y. 679, 29 N. E. 145. See also, Turley v. Bates, 2 H. & C. 200; Tarling v. Baxter, 6 Barn. & Cr. 360; Greenbaum v. Martinez, 86 Cal. 459, 25 Pac. 12. And such intention may be shown by the facts and circumstances. Greene v. Lewis, 85 Ala. 221, 4 So. 740, 7 Am. St. 42; Byles v. Colier, 54 Mich. 1, 19 N. W. 565. See also, Wheelock v. Starkweather, 146 Mich. 53, 108 N. W. 1085; Wadhams v. Balfour, 32 Ore. 313, 51 Pac. 642.

[17] Shealy v. Edwards, 73 Ala. 175, 49 Am. Rep. 43; Loval v. Wolf (Ala.), 60 So. 298; Fagan v. Faulkner, 5 Ark. 161; Graff v. Fitch, 58 Ill. 373, 11 Am. Rep. 85; Bell v. Farrar, 41 Ill. 400; Beatty v. Miller, 47 Ind. App. 494, 94 N. E. 897; Sedgwick v. Cottingham, 54 Iowa 512, 6 N. W. 738; Sumner v. Hamlet, 12 Pick. (Mass.) 76; Macomber v. Parker, 13 Pick. (Mass.) 175; Lingham v. Eggleston, 27 Mich. 324; Ober v. Carson's Exr., 62 Mo. 209; Burrows v. Whitaker, 71 N. Y. 291, 27 Am. Rep. 42; Barr v. Borthwick, 19 Ore. 578, 25 Pac. 360; Izett v. Stetson & Post Mill Co., 22 Wash. 300, 60 Pac. 1128. But see where there is an un-

counting, weighing or measuring is to be done merely in order that the total price may be computed at a rate agreed upon, the title will generally pass at once where the parties so intend.[18]

§ 5020. Passing of title where goods are delivered on approval or the like.—When goods are delivered to the buyer on approval or other similar terms the property therein passes to the buyer when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;[19] or, if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection,[20] then, if a time has been fixed for the return of the goods, on the expiration of such time,[21] and, if no time has been fixed, on the expiration of a

derstanding or intention to the contrary as when the delivery is merely for inspection or the like. Ballantyne v. Appleton, 82 Maine 570, 20 Atl. 235; Cole v. Bryant, 73 Miss. 297, 18 So. 969; Cornell v. Clark, 104 N. Y. 451, 10 N. E. 888; Rosenthal v. Kahn, 19 Ore. 571, 24 Pac. 989. See also, generally, Martineau v. Kitching, L. R. 7 Q. B. 436; Deadwyler v. Karow, 131 Ga. 227, 62 S. E. 172, 19 L. R. A. (N. S.) 197, and note; Cunningham v. Ashbrook, 20 Mo. 553.

[18] Leonard v. Davis, 1 Black (U. S.) 476, 17 L. ed. 222; Hatch v. Standard Oil Co. of Cleveland, 100 U. S. 124, 25 L. ed. 554. See, however, Lassing v. James, 107 Cal. 348, 40 Pac. 534; Holliday v. Burgess, 34 Ill. 193; Allen v. Elmore, 121 Iowa 241, 96 N. W. 769; Stearns v. Grand Trunk R. Co., 156 Mich. 145, 120 N. W. 572; McMillan v. Schweitzer, 87 Mo. 402; Crofoot v. Bennett, 2 N. Y. 258; Sanger v. Waterbury, 116 N. Y. 371, 22 N. E. 404; Fromme v. O'Donnell, 124 Wis. 529, 103 N. W. 3. See also, Izett v. Stetson & Post Mill Co., 22 Wash. 300, 60 Pac. 1128.

[19] Elphick v. Barnes, 5 C. P. D. 321; Ellis v. Mortimer, 1 B. & P. (N. R.) 257; Mowbray v. Cady, 40 Iowa 604; Frey-Sheckler Co. v. Iowa Brick Co., 104 Iowa 494, 73 N. W. 1051 (refusing to surrender on demand); Delamater v. Chappell, 48 Md. 244 (selling goods to third person); Hickman v. Shimp, 109 Pa. St. 16. See also, Stone v. Browning, 68 N. Y. 598; Hall & Brown Woodworking Mach. Co. v. Brown, 82 Tex. 469, 17 S. W. 715; Fox v. Wilkinson, 133 Wis. 357, 113 N. W. 669, 14 L. R. A. (N. S.) 1107; Zipp Mfg. Co. v. Pastorino, 120 Wis. 176, 97 N. W. 904 (by using unnecessarily and not merely to make test). And see further, as to the necessity for express or implied approval, Gates Iron Works v. Cohen, 7 Colo. App. 341, 43 Pac. 667; In re Hill Co., 123 Fed. 866, 59 C. C. A. 354; Reed Smokeless Furnace Co. v. State, 34 Ind. App. 265, 72 N. E. 615; Davis Gas. Eng. Works Co. v. McHugh, 115 Iowa 415, 88 N. W. 948.

[20] Notice may be sufficient without sending the goods back. Grimoldby v. Wells, L. R. 10 C. P. 391; McCormick Harvesting Mach. Co. v. Cochran, 64 Mich. 636, 31 N. W. 561; American White Bronz Co. v. Gillette, 88 Mich. 231, 50 N. W. 136, 26 Am. St. 286; McCormick Harvesting Mach. Co. v. Chesrown, 33 Minn. 32, 21 N. W. 846; Rohn v. Dennis, 109 Pa. St. 504; Exhaust Ventilator Co. v. Chicago, M. &c. R. Co., 69 Wis. 454, 34 N. W. 509. And it may be waived by the seller. Wartman v. Breed, 117 Mass. 18; Gibson v. Vail, 53 Vt. 476.

[21] Fraser v. Ross, 1 Pennew. (Del.) 348, 41 Atl. 204; Prairie Farmer Co. v. Taylor, 69 Ill. 440, 18 Am. Rep. 621; Potter v. Lee, 94 Mich. 140, 53 N. W. 1047; Gentilli v. Starace, 133 N. Y. 140, 30 N. E. 660; Stafford v.

reasonable time.[22] In the meantime the goods usually remain at the risk of the seller.[23]

§ 5021. Transfer of title to unascertained goods—Appropriation—Delivery to carrier.—Where the contract is for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer.[24] There can be no difficulty where the assent of both parties is clear, and the statement of the general rule as just made is a safe one, though some authorities hold that appropriation by the seller may

Pooler, 67 Barb. (N. Y.) 143; Butler v. School Dist. of Lehighton, 149 Pa. St. 351, 24 Atl. 308; Waters Heater Co. v. Mansfield, 48 Vt. 378. And compare Aultman v. Theirer, 34 Iowa 272. See also, as to when this may be determined by usage or custom, Sanders v. Jameson, 2 C. & K. 557.

[22] Osborn v. Stanley, 35 Ill. 102, 85 Am. Dec. 347; Frederick v. Case, 28 Ill. App. 215; Childs v. O'Donnell, 84 Mich. 533, 47 N. W. 1108; S. C. Forsaith Mach. Co. v. Mengel, 99 Mich. 280, 58 N. W. 305; Rosenfield v. Swenson, 45 Minn. 190, 47 N. W. 718; Quinn v. Stout, 31 Mo. 160; Hickman v. Shimp, 109 Pa. St. 16; Fintel v. Cook, 88 Wis. 485, 60 N. W. 788. See also, Fox v. Wilkinson, 133 Wis. 337, 113 N. W. 669, 14 L. R. A. (N. S.) 1107, and note; and Greacen v. Poehlman, 191 N. Y. 493, 48 N. E. 390. But it has been held that while retention for an unreasonable time is conclusive as against the buyer it may not be conclusive against others. Shipman v. Graves, 41 Mich. 675, 3 N. W. 177.

[23] Gottlieb v. Rinaldo, 78 Ark. 123, 93 S. W. 750, 6 L. R. A. (N. S.) 273 and note; Wiggins v. Tumlin, 96 Ga. 753, 23 S. E. 75; Pitts Sons' Mfg. Co. v. Poor, 7 Ill. App. 24; Hunt v. Wyman, 100 Mass. 198; Glasscock v. Hazell, 109 N. Car. 143, 13 S. E. 789; Sturm v. Boker, 150 U. S. 312, 37 L. ed. 1093, 14 Sup. Ct. 99; Rumpf v. Barto, 10 Wash. 382, 38 Pac. 1129. See also, Elphick v. Barnes, 5 C. P. D. 321. The transaction is distinguished from a contract on "sale or return" in the first case above cited, (also in Wind v. Iler, 93 Iowa 316, 61 N. W. 1001, 27 L. R. A. 219; State v. Betz, 207 Mo. 589, 106 S. W. 64; Osborne v. Francis, 38 W. Va. 312, 18 S. E. 591, 45 Am. St. 859). And see as to when the title passes on "sale or return," ante, § 4982 on "Further Definitions and Explanation of Terms"; also Hotchkiss v. Higgins, 52 Conn. 205, 52 Am. Rep. 582; and Henderson v. Wheaton, 139 Ill. 581, 28 N. E. 1100; note in 28 L. R. A. (N. S.) 539. And see as to the effect of a provision that the article shall be satisfactory, ante, vol. 2, §§ 1588, 1603; also Campbell Print. Press &c. Co. v. Thorp, 36 Fed. 414, 1 L. R. A. 645, and cases reviewed in opinion and note.

[24] Rhode v. Thwaites, 6 B. & C. 388; Heilbutt v. Hickson, L. R. 7 C. P. 438; Heert v. Ridenour-Raymond Grocer Co., 48 Colo. 42, 108 Pac. 968, 139 Am. St. 259; Mitchell v. Le Clair, 165 Mass. 308, 43 N. E. 117; Lynch v. O'Donnell, 127 Mass. 311; Nash v. Rockford Veneer Co., 109 Mich. 269, 67 N. W. 111; Fishback v. Van Dusen, 33 Minn. 111, 24 N. W. 244; McIntyre v. Kline, 30 Miss. 361, 64 Am. Dec. 163; Thompson v. Conover, 32 N. J. L. 466; Wooster v. Sherwood, 25 N. Y. 278; Johnson v. Hays, 5 Ohio St. 101; Ballentine v. Robinson 46 Pa. St. 177; International & G. N. R. Co. v. Ogburn, 26 Tex. Civ. App. 217, 63 S. W. 1072.

be sufficient even without the subsequent assent of the buyer.[25] At all events, such assent may be express or implied, and may be given either before or after the appropriation is made.[26] Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier[27] or other bailee[28] (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.[29] But this

[25] Colorado Springs Live Stock Co. v. Godding, 20 Colo. 249, 38 Pac. 58. See also, Martz v. Putnam, 117 Ind. 392, 20 N. E. 270; Merchants' Nat. Bank v. Bangs, 102 Mass. 291; Sneathen v. Grubbs, 88 Pa. St. 147. But see Campbell v. Mersey Docks &c. Board, 14 C. B. N. S. 414; Bryans v. Nix, 4 M. & W. 775; Moody v. Brown, 34 Maine 107, 56 Am. Dec. 640; Tufts v. Grewer, 83 Maine 407, 22 Atl. 382; Andrews v. Cheney, 62 N. H. 404; Hague v. Porter, 3 Hill (N. Y.) 141; Rider v. Kelley, 32 Vt. 268, 76 Am. Dec. 176. Perhaps all that is meant in the cases first cited is that subsequent assent of the buyer is unnecessary where the assent is already implied or the contract or circumstances are such that he is deemed to have authorized the seller to make the appropriation.

[26] As to prior assent implied or given by previous authority, see Aldridge v. Johnson, 7 E. & B. 885; Ex parte Pearson, L. R. 3 Ch. 443; Ellis v. Roche, 73 Ill. 280; Martz v. Putnam, 117 Ind. 392, 20 N. E. 270; Sedgwick v. Cottingham, 54 Iowa 512, 6 N. W. 738; Smith v. Edwards, 156 Mass. 221, 30 N. E. 1017; Rodman v. Guilford, 112 Mass. 405; Pierson v. Crooks, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. 831; Fry v. Lucas, 29 Pa. St. 356; Hatch v. Standard Oil Co. of Cleveland, 100 U. S. 124, 25 L. ed. 554; Griswold v. Scott, 66 Vt. 550, 29 Atl. 1013; Pratt v. Peck, 70 Wis. 620, 36 N. W. 410. See also, Farmers' Nat. Bank v. Cooper, 44 Ind. App. 335, 88 N. E. 856. As to subsequent implied assent, see Rhode v. Thwaites, 6 B. & C. 388; Wilkins v. Bromhead, 6 M. & G. 963; Armstrong v. Turner, 49 Md. 589; Goddard v. Binney, 115 Mass. 450, 15 Am. St. 112; Mitchell v. Le Clair, 165 Mass. 308, 43 N. E. 117; Spicers v. Harvey, 9 R. I. 582.

[27] Fragano v. Long, 4 B. & C. 219; Whiting v. Farrand, 1 Conn. 60; Carthage v. Munsell, 203 Ill. 474, 67 N. E. 831; Rechtin v. McGary, 117 Ind. 132, 19 N. E. 731; Leggett & Meyer Tobacco Co. v. Collier, 89 Iowa 144, 56 N. W. 417; Putnam v. Tillotson, 13 Metc. (Mass.) 517; Cox v. Anderson, 194 Mass. 136, 80 N. E. 236; Kuppenheiner v. Wertheimer, 107 Mich. 77, 64 N. W. 952, 61 Am. St. 317; State v. Rosenberger, 212 Mo. 648, 111 S. W. 509, 20 L. R. A. (N. S.) 284, 126 Am. St. 580 (subject to right of stoppage in transitu); Neimeyer Lumber Co. v. Burlington & M. R. R. Co., 54 Nebr. 321; 74 N. W. 670, 40 L. R. A. 534; Wilcox Silver Plate Co. v. Green, 72 N. Y. 17; Pullman Palace-Car Co. v. Metropolitan St. R. Co., 157 U. S. 94, 39 L. ed. 632, 15 Sup. Ct. 503; United States v. Andrews, 207 U. S. 229, 52 L. ed. 185, 28 Sup. Ct. 100; Whitman Agricultural Co. v. Strand, 8 Wash. 647, 36 Pac. 682; Swanke v. McCarty, 81 Wis. 109, 51 N. W. 92; Elliott R. R. (2d ed.), § 1414. See also, Deutzel v. Island Park Assn., 229 Pa. St. 403, 78 Atl. 935, 33 L. R. A. (N. S.) 55, and note to Ramsey &c. Mfg. Co. v. Kelsea (55 N. J. L. 320) in 22 L. R. A. 415.

[28] Bradford v. Marbury, 12 Ala. 520, 46 Am. Dec. 264; Hunter v. Wright, 12 Allen (Mass.) 548; Gibson v. Chillicothe Branch of State Bank, 11 Ohio St. 311; Gibson v. Stevens, 8 How. (U. S.) 384, 12 L. ed. 1123; Rice v. Cutler, 17 Wis. 351, 84 Am. Dec. 747. See also, Wing v. Clark, 24 Maine 366.

[29] In Heert v. Ridenour-Raymond Grocer Co., 48 Colo. 42, 108 Pac. 968, 139 Am. St. 259, it was held that the

may sometimes depend upon the contract or relation of the parties and other circumstances.[30] So, there is some difference of opinion as to the rule where goods are shipped "C. O. D."[31] The weight of authority, however, seems to be to the effect that where goods are ordered and shipped "C. O. D." the carrier is regarded as the agent of the buyer to receive them and the agent of the seller to collect the price, and the sale is usually complete when the goods are delivered to the carrier.[32]

§ 5022. Seller may reserve right of disposal—Title does not pass until condition is performed—Statutes.—Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, and the seller, by the terms of the contract or appropriation, reserves the right of disposal of the goods until certain conditions are fulfilled, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled, notwithstanding the goods may have been delivered to a carrier or bailee to be transmitted

title passed to the buyer even though the seller paid the freight, it appearing from the circumstances that prepayment of freight was not made for the purpose of retaining title in the seller. But see as to right of stoppage in transitu, post, § 5072 et seq.; also Elliott R. R. (2d ed.), § 1539 et seq. And see where goods were consigned to shipper with directions to notify his agent, who, before their arrival, contracted to sell them. Pittsburgh, C., C. & St. L. R. Co. v. Knox (Ind.), 98 N. E. 295.

[30] Dunlop v. Lambert, 6 Cl. & F. 600; Waring v. Cox, 1 Campb. 369; Devine v. Edwards, 101 Ill. 138; Charles v. Lasher, 20 Ill. App. 36; Kribs v. Jones, 44 Md. 396; Bonner v. Marsh, 10 Smedes & M. (Miss.) 376, 48 Am. Dec. 754; McNeal v. Braun, 53 N. J. L. 617, 23 Atl. 687, 26 Am. St. 441; Braddock Glass Co. v. Irwin, 153 Pa. St. 440, 25 Atl. 490; McLaighlin v. Marston, 78 Wis. 670, 47 N. W. 1058. See also the next following section. The goods must be according to contract. Wait v. Baker, 2 Exch. 1; Michael Diversy v. Kellogg, 44 Ill. 114; Wolf v. Dietzsch, 75 Ill. 205; Alsberg v. Latta, 30 Iowa 442; The Frances, 8 Cranch (U. S.) 359, 3 L. ed. 589. See where either an excessive quantity or only a part is delivered, the note in 26 L. R. A. (N. S.) 23, 25.

[31] See American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. 182; notes in 22 L. R. A. 426; 24 L. R. A. (N. S.) 143; 1 L. R. A. (N. S.) 489, and 2 L. R. A. (N. S.) 383; 4 Elliott R. R. (2d. ed.), §§ 1425, 1530.

[32] Pilgreen v. State, 71 Ala. 368; Hunter v. State, 55 Ark. 357, 18 S. W. 374; Carthage v. Duvall, 202 Ill. 234, 66 N. E. 1099; James v. Commonwealth, 102 Ky. 108, 19 Ky. L. 1045, 42 S. W. 1107; State v. Intoxicating Liquors, 73 Maine 278; State v. Rosenberger, 212 Mo. 648, 111 S. W. 509, 20 L. R. A. (N. S.) 284, 126 Am. St. 580; State v. Mullin, 78 Ohio St. 358, 85 N. E. 556, 18 L. R. A. (N. S.) 609, 125 Am. St. 710; Commonwealth v. Fleming, 130 Pa. St. 138, 18 Atl. 622, 5 L. R. A. 470, 17 Am. St. 763; Golightly v. State, 49 Tex. Cr. 44, 90 S. W. 26, 2 L. R. A. (N. S.) 383, and note, 122 Am. St. 779; Adams Exp. Co. v. Kentucky, 206 U. S. 138, 51 L. ed. 992, 27 Sup. Ct. 608; State v.

to the buyer or even to the buyer himself.[33] This is undoubtedly good law as between the parties, and it is generally so held even as against third persons, unless changed by statute. But there is much reason for qualifying or limiting this rule as to innocent third persons, where the reservation is in the nature of a secret lien,[34] and in some of the states the rule does not hold good as

Flanagan, 38 W. Va. 53, 17 S. E. 792, 22 L. R. A. 430, 45 Am. St. 836. Contra, United States v. Cline, 26 Fed. 515; State v. United States Exp. Co., 70 Iowa 271, 30 N. W. 568; State v. O'Neil, 58 Vt. 140, 2 Atl. 586, 56 Am. Rep. 557; State v. Goss, 59 Vt. 266, 9 Atl. 829, 59 Am. Rep. 706. Compare also, United States v. Chevallier, 107 Fed. 434, 46 C. C. A. 402; Crabb v. State, 88 Ga. 584, 15 S. E. 455; Canton v. McDaniel, 188 Mo. 207, 86 S. W. 1092.

[33] Brandt v. Bowlby, 2 B. & Ad. 932; Goodgame v. Sanders, 140 Ala. 247, 37 So. 200; Perkins v. Mettler, 126 Cal. 100, 58 Pac. 384; Gilbert v. National Cash Register Co., 176 Ill. 288, 52 N. E. 22; Sears v. Shrout, 24 Ind. App. 313, 56 N. E. 728; Baker v. Hall, 15 Iowa 277; Amundson v. Standard Print. &c. Co., 140 Iowa 464, 118 N. W. 789; Bunday v. Columbus Mach. Co., 143 Mich. 10, 106 N. W. 397, 5 L. R. A. (N. S.) 475, and note; Lansing Iron & Engine Works v. Wilbur, 111 Mich. 413, 69 N. W. 667; Northwestern Mut. Life Ins. Co. v. George, 77 Minn. 319, 79 N. W. 1028, 1064; W. F. Zimmerman Lumber Co. v. Elder (Miss.), 29 So. 466; Bennett Bros. Co. v. Tam, 24 Mont. 457, 62 Pac. 780; Richardson Drug Co. v. Teasdall, 52 Nebr. 698, 72 N. W. 1028; Cole v. Berry, 42 N. J. L. 308, 36 Am. Rep. 511; Ballard v. Burgett, 40 N. Y. 314; Summerson v. Hicks, 134 Pa. St. 566, 19 Atl. 808; Segrist v. Crabtree, 113 U. S. 287, 33 L. ed. 125, 9 Sup. Ct. 687; Freed Furniture Co. v. Sorensen, 28 Utah 419, 79 Pac. 564, 107 Am. St. 731, 3 Am. & Eng. Ann. Cas. 639, and note; Page v. Urick, 31 Wash. 601, 72 Pac. 454, 96 Am. St. 924. See also, Singer Mfg. Co. v. Graham, 8 Ore. 17, 34 Am. Rep. 572; Washburn v. Inter-Mountain Mining Co., 56 Ore. 578, 109 Pac. 382, Ann. Cas. 1912C 357 and note, and notes in 25 L. R. A. (N. S.) 760, 783, 785, and 29 L. R. A. (N. S.) 709, showing that this is the weight of authority even as to third persons in the absence of statute. This has been held where the condition of the reservation was the payment of the price. Triplett v. Mansur &c. Co., 68 Ark. 230, 57 S. W. 261, 82 Am. St. 284; Tanner v. Mishawaka Woolen Mfg. Co., 28 Ind. App. 536, 63 N. E. 313; Fleury v. Tufts, 25 Ill. App. 101; Herring v. Hoppock, 15 N. Y. 409; Herring-Hall-Marvin Co. v. Smith, 43 Ore. 315, 72 Pac. 704, 73 Pac. 340; Harkness v. Russell, 118 U. S. 663, 30 L. ed. 285, 7 Sup. Ct. 51; Davison v. Davis, 125 U. S. 90, 31 L. ed. 635, 8 Sup. Ct. 825; Lippincott v. Rich, 22 Utah 196, 61 Pac. 526. Or the giving of security therefor. Salomon v. Hathaway, 126 Mass. 482; Coggill v. Hartford &c. R. Co., 3 Gray (Mass.) 545; Osborn v. Gantz, 60 N. Y. 540; Campbell Press Co. v. Walker, 114 N. Y. 7, 20 N. E. 625; Chalmers v. McAuley, 68 Vt. 44, 33 Atl. 767. See also, Hooven, Owens & Rentschler Co. v. Burdette, 153 Ill. 672, 39 N. E. 1107; Seed v. Lord, 66 Maine 580; Sumner v. Cottey, 71 Mo. 121; Weeks v. Pike, 60 N. H. 447. In Collerd v. Tully, 78 N. J. Eq. 557, 80 Atl. 491, Ann. Cas. 1912C 78, it is held that where goods are delivered to the buyer under a conditional sale, although the title is retained by the seller as security for unpaid purchase-money, the risk of loss is on the buyer.

[34] See Andrews v. Colorado Sav. Bank, 20 Colo. 313, 36 Pac. 902, 46 Am. St. 291n; Ketchum v. Watson, 24 Ill. 591; Perkins v. Loan & Exchange Bank, 43 S. Car. 39, 20 S. E. 759; Planters' Bank v. Vandyck, 4 Heisk. (Tenn.) 617; Knittel v. Cushing, 57 Tex. 354, 44 Am. Rep. 598;

against a subsequent bona fide purchaser[35] or attaching or execution creditor of the buyer[36] having no knowledge nor notice of any kind of such conditions, while in many of the states there are statutes requiring expressly or in effect that agreements for reservation of title in the seller under such circumstances where goods are delivered to the buyer must be filed or recorded in order to be valid as against such innocent third persons.[37]

Osborn v. South Shore Lumber Co., 91 Wis. 526, 65 N. W. 184; Heryford v. Davis, 102 U. S. 235, 26 L. ed. 160.

[35] Brundage v. Camp, 21 Ill. 330; Fifield v. Bank, 148 Ill. 163, 35 N. E. 802, 39 Am. St. 166; Stadtfield v. Huntsman, 92 Pa. St. 53, 37 Am. Rep. 661; Dearborn v. Raysor, 132 Pa. St. 231, 20 Atl. 690. See also, Vaughn v. Hopson, 10 Bush (Ky.) 337; Lincoln v. Quyn, 68 Md. 299, 11 Atl. 848, 6 Am. St. 446; Central Trust Co. v. Arctic Ice Mach. Mfg. Co., 77 Md. 202, 26 Atl. 493; and compare Smith v. Lynes, 5 N. Y. 41; Dows v. Kidder, 84 N. Y. 121, and authorities cited in last preceding note. Many of the authorities on both sides are reviewed in the note in 13 L. R. A. (N. S.) 697.

[36] In the case of In re George M. Hill Co., 123 Fed. 866, 59 C. C. A. 354, the Illinois cases and federal decisions under the Illinois law are cited and it is said: "Under the law of the state of Illinois a sale under contract conditioned that no title should pass until payment, the property being delivered and accepted, is constructively fraudulent as to creditors who come armed with execution or attachment, * * * the rule being otherwise in most of the states of the Union." Among the Illinois cases are Murch v. Wright, 46 Ill. 487, 95 Am. Dec. 455; and Peoria Mfg. Co. v. Lyons, 153 Ill. 427, 38 N. E. 661. See also, in Pennsylvania, Martin v. Mathiot, 14 Serg. & R. (Pa.) 214, 16 Am. Dec. 491; Ott v. Sweatman, 166 Pa. St. 217, 31 Atl. 102. The prevailing rule to the effect that the vendor has no such attachable interest is stated in McIver v. Williamson-Halsell-Frazier Co., 19 Okla. 454, 92 Pac. 170, 13 L. R. A. (N. S.) 697, where some of the conflicting authorities are reviewed.

[37] See Rhode Island Locomotive Works v. Empire Lumber Co., 91 Ga. 639, 17 S. E. 1012; Vorse v. Loomis, 86 Iowa 522, 53 N. W. 314; Field v. Gillerson, 80 Maine 270, 14 Atl. 70; Babcock Co. v. Williams, 75 Minn. 147, 77 N. W. 791; Fairbanks v. Baskett, 98 Mo. App. 53, 71 S. W. 1113; Eidson v. Hedger, 38 Mo. App. 52; Collins v. Wilhoit, 108 Mo. 451, 18 S. W. 839; Gerrish v. Clark, 64 N. H. 492, 13 Atl. 870; Clark v. Hill, 117 N. Car. 11, 23 S. E. 91, 53 Am. St. 574; Speyer v. Baker, 59 Ohio St. 11, 51 N. E. 442; Baltimore &c. R. Co. v. Good, 82 Ohio St. 278, 92 N. E. 435, 29 L. R. A. (N. S.) 713; Perkins v. Loan & Exchange Bank, 43 S. Car. 39, 20 S. E. 759; Harling v. Creech, 88 Tex. 300, 31 S. W. 357 (even as between parties); Church v. McLeod, 58 Vt. 541, 3 Atl. 490. Compare also, D. A. Lomplains Co. v. Monticello Cotton Co., 137 Fed. 625; Boyer v. M. D. Knowlton Co., 85 Ohio St. 104, 97 N. E. 137, 38 L. R. A. (N. S.) 224; notes in 64 L. R. A. 353, 35 L. R. A. (N. S.) 385. But see Starnes v. Boyd (Ark.), 142 S. W. 1143; Washburn v. Inter-Mountain Mining Co., 56 Ore. 578, 109 Pac. 382, Ann. Cas. 1912C 357 and note, also notes in 25 L. R. A. (N. S.) 760; Studebaker v. Mau, 13 Wyo. 358, 80 Pac. 151, 110 Am. St. 1001. As will be seen from some of the authorities cited, under some of the statutes the matter often depends upon whether the transaction is a conditional sale or amounts in effect to a chattel mortgage. See also as to right of seller who reserves title to retake the property, and as to statutes upon the subject: Pfeiffer v. Norman (N. Dak.), 133 N. W. 97, 38 L. R. A. (N. S.) 891, and notes. And as to right of vendor in conditional sale where purchaser becomes

§ 5023. **Right of disposal deemed reserved where goods are shipped with bill of lading making them deliverable to order of seller or his agent.**—Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie deemed to reserve the right of disposal.[38] And the attaching of a draft for the purchase-price to the bill of lading usually strengthens or corroborates the inference that the title was not intended to pass at the time of delivery to the carrier.[39] The question, however, is one of intention, and the particular facts and circumstances may be controlling either way where they clearly show the intention. The bill of lading represents the goods, and its transfer usually operates as a symbolical delivery sufficient ordinarily to pass the property in accordance with the intention of the parties.[40] Where the

bankrupt, see Myrick v. Liquid Carbonic Co., 137 Ga. 154, 73 S. E. 7, 38 L. R. A. (N. S.) 554, and note.

[38] Ogg v. Shuter, 1 C. P. D. 47; Turner v. Trustees, 6 Exch. 543; Jenkyns v. Brown, 14 Q. B. 496; Jones v. Brewer, 79 Ala. 545; Erwin v. Harris, 87 Ga. 333, 13 S. E. 513; Ward v. Taylor, 56 Ill. 494; Sohn v. Jervis, 101 Ind. 578, 1 N. E. 73; Hamilton v. Joseph Schlitz Brewing Co., 129 Iowa 172, 105 N. W. 438, 24 L. R. A. (N. S.) 1078, and note; Kentucky Refining Co. v. Globe Refining Co., 104 Ky. 559, 20 Ky. L. 778, 47 S. W. 602; Fifth Nat. Bank v. Bayley, 115 Mass. 228; First Nat. Bank v. Crocker, 111 Mass. 163; Merchants' Nat. Bank v. Bangs, 102 Mass. 291; Willman Mercantile Co. v. Fussy, 15 Mont. 511, 39 Pac. 738, 48 Am. St. 698; Farmers' &c. Nat. Bank v. Logan, 74 N. Y. 568; Dows v. Nat. Bank, 91 U. S. 618, 23 L. ed. 214; Back v. Smith, 56 W. Va. 47, 66 S. E. 1; Doyle v. Roth Mfg. Co., 76 Wis. 48, 44 N. W. 1100, note in 22 L. R. A. 421, 422. Compare also, Pittsburg, C., C. & St. L. R. Co. v. Knox (Ind.), 98 N. E. 295, 4 Elliott R. R. (2d ed.), § 1426.

[39] Reed v. Racine Boat Co. (Iowa), 137 N. W. 458; note to Hamilton v. Joseph Schlitz Brew. Co., 2 L. R. A. (N. S.) 1078. See also, Shepherd v. Harrison, L. R. 5 H. L. 116, 40 L. J. Q. B. 148; Arkansas So. Ry. Co. v. German Nat. Bank, 77 Ark. 482, 92 S. W. 522, 113 Am. St. 160; Seeligson v. Philbrick, 30 Fed. 600; and compare 4 Elliott R. R. (2d ed.), § 1429a, and next to last note to this section; Commercial Bank v. Chicago, St. P. &c. R. Co., 160 Ill. 401, 43 N. E. 756; Hopkins v. Cowen, 90 Md. 152, 44 Atl. 1062, 47 L. R. A. 124; Freeman v. Kraemer, 63 Minn. 242, 65 N. W. 455; Missouri Pac. R. Co. v. Lau, 57 Nebr. 559, 78 N. W. 291; Bank of Rochester v. Jones, 4 N. Y. 497, 55 Am. Dec. 290; Pennsylvania R. Co. v. Stern, 119 Pa. St. 24, 12 Atl. 756, 4 Am. St. 626; Bank v. Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. 618. In Reed v. Racine Boat Co. (Iowa), 137 N. W. 458, it was held that the seller retained the title and control until the draft was paid and the bill of lading delivered to the buyer notwithstanding an indorsement on the bill of lading to deliver it to the buyer.

[40] Sewell v. Burdick, 10 App. Cas. 74; Forbes v. Boston & L. R. Co., 133 Mass. 154; Bank of Rochester v. Jones, 4 N. Y. 497, 55 Am. Dec. 290; Commercial Bank v. Pfeiffer, 108 N. Y. 242, 15 N. E. 311; Mitchell v. Baker, 208 Pa. 377, 57 Atl. 760; Means v. Bank of Randall, 146 U. S. 620, 36 L. ed. 1107, 13 Sup. Ct. 186; Gibson v. Stevens, 8 How. (U. S.) 384, 12 L. ed. 1123. See 4 Elliott R. R. (2d ed.), § 1426. See also, What

bill of lading is to the order of the purchaser the natural inference would be different from that where it is to the seller and it would seem to show an intention that the title should pass, but even here the attaching of a draft would indicate an intention that the title should not pass until payment or, at least, acceptance of the draft, and it has been held in a number of such cases that the title did not pass.[41] On the other hand, it has been held in other cases that the title did pass notwithstanding a draft was attached.[42] But in the latter cases as well as in the former, the question was regarded largely as one of fact depending upon the intention of the parties and particular circumstances.

§ 5024. Risk of loss.—Res periit domino is the general rule and "the common law fixes the risk where the title resides."[43] Therefore, in the absence of anything to the contrary, the goods remain at the seller's risk until the property therein is transferred to the buyer;[44] but when the property therein is transferred

Cheer Savings Bank v. Mowery, 149 Iowa 114, 128 N. W. 7; Ayres v. Dorsey, 101 Iowa 141, 70 N. W. 111, 63 Am. St. 376.

[41] Hilmer v. Hills, 138 Cal. 134, 70 Pac. 1080; Merchants' Exchange Bank v. McGraw, 59 Fed. 972, 8 C. C. A. 420; Taylor v. Turner, 87 Ill. 296; Emery's Sons v. Irving Nat. Bank, 25 Ohio St. 360, 18 Am. Rep. 299; Greenwood Grocery Co. v. Canadian County Mill & Elevator Co., 72 S. Car. 450, 52 S. E. 191, 2 L. R. A. (N. S.) 79n, 110 Am. St. 627. See also, Mathewson v. Belmont Flouring Mills Co., 76 Ga. 357; Bergeman v. Indianapolis &c. R. Co., 104 Mo. 77, 15 S. W. 992; Cayuga Co. Nat. Bank v. Daniels, 47 N. Y. 631. Compare Pittsburg, C., C. & St. L. R. Co. v. Knox (Ind.), 98 N. E. 295; Reed v. Racine Boat Co. (Iowa), 137 N. W. 458; Wigton v. Bowley, 130 Mass. 252; Bank of Litchfield v. Elliott, 83 Minn. 469, 86 N. W. 454; Gulf, W. T. & P. R. Co. v. Browne, 27 Tex. Civ. App. 437, 66 S. W. 341; Halliday v. Hamilton, 11 Wall. (U. S.) 560, 20 L. ed. 214.

[42] And a secret intention on the part of the seller that title shall not pass will not avail him as against a bona fide purchaser from the buyer where the bill of lading is in the name of the buyer and the goods are forwarded to him accordingly. Robinson v. Pogue, 86 Ala. 257, 5 So. 685; Wigton v. Bowley, 130 Mass. 252; Oester v. Sitlington, 115 Mo. 247, 21 S. W. 820. As to nonliability of bank cashing a draft in its favor with bill of lading attached for deficiency or defects in goods, see Cosmos Cotton Co. v. First Nat. Bank, 171 Ala. 392, 54 So. 621, 32 L. R. A. (N. S.) 1173, and note.

[43] Joyce v. Adams, 8 N. Y. 291, Seld. Notes 136. See also, Calcutta & Burmah Co. v. De Mattos, 32 L. J. Q. B. 322; Rugg v. Minett, 11 East 210; Stone v. Waite, 88 Ala. 599, 7 So. 117; Hahn v. Fredericks, 30 Mich. 223, 18 Am. Rep. 119; Lingham v. Eggleston, 27 Mich. 324; Tillson v. United States, 129 U. S. 101, 32 L. ed. 636, 9 Sup. Ct. 255, 24 Ct. Cl. (U. S.) 526. But see Browne v. Hare, 3 H. & N. 484; Farmers' &c. Bank v. Logan, 74 N. Y. 568.

[44] Simmons v. Swift, 5 Barn. & C. 857; Elphick v. Barnes, 5 C. P. D. 321; Slade v. Lee, 94 Mich. 127, 53 N. W. 929; Towne v. Davis, 66 N. H. 396, 22 Atl. 450; Terry v. Wheeler, 25 N. Y. 520; Williams v. Allen, 10 Humph. (Tenn.) 337, 51 Am. Dec.

to the buyer the goods are at the latter's risk no matter whether they have been actually delivered to him or not.[45] It may be agreed, however, that the property shall be in the one and the risk in the other.[46] And where delivery has been delayed by the fault of one of them the risk has been held to be that of the party in fault as to any loss which would not have occurred but for such fault.[47]

709; Kelly v. Bliss, 54 Wis. 187, 11 N. W. 488. See also, Gottlieb v. Rinaldo, 78 Ark. 123, 93 S. W. 750, 6 L. R. A. (N. S.) 273, and note. But compare Collerd v. Tully, 78 N. J. Eq. 557, 80 Atl. 491, Ann. Cas. 1912C 78; La Velly v. Ravenna, 78 Vt. 152, 62 Atl. 47, 2 L. R. A. (N. S.) 97, and note, 112 Am. St. 898, where there is a conditional sale reserving title in the vendor to secure payment of the purchase-price.

[45] Leonard v. Davis, 1 Black (U. S.) 476, 17 L. ed. 222. See also, Tarling v. Baxter, 6 Barn. & C. 360; Heert v. Ridenour-Raymond Grocer Co., 48 Colo. 42, 108 Pac. 968, 139 Am. St. 259; Thompson v. Brannin, 94 Ky. 490, 15 Ky. L. 36, 21 S. W. 1057; Hankins v. Baker, 46 N. Y. 666 (symbolical delivery); Bissell v. Balcom, 39 N. Y. 275; Griswold v. Scott, 66 Vt. 550, 29 Atl. 1013.

[46] Martineau v. Kitching, L. R. 7 Q. B. 436; Castle v. Playford, 7 Exch. 98; American Soda Fountain Co. v. Vaughn, 69 N. J. L. 582, 55 Atl. 54. See also, Calcutta & Burmah Co. v. De Mattos, 32 L. J. Q. B. 322, 33 L. J. Q. B. 214.

[47] Martineau v. Kitching, L. R. 7 Q. B. 436. But see McConihe v. New York & E. R. Co., 20 N. Y. 495, 75 Am. Dec. 420; Grant v. United States, 7 Wall. (U. S.) 331, 19 L. ed. 194, 7 Ct. Cl. (U. S.) 53. Where either the buyer or seller is a bailee of the goods of the other party the general rules applicable to such bailments apply. See Bertelson v. Bower, 81 Ind. 512; Cloyd v. Steiger, 139 Ill. 41, 28 N. E. 987; Sprinkle v. Brimm, 144 N. Car. 401, 57 S. E. 148, 12 L. R. A. (N. S.) 679, and note; McCandlish v. Newman, 22 Pa. St. 460-465, 8 Leg. Int. (Pa.) 238; Davis v. Koenig, 165 Pa. St. 347, 30 Atl. 976. See also, Milliken v. Randall, 89 Maine 200, 36 Atl. 75; Lansing v. Turner, 2 Johns. (N. Y.) 13; Sturm v. Boker, 150 U. S. 312, 37 L. ed. 1093, 14 Sup. Ct. 99.

CHAPTER CLVII.

EFFECTS OF THE CONTRACT—TRANSFER OF TITLE.

§ 5030. Attempted sale by one not the owner.
5031. Estoppel of owner.
5032. Estoppel of owner—Conditional sales.
5033. Factors acts and recording or other statutes—Sales in bulk.
§ 5034. Where seller has voidable title.
5035. Sale by one having possession of goods or documents of title with consent of owner.
5036. Person in possession as ostensible owner—Attaching and execution creditors.

§ 5030. Attempted sale by one not the owner.—As a general rule, where goods are sold by a person who is not the owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title than the seller had,[1] unless the owner is by his conduct estopped or precluded from denying the seller's authority to sell. But this rule does not

[1] Lightman v. Boyd, 132 Ala. 618, 32 So. 714; Smith Premier Typewriter Co. v. Stidger, 18 Colo. App. 261, 71 Pac. 400; Klein v. Seibold, 89 Ill. 540; McPheters v. Page, 83 Maine 234, 22 Atl. 101, 23 Am. St. 772; Moody v. Blake, 117 Mass. 23, 19 Am. Rep. 394; Saltus v. Everett, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541; Soltau v. Gerdau, 119 N. Y. 380, 23 N. E. 864, 16 Am. St. 843; Hamet v. Letcher, 37 Ohio St. 356, 41 Am. Rep. 519; Velsian v. Lewis, 15 Ore. 539, 16 Pac. 631, 3 Am. St. 184; Walker v. First Nat. Bank, 43 Ore. 102, 72 Pac. 635; Quinn v. Davis, 78 Pa. St. 15; Barker v. Dinsmore, 72 Pa. St. 427, 13 Am. Rep. 697; Ventress v. Smith, 10 Pet. (U. S.) 161, 9 L. ed. 382; London Joint Stock Bank v. Simmons (1892), A. C. 201, 215. Bare possession without any other indicia of ownership does not carry with it authority to sell. Stultz v. Miltenburger (Ind.), 96 N. E. 581. See Gentry v. Singleton, 128 Fed. 679, 63 C. C. A. 231; Turnbow v. Beckstead, 25 Utah 468, 71 Pac. 1062. See also, Jetton v. Tobey, 62 Ark. 84, 34 S. W. 531; Stanley v. Gaylord, 1 Cush. (Mass.) 536, 48 Am. Dec. 643; Baker v. Taylor, 54 Minn. 71, 55 N. W. 823. Where an employé, sent with cotton with instructions to take it to the compress, have it weighed and bring the receipt to the employer, delivered the cotton as his own, obtained the receipt and sold it, the purchaser was held to obtain no title as against the true owner, and the court said: "Caveat emptor" applies. Unger v. Abbott, 92 Miss. 563, 46 So. 68, 131 Am. St. 545. And see generally to the effect that a mere bailee cannot give a good title, Ingersoll v. Emmerson, 1 Ind. 76, Smith (Ind.) 77; Levi v. Booth, 58 Md. 305, 42 Am. Rep. 332; Nichols v. Monjeau, 132 Mich. 582, 94 N. W. 6; Covill v. Hill, 4 Denio (N. Y.) 323, revd. 1 N. Y. 522; McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Miller Piano Co. v. Parker, 155

affect the provisions of any applicable factor's act, recording act, or other statutory enactment enabling the apparent owner of goods to dispose of them as if he were the true owner; nor does it affect the validity of any contract of sale under any common-law or statutory power of sale,[2] or under the order of a court of competent jurisdiction.[3] And the rule does not apply to negotiable paper, as, for instance, where it is payable to bearer or has been indorsed in blank and is stolen and negotiated to a good-faith purchaser.[4]

§ 5031. Estoppel of owner.—It would be a fraud for a party to assert what his previous conduct has denied, as against and to the injury of others who have acted on the faith of such denial as well as where they have acted on the faith of fraudulent representations,[5] and he who has been silent as to his alleged right when he ought in good faith to have spoken will not be heard to speak when he ought to be silent.[6] These principles of estoppel are applied in the law of sales in cases of apparent ownership and in cases of apparent authority, but there is some difficulty and some difference of opinion as to their

Pa. St. 208, 26 Atl. 303, 35 Am. St. 873. Compare also, Romeo v. Martucci, 72 Conn. 504, 45 Atl. 1199, 47 L. R. A. 601, 77 Am. St. 327; Gilman Linseed Oil Co. v. Norton, 89 Iowa 434, 56 N. W. 663, 48 Am. St. 400; Ullman v. Biddle, 53 W. Va. 415, 44 S. E. 280.

[2] See vol. 4, tit. "Bailments."

[3] Caveat emptor is the rule at judicial sales. Borders v. Hodges, 154 Ill. 498, 39 N. E. 597; Lewark v. Carter, 117 Ind. 206, 20 N. E. 119, 3 L. R. A. 440, 10 Am. St. 40; King v. Gunnison, 4 Pa. St. 171; The Monte Allegre, 9 Wheat. (U. S.) 616, 6 L. ed. 174; Long v. Weller's Exr., 29 Grat. (Va.) 347. But see as to right of purchaser as against execution creditor, Dresser v. Kronberg, 108 Maine 423, 81 Atl. 487, 36 L. R. A. (N. S.) 1218. And see as to who is a bona fide purchaser at such a sale and of what he must take notice and how far he is protected, note in 21 L. R. A. 33 et seq.

[4] Ehrlich v. Jennings, 78 S. Car. 269, 58 S. E. 922, 125 Am. St. 795n, and elaborate note reviewing many authorities and stating distinction between negotiation before delivery and after delivery. Bills of lading in some jurisdictions are put on the same footing. See as to bonds, certificates of stock and other instruments, the note in 103 Am. St. 979 et seq.

[5] Robbins v. Moore, 129 Ill. 30, 21 N. E. 934; Anderson v. Hubble, 93 Ind. 570, 47 Am. Rep. 394; Gregg v. Von Phul, 1 Wall. (U. S.) 274, 17 L. ed. 536. See also, Quick v. Milligan, 108 Ind. 419, 9 N. E. 392, 58 Am. Rep. 49; Hill v. Wand, 47 Kans. 340, 27 Pac. 988, 27 Am. St. 288; Nixon v. Brown, 57 N. H. 34; McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618.

[6] Anderson v. Hubble, 93 Ind. 570, 47 Am. Rep. 394; Wendell's Exrs. v. Rensselaer, 1 Johns. Ch. (N. Y.) 344; Buckingham v. Smith, 10 Ohio 288; Hill v. Epley, 31 Pa. St. 331; Morgan v. Chicago & Alton R. Co., 96 U. S. 716, 24 L. ed. 743.

application in certain cases that are close to the line. A sale made by a person not the owner and having no actual authority may be good as against the real owner under this doctrine of estoppel, as, for instance, when the owner clothes another with apparent title or power of disposition by way of sale and an innocent person is thereby induced to buy them,[7] or where the owner with full knowledge stands by in silence and suffers another to treat the goods as his own and thereby induces a third person to buy them in good faith as the goods of another.[8] So, where the owner of goods culpably induces a sheriff to levy on or sell them as the goods of another who is the execution defendant, the same principle has often been applied.[9] A somewhat similar principle also often exerts an important influence in such cases. It is this: Where one of two innocent persons must suffer by the wrongful act of a third, he who has put it in the power of such third person to cause the loss must be the sufferer.[10] But as already shown in a note to the first section of this chapter, this principle does not ordinarily apply where the possession of the seller is that of a bailee.[11] And there are other cases in which the possession is not such as to come within the rules stated in this section.[12] One may

[7] Pickering v. Busk, 15 East 38; Grace v. McKissack, 49 Ala. 163; Bent v. Jerkins, 112 Ala. 485, 20 So. 655; Stewart v. Munford, 91 Ill. 58; Preston v. Witherspoon, 109 Ind. 457, 9 N. E. 585, 58 Am. Rep. 417; Lewenberg v. Hayes, 91 Maine 104, 39 Atl. 469, 64 Am. St. 215; Dias v. Chickering, 64 Md. 348, 1 Atl. 709, 54 Am. Rep. 770; Columbus Buggy Co. v. Turley, 73 Miss. 529, 19 So. 232, 32 L. R. A. 260, 55 Am. St. 550; O'Connor's Admx. v. Clark, 170 Pa. St. 318, 32 Atl. 1029, 29 L. R. A. 607; Cowdrey v. Vandenburgh, 101 U. S. 572, 25 L. ed. 923. It is so held where the buyer allows the vendor to continue in possession and thus invests the vendor with apparent authority to sell. Gardiner v. McDonogh, 147 Cal. 313, 81 Pac. 964; Flanigan v. Pomeroy, 85 Minn. 264, 88 N. W. 761, and other cases there cited.

[8] Gregge v. Wells, 10 A. & E. 90; Brooks v. Record, 47 Ill. 30; Anderson v. Hubble, 93 Ind. 570, 47 Am. Rep. 394; Tracy v. Lincoln, 145 Mass. 357, 14 N. E. 122; Thompson v. Blanchard, 4 N. Y. 303.

[9] Pickard v. Sears, 6 A. & E. 469; Leeper v. Hersman, 58 Ill. 218; Reiss v. Hanchett, 141 Ill. 419, 31 N. E. 165; Dewey v. Field, 4 Metc. (Mass.) 381, 38 Am. Dec. 376; Stiff v. Ashton, 155 Mass. 130, 29 N. E. 203; Stephens v. Baird, 9 Cow. (N. Y.) 274.

[10] Hern v. Nichols, 1 Salk. 289; Lickbarrow v. Mason, 2 T. R. 63-70; Preston v. Witherspoon, 109 Ind. 457, 9 N. E. 585, 58 Am. Rep. 417; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30.

[11] Baehr v. Clark, 83 Iowa 313, 49 N. W. 840, 13 L. R. A. 717; Sargent v. Gile, 8 N. H. 325.

[12] Meggy v. Imperial Discount Co., 3 Q. B. Div. 711; Stultz v. Miltenburger (Ind.), 96 N. E. 581; Ball-Barnhart-Putnam Co. v. Lane, 135 Mich. 275, 97 N. W. 727; Unger v. Abbott, 92 Miss. 563, 46 So. 68, 131 Am. St. 545, and other cases hereinafter cited.

intrust his goods to another to be repaired, without giving the latter such ostensible authority to sell them as to create an estoppel even though such party habitually sells goods of the same kind.[13] And an agent may be intrusted with goods without any authority, either real or apparent, to sell them.[14] But where the owner gives another both possession and indicia of ownership, a bona fide purchaser, rightfully relying thereon, is generally protected.[15] It has been so held where the owner of a wagon allowed one of his employés to have his name painted thereon for the purpose of inducing the public to believe that the property belonged to such employé,[16] and where one ordering a steamboat to be built allowed the agent to hold himself out as owner and had the vessel enrolled in the name of the agent as owner.[17]

§ 5032. Estoppel of owner—Conditional sales.—In the case of a conditional sale, where the seller delivers goods to the buyer on credit and stipulates in the contract that the title shall not pass until the price is paid, the seller is not thereby estopped from asserting his title against one who purchases from the buyer, relying upon the latter's apparent title. The great weight of authority is to this effect,[18] but it is held otherwise in some few

[13] Biggs v. Evans (1894), 1 Q. B. 88; Levi v. Booth, 58 Md. 305, 42 Am. Rep. 332. See also, Smith v. Clews, 114 N. Y. 190, 21 N. E. 160, 4 L. R. A. 392, 11 Am. St. 627.

[14] See vol. 4, tit. "Agency," and Romeo v. Martucci, 72 Conn. 504, 45 Atl. 1, 99, 47 L. R. A. 601, 77 Am. St. 327; Baehr v. Clark, 83 Iowa 313, 49 N. W. 840, 13 L. R. A. 717; Unger v. Abbott, 92 Miss. 563, 46 So. 68, 131 Am. St. 545.

[15] Pickering v. Bush, 15 East 38; Henderson v. Williams (1895), 1 Q. B. 521; Nixon v. Brown, 57 N. H. 34; Calais Steamboat Co. v. Pelt's Admr., 2 Black (U. S.) 372, 17 L. ed. 282. But see Farquharson Bros. v. King (1902), A. C. 325; Henry v. Philadelphia Warehouse Co., 81 Pa. St. 76; Armstrong v. Freimuth, 78 Minn. 94, 80 N. W. 862.

[16] O'Connor's Admx. v. Clark, 170 Pa. St. 318, 32 Atl. 1029, 29 L. R. A. 607.

[17] Calais Steamboat Co. v. Van Pelt's Admr., 2 Black (U. S.) 372, 17 L. ed. 282.

[18] Harkness v. Russell, 118 U. S. 663, 30 L. ed. 285, 7 Sup. Ct. 51 (reviewing many cases). See Sumner v. Woods, 67 Ala. 139, 42 Am. Rep. 104; Piedmont Land & Imp. Co. v. Thomson-Houston Motor Co. (Ala.), 12 So. 768; Riley v. Dillon, 148 Ala. 283, 41 So. 768; Carroll v. Wiggins, 30 Ark. 402; Triplett v. Mansur &c. Co., 68 Ark. 230, 57 S. W. 261, 82 Am. St. 284; Van Allen v. Francis, 123 Cal. 474, 56 Pac. 339; Mathews v. Smith, 8 Houst. (Del.) 22, 31 Atl. 879; Roof v. Chattanooga Wood Split Pulley Co., 36 Fla. 284, 18 So. 597; Sears v. Shrout, 24 Ind. App. 313, 56 N. E. 728; Baals v. Stewart, 109 Ind. 371, 9 N. E. 403; Nat. Cash Register Co. v. Zangs, 127 Iowa 710, 104 N. W. 360; Lorain Steel Co. v. Norfolk & B. St. R. Co., 187 Mass. 500, 73 N. E. 646; Lansing Iron & Engine Works v. Wilbur, 111 Mich. 413, 69 N. W. 667; Watts v. Ainsworth, 89

cases.[19] And the seller's creditors can no more disturb the buyer's property right than can the seller, although the seller's interest may be subject to execution;[20] nor can the buyer's creditors seize the property in such a case while the price is unpaid, aside from a case of estoppel under the principles already considered or some statute.[21] But, as will be shown in the next section, recording acts or similar statutes have greatly qualified the rule or affected the general subject in many states.

Miss. 40, 42 So. 672, 119 Am. St. 700; Wangler v. Franklin, 70 Mo. 659; Heinbockel v. Zugbaum, 5 Mont. 344, 5 Pac. 897, 51 Am. Rep. 59; Michelson v. Collins, 72 N. H. 554, 58 Atl. 50; Harris v. Woodard, 96 N. Car. 232, 1 S. E. 544; Call v. Seymour, 40 Ohio St. 670; Christensen v. Nelson, 38 Ore. 473, 63 Pac. 648; Carpenter v. Scott, 13 R. I. 477; Leath v. Uttley, 66 Tex. 82, 17 S. W. 401; Lippincott v. Rich, 19 Utah 140, 56 Pac. 806; McComb v. Donald's Admr., 82 Va. 903, 5 S. E. 558; Johnston v. Wood, 19 Wash. 441, 53 Pac. 707. See also, Comer v. Cunningham, 77 N. Y. 391, 33 Am. Rep. 626; and earlier cases in the same jurisdictions as those above cited and in a few other jurisdictions, reviewed in Harkness v. Russell, 118 U. S. 663, 30 L. ed. 285, 7 Sup. Ct. 51. But compare Winchester Wagon Works &c. Co. v. Carman, 109 Ind. 31, 9 N. E. 707, 58 Am. Rep. 382, and cases cited; West v. Fulling, 36 Ind. App. 617, 76 N. E. 325 (where goods are sold on credit with right in grantee to sell them at retail); Steele v. Aspy, 128 Ind. 367, 27 N. E. 739. Seller's title was held subordinate to innkeeper's lien in Waters v. Gerard, 189 N. Y. 302, 82 N. E. 143, 121 Am. St. 886.

[19] Jones v. Clark, 20 Colo. 353, 38 Pac. 371; Murch v. Wright, 46 Ill. 487, 95 Am. Dec. 455; Van Duzor v. Allen, 90 Ill. 499; Vaughn v. Hopson, 10 Bush (Ky.) 337; Barber Asphalt Pav. Co. v. St. Louis Cypress Co., 121 La. 152, 46 So. 193; Lincoln v. Quynn, 68 Md. 299, 11 Atl. 848, 6 Am. St. 446; Stadtfield v. Huntsman, 92 Pa. St. 53, 37 Am. Rep. 661; Dearborn v. Raysor, 132 Pa. St. 231, 20 Atl. 690.

[20] McMillan v. Larned, 41 Mich. 521, 2 N. W. 662. See Williston Sales, § 326; and last section of this chapter.

[21] Rodgers v. Bachman, 109 Cal. 552, 42 Pac. 448; Cooley v. Gillan, 54 Conn. 80, 6 Atl. 180; Keck v. State, 12 Ind. App. 119, 39 N. E. 899; Peabody v. Maguire, 79 Maine 572, 12 Atl. 630; Barrett v. Pritchard, 2 Pick. (Mass.) 512, 13 Am. Dec. 449; Dewes Brewery Co. v. Merritt, 82 Mich. 198, 46 N. W. 379, 9 L. R. A. 270; Aultman v. Mallory, 5 Nebr. 178, 25 Am. Rep. 478; Cleveland Mach. Works v. Lang, 67 N. H. 348, 31 Atl. 20, 68 Am. St. 675; Herring v. Hoppock, 15 N. Y. 409; Sage v. Sleutz, 23 Ohio St. 1; Dodd v. Bowles, 3 Wash. Ter. 383, 19 Pac. 156. This is true although the interest of the buyer may be subjected to the claims of creditors. Newhall v. Kingsbury, 131 Mass. 445. But see George v. Tufts, 5 Colo. 162; Weber v. Diebold Safe &c. Co., 2 Colo. App. 68, 29 Pac. 747; Lucas v. Campbell, 88 Ill. 447; Martin v. Mathiot, 14 Serg. & R. (Pa.) 214, 16 Am. Dec. 491; Duplex Print. Press Co. v. Clipper Pub. Co., 213 Pa. St. 207, 62 Atl. 841; Hervey v. Rhode Island Locomotive Works, 93 U. S. 664, 23 L. ed. 1003 (following Illinois decisions as local law). As to conditional sale, good against buyer's trustee in bankruptcy, see York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. 481. But compare West v. Fulling, 36 Ind. App. 617, 76 N. E. 325; and see In re Franklin Lumber Co., 187 Fed. 281; In re Nelson, 191 Fed. 233, under amendment of 1910 to Bankruptcy Act. See also, generally, the note to Myrick v. Liquid Carbonic Co. (137 Ga. 154, 73 S. E. 7) in 38 L. R. A. (N. S.) 554.

§ 5033. Factor's acts and recording or other statutes—Sales in bulk.—In England and in many of the states there are statutes, known as Factors' Acts, which further protect innocent persons who deal with factors and similar agents intrusted with the possession of goods or documents of title thereto.[22] They vary somewhat in their provisions and it is not the purpose here to do more than call attention to them and suggest that the statute and decisions of the particular jurisdiction should be consulted. So, there are statutes in many jurisdictions requiring the recording of conditional sales in order to prevent a bona fide purchaser without notice from obtaining a good title as against the original seller.[23] They, also, vary in their terms, and many of them protect others than those who are strictly bona fide purchasers. In this connection it may not be out of place to also note that in a number of states acts have recently been passed making sales of an entire stock of merchandise in bulk presumptively fraudulent in the absence of a compliance with certain formalities prescribed by the statute in regard to notice, recording, or the like.[24]

[22] See vol. 4, ch. lxiii; also Williston on Sales, §§ 318-322; 12 Am. & Eng. Ency. Law (2d ed.) 614 et seq.; Lee v. Butler, (1893) 2 Q. B. 318; Helby v. Matthews, (1895) App. Cas. 471; Oppenheimer v. Frazer, (1907) 1 K. B. 519; Thacher v. Moors, 134 Mass. 156; Prentice Co. v. Page, 164 Mass. 276, 41 N. E. 279; Cairns v. Page, 165 Mass. 552, 43 N. E. 503; Covill v. Hill, 4 Denio (N. Y.) 323, revd. 1 N. Y. 522; Soltau v. Gerdau, 119 N. Y. 380, 23 N. E. 864, 16 Am. St. 843; Macky v. Dillinger, 73 Pa. St. 85.

[23] Williston Sales, §§ 327, 328; Coors v. Reagan, 44 Colo. 126, 96 Pac. 966; Steen v. Harris, 81 Ga. 681, 8 S. E. 206; English v. Hill, 116 Ga. 415, 42 S. E. 717; Park v. Weston, 52 Iowa 675, 3 N. W. 713; Rock Island Plow Co. v. Maynard Sav. Bank, 123 Iowa 640, 99 N. W. 298; Creamery Mfg. Co. v. Tagley, 91 Minn. 79, 97 N. W. 412; Collins v. Wilhoit, 35 Mo. App. 585; Redenbaugh v. Kelton, 130 Mo. 558, 32 S. W. 67; Regier v. Carver, 54 Nebr. 507, 74 N. W. 830; Campbell Print. Co. v. Dyer, 46 Nebr. 830, 65 N. W. 904; Gerrish v. Clark, 64 N. H. 492, 13 Atl. 870; Wooley v. Geneva Wagon Co., 59 N. J. L. 278, 35 Atl. 789; Smith v. Hotel Ritz Co., 74 N. J. Eq. 616, 70 Atl. 137; Kirk v. Crystal, 118 App. Div. (N. Y.) 32, 103 N. Y. S. 17; Barrington v. Skinner, 117 N. Car. 47, 23 S. E. 90; Speyer v. Baker, 59 Ohio St. 11, 51 N. E. 442; Herring v. Cannon, 21 S. Car. 212, 53 Am. Rep. 661; Knittel v. Cushing, 57 Tex. 354, 44 Am. Rep. 598; Bowen v. Lansing Wagon Works, 91 Tex. 385, 43 S. W. 872; Cole v. Howe, 50 Vt. 35; Arbuckle v. Gates, 95 Va. 802, 30 S. E. 496; Troy Wagon Co. v. Hutton, 53 W. Va. 154, 44 S. E. 135; Mississippi River Logging Co. v. Miller, 109 Wis. 77, 85 N. W. 193. See In re Gosch, 126 Fed. 627, 61 C. C. A. 363; In re Franklin, 151 Fed. 642; Dunlop v. Mercer, 156 Fed. 545.

[24] Some of such statutes have been held unconstitutional, but many others have been upheld owing to a different view taken by the particular courts or owing to the fact that the provisions were not the same and not

§ 5034. Where seller has voidable title.—Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title.[25] There is an exception to this rule, at common law, in the case of infants and in many jurisdictions, in the care of persons of unsound mind.[26] But the English Sale of Goods Act and the American Uniform Sales Act state the law as above on the theory that the title to goods bought from an infant or lunatic ought not to be left indefinitely in an unperfected state and that the stability of titles and advantages to trade justify this diminution in the privileges of such persons.[27]

§ 5035. Sale by one having possession of goods or documents of title with consent of owner.—At common law and in many of the states, where a person having sold goods continues in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof for value, to any person receiving the same in good faith and without notice of the previous sale, will have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of

subject to the same objections. Many of the statutes and decisions are reviewed in the note to Williams v. Preslo, in Ann. Cas. 1912C 704, and in notes in 2 L. R. A. (N. S.) 331, and 20 L. R. A. (N. S.) 160. See also, note to McGreenery v. Murphy, (76 N. H. 338, 82 Atl. 720), in 39 L. R. A. (N. S.) 374-377, as to remedies of creditors where a sale is made in violation of such a statute.

[25] White v. Garden, 10 C. B. 919; Babcock v. Lawson, 4 Q. B. D. 394, affd. 5 Q. B. D. 284; Pease v. Gloahec, L. R. 1 P. C. 219; Chicago Dock Co. v. Foster, 48 Ill. 507; Holland v. Swain, 94 Ill. 154; Doane v. Lockwood, 115 Ill. 490, 4 N. E. 500; Curme v. Rauh, 100 Ind. 247; Peninsular Stove Co. v. Ellis, 20 Ind. App. 491, 51 N. E. 105; Marks v. Hapgood, 24 Maine 407; Rowley v. Bigelow, 12 Pick. (Mass.) 307, 23 Am. Dec. 607; Horton v. Buffington, 105 Mass. 399; Edmunds v. Merchants' Despatch Transp. Co., 135 Mass. 283; Citizens Bank of Winona v. Studebaker Carriage Co., 71 Mass. 544; Mowrey v. Walsh, 8 Cow. (N. Y.) 238; Paddon v. Taylor, 44 N. Y. 371, 10 Abb. Pr. (N. S.) (N. Y.) 370; Sinclair v. Healy, 40 Pa. St. 417, 80 Am. Dec. 589; Singer Mfg. Co. v. Sammons, 49 Wis. 316, 5 N. W. 788. See also, Wilk v. Key, 117 Ala. 285, 23 So. 6; Neal v. Williams, 18 Maine 391; Comey v. Pickering, 63 N. H. 126; Zoeller v. Riley, 100 N. Y. 102, 2 N. E. 388, 53 Am. Rep. 157.

[26] Vol. 1, ch. xi, xii.

[27] Williston on Sales, § 348.

the goods to make the same.[28] And this principle applies also in some jurisdictions where the buyer obtains possession of the goods or documents of title with the consent of the seller and disposes of them to a bona fide purchaser for value who takes them without notice of any lien or other right of the original seller, and such bona fide purchaser is in such case protected from such lien or other right.[29] A bill of lading,[30] and, in several of the states, a warehouse receipt,[31] represents the goods therein described, and the possession of such a document is equivalent to the possession of the goods themselves. But it affords no better evidence of title than the actual possession of the goods them-

[28] Edwards v. Harben, 2 T. R. 587; Gradle v. Kern, 109 Ill. 557; Huschle v. Morris, 131 Ill. 587, 23 N. E. 643; Crawford v. Forristall, 58 N. H. 114; Kerr v. Henderson, 62 N. J. L. 724, 42 Atl. 1073; Stevens v. Gifford, 137 Pa. St. 219, 20 Atl. 542, 21 Am. St. 868; Fuller v. Sears, 5 Vt. 527; Weeks v. Prescott, 53 Vt. 57. See also, Teague v. Bass, 131 Ala. 422, 31 So. 4; Patchin v. Rowell (Conn.), 85 Atl. 511; Gibson v. Love, 4 Fla. 217; Harlow v. Hall, 132 Mass. 232; Hombeck v. Van Metre, 9 Ohio 153. And see further the next section, as to creditors.

[29] Lee v. Butler, (1893) 2 Q. B. 318; Cahn v. Pocketts Bristol Channel Steam Packet Co., (1899) 1 Q. B. 643; Brundage v. Camp, 21 Ill. 330; Fifield v. Bank, 148 Ill. 163, 35 N. E. 802, 39 Am. St. 166; Western Union Cold-Storage Co. v. Bankers' Nat. Bank, 176 Ill. 260, 52 N. E. 30; Dearborn v. Rayser, 132 Pa. St. 231, 20 Atl. 690. But not where the possession is obtained furtively and without consent of the original seller. Gibbs v. Jones, 46 Ill. 319. See also, Bates v. Smith, 83 Mich. 347, 47 N. W. 249; Brower v. Peabody, 13 N. Y. 121, 2 Abb. Pr. (N. Y.) 211, 11 How. Pr. (N. Y.) 492; Kinsey v. Leggett, 71 N. Y. 387; Owen v. Long, 97 Wis. 78, 72 N. W. 364. See Oakes v. Tonsmierre, 49 Fed. 447. In Perrine v. Barnard, 142 Ind. 448, 41 N. E. 820, a seller of lumber for cash was held not deprived of his lien for the purchase-price as against a purchaser from the buyer, where the lumber remained in the lumber yard of the original seller although he had set it apart in such a manner as to constitute a constructive delivery sufficient to vest title in the original buyer.

[30] Barber v. Meyerstein, L. R. 4 H. L. 317; Sanders v. Maclean, 11 Q. B. D. 327, 341; Mich. Central R. Co. v. Phillips, 60 Ill. 190; Western Union R. Co. v. Wagner, 65 Ill. 197; Lewis v. The Springville Banking Co., 166 Ill. 311; First Nat. Bank of Cincinnati v. Kelly, 57 N. Y. 34; Heiskell v. Farmers & Mechanics' Bank, 89 Pa. St. 155, 33 Am. Rep. 745; Holmes v. Bailey, 92 Pa. St. 57; Forbes v. Boston & Lowell R. Co., 133 Mass. 154; The Thames, 14 Wall. (U. S.) 98, 20 L. ed. 804. See ante, vol. 4, §§ 3163, 3360.

[31] Allen v. Maury, 66 Ala. 10; Bank of Newport v. Hirsch, 59 Ark. 225, 27 S. W. 74; Davis v. Russell, 52 Cal. 611, 28 Am. Rep. 647; State Bank v. Waterhouse, 70 Conn. 76, 38 Atl. 904, 66 Am. St. 82; Broadwell v. Howard, 77 Ill. 305; Farmers' Pack. Co. v. Brown, 87 Md. 1, 39 Atl. 625; First Nat. Bank of Green Bay v. Dearborn, 115 Mass. 219, 15 Am. Rep. 92; Bank of Rochester v. Jones, 4 N. Y. 497, 55 Am. Dec. 290; Yenni v. McNamee, 45 N. Y. 614; St. Anthony &c. Elevator Co. v. Dawson, 20 N. Dak. 18, 126 N. W. 1013, Ann. Cas. 1912B 1337; Gibson v. Stevens, 8 How. (U. S.) 384, 12 L. ed. 1123.

selves.[32] The American Uniform Sales Act, however, where adopted, has made some changes in the law as to documents of title.[33] In a very recent Massachusetts case[34] the defendants, who were owners of the goods in question, had bills of lading made out in triplicate and delivered one of them to the Massachusetts Hide Company, indorsed, "Deliver to Massachusetts Hide Corporation," on false representations by that company, which was to hold the goods in trust to deliver to Baker, an alleged purchaser. The Columbia Company purchased from the hide company in good faith and for value and the plaintiff similarly purchased from the Columbia Company. The defendants obtained the goods from the carrier by means of the second bill of lading, and the plaintiffs brought an action in tort for conversion. The court held that at common law no purchaser, other than Baker, could have obtained a good title from the hide company,[35] but that it was otherwise under the Uniform Sales Act

[32] Gurney v. Behrend, 3 E. & B. 633; Cole v. North-Western Bank, L. R. 10 C. P. 363. See ante, vol. 4, § 3163, and additional cases there cited. Burton v. Curyea, 40 Ill. 320, 327, 89 Am. Dec. 350; Canadian Bank v. McCrea, 106 Ill. 281; Brower v. Peabody, 13 N. Y. 121, 2 Abb. Prac. 211, 11 How. Prac. 492; Dows v. Perrin, 16 N. Y. 325; Second Nat. Bank v. Walbridge, 19 Ohio St. 419; Emery v. Bank, 25 Ohio St. 360; Shaw v. R. R. Co., 101 U. S. 557, 565; Allen v. Bank, 120 U. S. 20. See also, Commercial Bank v. Hurt, 99 Ala. 130, 12 So. 568, 19 L. R. A. 701, 42 Am. St. 38; Anchor Mill Co. v. Burlington &c. R. Co., 102 Iowa 262, 71 N. W. 255; Stollenwerck v. Thatcher, 115 Mass. 224; Nat. Bank v. R. R. Co., 44 Minn. 236.

[33] See Uniform Sales Act, §§ 28-40; Williston Sales, § 405, et seq.

[34] Roland M. Baker Co. v. Brown (Mass.), 100 N. E. 1025.

[35] "By this transaction, under the common law as declared by our decisions," says the court, "the title to the hides remained in the defendants; the Hide Company had no power to dispose of them in any other way than by a sale to Baker; and no one else could by a purchase from the Hide Company, or by any dealings with it, acquire a title to the hides which would be good against the defendants. The bill of lading merely represented the goods themselves; the Hide Company had no greater right, and could pass to any purchaser other than Baker no greater right, than if its possession with this limited authority had been of the goods themselves instead of the bill of lading which was their representative. Stollenwerck v. Thacher, 115 Mass. 224, 227; Moors v. Wyman, 146 Mass. 60, 15 N. E. 104; Cox v. Central Vermont Railroad, 170 Mass. 129, 136, 49 N. E. 97; Commercial National Bank v. Bemis, 177 Mass. 95, 98, 58 N. E. 476; Moors v. Bird, 190 Mass. 400, 408, 77 N. E. 643; Collateral Loan Co. v. Sallinger, 195 Mass. 135, 80 N. E. 811. See to the same effect Brown v. Billington, 163 Pa. 76, 29 Atl. 904, 43 Am. St. Rep. 780; Western Nat. Bank v. York Silk Manuf. Co., 225 Pa. 442, 74 Atl. 244; Moors v. Kidder, 106 N. Y. 32, 12 N. E. 818; Soltau v. Gerdau, 119 N. Y. 380, 23 N. E. 864, 16 Am. St. Rep. 843." "It follows," continued the court, "from what has been said that the Columbia Company by its purchase from the Hide Company and the indorsement and delivery of the bill of lading acquired as against the

which had gone into effect shortly before the time of the transaction in question, and under such act the plaintiff took absolute title regardless of the purpose of the indorsement to the hide company or its fraud.

§ 5036. Person in possession as ostensible owner—Attaching and execution creditors.—As a general rule the person in possession of goods as the ostensible owner under the rule stated in the preceding section will be deemed the real owner as to an attaching or execution creditor without notice of the pre-existing right when his debt was created.[36] But it is held that a simple creditor is not in a position to attach a sale of goods by his debtor on the ground of want of delivery and change of possession, but must acquire a lien by attachment, execution, or the like, before the buyer takes possession,[37] and that a buyer who takes possession before the rights of creditors have attached or accrued in such way can hold the property as against the creditors.[38] So, where one joint owner sells his interest in property in the

defendants a good title to the hides, and that title passed to the plaintiff by its purchase from the Columbia Company. The act of the defendants in obtaining the hides from the carrier by means of the second bill of lading was, as to the plaintiff, wrongful and having been done under a claim of right, constituted a conversion, for which they became liable to the plaintiff; and no demand was necessary before bringing the action. Hunt v. Boston, 183 Mass. 303, 67 N. E. 244; Geneva Wagon Co. v. Smith, 188 Mass. 202, 74 N. E. 299." It was also held that the defendants could not justly claim that the first bill of lading had become a "spent" document.

[36] Crocker v. Cunningham, 122 Cal. 547, 55 Pac. 404; Jones v. Clark, 20 Colo. 353, 38 Pac. 371; Hull v. Sigsworth, 48 Conn. 258, 40 Am. Rep. 167; Burnell v. Robertson, 5 Gil. (Ill.) 282; Ticknor v. McClelland, 84 Ill. 471; Peoria Mfg. Co. v. Lyons, 153 Ill. 427, 38 N. E. 661; Howell v. Fisk, 52 Ill. App. 310; Vanmeter v. Estill, 78 Ky. 456; Cobb v. Haskell, 14 Maine 303, 31 Am. Dec. 56; Ludwig v. Fuller, 17 Maine 162, 35 Am. Dec. 245; Reed v. Reed, 70 Maine 504; Lanfear v. Sumner, 17 Mass. 110, 9 Am. Dec. 119; Dempsey v. Gardner, 127 Mass. 381, 34 Am. Rep. 389; Cutting v. Jackson, 56 N. H. 253; Lehr v. Brodbeck, 192 Pa. St. 535, 43 Atl. 1006, 73 Am. St. 828; Farquhar v. McAlevy, 142 Pa. St. 233, 21 Atl. 811, 24 Am. St. 497. See also, Abe v. Sumnerville, 46 Ind. App. 348, 92 N. E. 658; Dooley v. Pease, 180 U. S. 126, 45 L. ed. 457, 21 Sup. Ct. 329 (following local law of Illinois).

[37] Price v. Heubler, 63 Conn. 374, 28 Atl. 524; Cruikshank v. Cogswell, 26 Ill. 366; Clute v. Steele, 6 Nev. 335; Poling v. Flanagan, 41 W. Va. 191, 23 S. E. 685.

[38] Gilbert v. Decker, 53 Conn. 401, 4 Atl. 685; Bartlett v. Williams, 1 Pick. (Mass.) 288; Smith v. Stern, 17 Pa. St. 360; Oliver v. Reading Iron Co., 170 Pa. St. 396, 401, 32 Atl. 540; Kendall v. Samson, 12 Vt. 515. See also, Abe v. Sumnerville, 46 Ind. App. 348, 92 N. E. 658 (so holding where the seller had a secret mortgage but took possession before any other lien attached).

possession of the other co-owner or owners, actual change of possession ordinarily is not required even as against execution creditors of the seller.[39] A writ of attachment levied upon goods and followed by a judgment will bind the property of the attachment debtor in the goods as from the time of such levy.[40]

[39] Weiland v. Potter, 8 Colo. App. 79, 44 Pac. 769; Brown v. Graham, 24 Ill. 628; Yank v. Bordeaux, 23 Mont. 205, 58 Pac. 42, 75 Am. St. 522; Love v. Schmidt, 26 Okla. 648, 110 Pac. 665, Ann. Cas. 1912B 458 and note.

[40] Woolfolk v. Ingram, 53 Ala. 11; Chittenden v. Rogers, 42 Ill. 95; Hannahs v. Felt, 15 Iowa 141; Van Loan v. Kline, 10 Johns. (N. Y.) 129.

CHAPTER CLVIII.

PERFORMANCE OF THE CONTRACT—CONTRACTUAL OBLIGATIONS.

§ 5040. Duty of seller to deliver and buyer to accept and pay.
5041. Delivery and payment concurrent conditions.
5042. Place of delivery.
5043. Time of delivery.
5044. Delivery where goods are in possession of bailee.
5045. Demand or tender of delivery must be at reasonable hour.
5046. Expense of putting goods in deliverable state.
5047. Incomplete delivery—Smaller quantity than agreed.
5048. Incomplete delivery — New York doctrine.
5049. Delivery of excessive quantity.
5050. Delivery of goods mixed with others.
§ 5051. Effect of usage or agreement as controlling preceding rules.
5052. Rules of construction when quantity is not definitely stated.
5053. Delivery in instalments.
5054. Delivery to carrier for buyer —Risk of deterioration.
5055. Acceptance — Buyer not deemed to accept without opportunity to inspect.
5056. Place of inspection.
5057. Inspection or examination— Reasonable opportunity.
5058. Waiver of right of inspection.
5059. Acceptance—When buyer is deemed to have accepted.

§ 5040. Duty of seller to deliver and buyer to accept and pay.—In every contract for the sale of goods there is necessarily involved, it is said, a contract on the one side to deliver, and on the other to accept.[1] Generally speaking this is no doubt true, but the particular contract may be such that an actual delivery to the buyer personally is not required or that an actual acceptance and payment on his part is not required. Thus, the contract may provide that the seller shall send the goods to a third person or the seller may agree to take the note of a third person in payment, or the like. So, the general obligation to deliver may be modified by some condition in the contract.[2] It may be stated as a gen-

[1] Benj. Princ. Sales (2d ed.) 134, citing Buddle v. Green, 3 H. & N. 906; Haskins v. Warren, 115 Mass. 514, 533; Gray v. Walton, 107 N. Y. 254, 14 N. E. 191.

[2] Buddle v. Green, 3 H. & N. 906 (that the purchaser from the owner where the goods are in possession of another shall pay the latter his charges on the goods); Bartlett v. Holmes, 13 C. B. 630 (that an order shall be handed over to such third person for them).

eral rule that it is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract. But the duty to deliver may be modified or controlled by the special terms of the contract,[3] and the seller may agree to deliver without immediate payment, as in the ordinary case of a sale on credit,[4] or the buyer may agree to pay at a certain time irrespective of delivery.[5] Taking a check or draft which is dishonored and proves to be worthless does not amount to payment, nor, according to the weight of authority, does it constitute a waiver of cash payment so as to pass title to a vendee which he can pass to a stranger even though the latter is a bona fide purchaser or the like.[6] But cash payment may be waived, and some authorities hold that a waiver may be more readily inferred in favor of an innocent purchaser from the vendee from delivery and other circumstances where there is no reservation of title in the vendor.[7]

[3] E. W. Bliss Co. v. United States Incandescent Gas Light Co., 149 N. Y. 300, 43 N. E. 859.

[4] Staunton v. Wood, 16 Q. B. 638; Kahn v. Cook, 22 Ill. App. 559. See also, Doyle v. Roth Mfg. Co., 76 Wis. 48, 44 N. W. 1100. And compare Elgin v. Barker (Ark.), 153 S. W. 598; Moore v. Patchin (W. Va.), 76 S. E. 426.

[5] Dunlop v. Grote, 2 C. & K. 158.

[6] Peoria & P. U. R. Co. v. Buckley, 114 Ill. 337, 2 N. E. 179; Weddigen v. Boston Elastic Fabric Co., 110 Mass. 422; Oester v. Sitlington, 115 Mo. 247, 21 S. W. 820; Hodgson v. Barrett, 33 Ohio St. 63, 31 Am. Rep. 527; McIver v. Williamson-Halsell-Frasier Co., 19 Okla. 454, 92 Pac. 170, 13 L. R. A. (N. S.) 696 (and note reviewing cases on both sides); Johnson v. Iankovetz, 57 Ore. 24, 102 Pac. 799, 110 Pac. 398, 29 L. R. A. (N. S.) 709; Continental Bank & Trust Co. v. Hartman (Tex. Civ. App.), 129 S. W. 179. But compare Hide & Leather Nat. Bank v. West, 20 Ill. App. 61; Cockran v. Stewart, 57 Minn. 499, 59 N. W. 543; Comer v. Cunningham, 77 N. Y. 391, 33 Am. Rep. 626; Moyce v. Newington, L. R. 4 Q. B. Div. 32. See also, generally, applying the doctrine of the text to similar cases, Jones v. Southern Cooperage Co., 94 Ark. 621, 127 S. W. 704; Amundson v. Standard Printing &c. Co., 140 Iowa 464, 118 N. W. 789; Freeman v. Kraemer, 63 Minn. 242, 65 N. W. 455.

[7] Hirschorn v. Canney, 98 Mass. 149; National Bank v. Chicago, B. & N. R. Co., 44 Minn. 224, 46 N. W. 342, 9 L. R. A. 263, 20 Am. St. 566; Johnson v. Iankovetz, 57 Ore. 24, 102 Pac. 799, 110 Pac. 398, 29 L. R. A. (N. S.) 709, 712. See also, generally, as to waiver, Crawford v. Spraggins, 109 Ala. 353, 19 So. 372; E. I. Dupont Co. v. John Shields Constr. Co., 171 Fed. 305, 96 C. C. A. 197; Kingsley v. McGrew, 48 Nebr. 812, 67 N. W. 787; Parker v. Baxter, 86 N. Y. 586; Bowen v. Burk, 13 Pa. St. 146; Rawson v. Johnson, 1 East 203; Morton v. Lamb, 7 T. R. 125; Bloxam v. Saunders, 4 B. & C. 951; Funk v. Hough, 29 Ill. 145; Barrow v. Window, 71 Ill. 214; Dana v. King, 2 Pick. (Mass.) 155; National Contracting Co. v. Vulcanite Portland Cement Co., 192 Mass. 247, 78 N. E. 414; Porter v. Rose, 12 Johns. (N. Y.) 209, 7 Am. Dec. 306; Tipton v. Feitner, 20 N. Y. 423; Simmons v. Green, 35 Ohio St. 104; Baltimore & O. S. W. R. Co. v. Good, 82 Ohio St. 278, 92 N. E. 435, 29 L. R. A. (N.

§ 5041. Delivery and payment concurrent conditions.—Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.[8] If the goods are put into the possession of the buyer in the expectation of immediate payment, and he does not make it, the seller is usually at liberty to regard the delivery as conditional, and may at once reclaim the goods.[9]

§ 5042. Place of delivery.—The question as to the place of delivery and as to whether it is for the buyer to take possession or for the seller to send the goods to the buyer may be expressly determined by the contract between the parties, or the agreement as to this may be implied.[10] Where no place of delivery is specified in the contract, the general rule is that the goods are to be delivered at the place where they are known to be at the time of

S.) 713; Catlin v. Jones, 48 Ore. 158, 85 Pac. 515; Robison v. Tyson, 46 Pa. St. 286; Phelps v. Hubbard, 51 Vt. 489. See also, Harrison v. Fortlage, 161 U. S. 57, 40 L. ed. 616, 16 Sup. Ct. 488.

[8] And Hill v. Fruita Mercantile Co., 42 Colo. 491, 94 Pac. 354, 126 Am. St. 172 (When no time is fixed for payment it is due when the vendor delivers the goods to a carrier for transportation to the vendee pursuant to the contract); Merrill Furniture Co. v. Hill, 87 Maine 17, 32 Atl. 712; Skillman Hardware Mfg. Co. v. Davis, 53 N. J. L. 144, 20 Atl. 1080; Ziehen v. Smith, 148 N. Y. 558, 42 N. E. 1080. See, where seller is excused from formal tender because of buyer's repudiation, B. F. Swartz & Co. v. Woldert Grocery Co., 151 Ky. 743, 152 S. W. 934; Thomas Gordon Malting Co. v. Bartels Brewing Co. (N. Y.), 100 N. E. 461; Wester v. Casein Co. (N. Y.), 100 N. E. 488.

[9] Ames v. Moir, 130 Ill. 582, 22 N. E. 535, affd. 138 U. S. 306, 34 L. ed. 951, 11 Sup. Ct. 311; Evansville & T. H. R. Co v. Erwin, 84 Ind. 457; Adams v. O'Connor, 100 Mass. 515, 1 Am. Rep. 137; Carter, Rice & Co. v. Cream of Wheat Co., 73 Minn. 315, 76 N. W. 55; Paul v. Reed, 52 N. H. 136; Palmer v. Hand, 13 Johns. (N. Y.) 434, 7 Am. Dec. 392; Baltimore & O. S. W. R. Co. v. Good, 82 Ohio St. 278, 92 N. E. 435, 29 L. R. A. (N. S.) 713 (And when there is no waiver of payment the property does not pass until the price is paid); Henderson v. Lauck, 21 Pa. St. 359. See also, Godts v. Rose, 17 C. B. 229.

[10] Devine v. Edwards, 101 Ill. 138; Van Valkenburgh v. Gregg, 45 Nebr. 654, 63 N. W. 949; Field v. Runk, 22 N. J. L. 525; McLaughlin v. Marston, 78 Wis. 670, 47 N. W. 1058. No particular form is necessary to delivery and there may be a delivery although the buyer does not take manual possession or immediately remove the goods. Elgin v. Barker (Ark.), 153 S. W. 598; Rairden v. Hedrick (Mont.), 129 Pac. 498.

contract,[11] which is usually the seller's place of business,[12] or, in the case of goods to be manufactured, the place of manufacture.[13] But if the seller has no place of business, then his residence may be the proper place, or some place other than either may be deemed or inferred to have been contemplated by reason of the circumstances, such as the nature of the article, usage or previous course of dealing between the parties.[14] If the place is to be designated by the buyer he should give notice of the time and place selected and it is sufficient for the seller to have the goods ready for delivery at the place where they are manufactured or kept if the buyer on due notice does not designate the place.[15]

§ 5043. **Time of delivery.**—The time of delivery as well as the place may, of course, be determined by the contract. But if no time is fixed, and it is the duty of the seller under the contract to send the goods to the buyer, the general rule is that the seller has a reasonable time and no more within which to send them.[16]

[11] Bosworth v. Frankberger, 15 Ill. 508; Smith v. Gillett, 50 Ill. 290; Bailey v.. Ricketts, 4 Ind. 488; Hillestad v. Hostetter, 46 Minn. 393, 49 N. W. 192; Gray v. Walton, 107 N. Y. 254, 14 N. E. 191; Hatch v. Standard Oil Co. of Cleveland, 100 U. S. 124, 25 L. ed. 554. See also, Phœnix Lock Works v. Capelle Hardware Co., 9 Houst. (Del.) 232, 32 Atl. 79; Perlman v. Sartorius, 162 Pa. St. 320, 29 Atl. 852, 42 Am. St. 834.

[12] See authorities cited in last preceding note; also Sousley v. Burns' Admr., 10 Bush (Ky.) 87; Bliss Co. v. United States Incandescent Gas Light Co., 149 N. Y. 300, 43 N. E. 859.

[13] Ragland v. Wood, 71 Ala. 150, 46 Am. Rep. 305; Middlesex Co. v. Osgood, 4 Gray (Mass.) 447; Goddard v. Binney, 115 Mass. 450, 15 Am. Rep. 112.

[14] Wilmouth v. Patton, 2 Bibb (Ky.) 280: Sousley v. Burns' Admr., 10 Bush (Ky.) 87; Field v. Runk, 22 N. J. L. 525; Bronson v. Gleason, 7 Barb. (N. Y.) 472; Williams v. Adams, 3 Sneed (Tenn.) 359; Hatch v. Standard Oil Co. of Cleveland, 100 U. S. 124, 25 L. ed. 554. See also, Wood v. Tassell, 6 Q. B. 234; Smith v. Gillett, 50 Ill. 290. In a few states the statute fixes the place in the absence of any provision in the contract determining it.

[15] Lucas v. Nichols, 5 Gray (Mass.) 309; Hunter v. Wetsell, 84 N. Y. 549, 38 Am. Rep. 544. See also, Davies v. McLean, 21 Wkly. Rep. 264, 28 L. T. (N. S.) 113; Hammic v. Goldner, 11 M. & W. 849: Bell v. Hatfield, 121 Ky. 560, 28 Ky. L. 515, 89 S. W. 544, 72 L. R. A. (N. S.) 529; Smith v. Wheeler, 7 Ore. 49, 33 Am. Rep. 698; Kunkle v. Mitchell, 56 Pa. St. 100. But see Lincoln v. Gallagher, 79 Maine 189, 8 Atl. 883; Howard v. Miner, 20 Maine 325. Designation of place by assignee of buyer may be sufficient. Mewhirter v. Price, 11 Ind. 199.

[16] Coyne v. Avery, 189 Ill. 378, 59 N. E. 788; Henkle v. Smith, 21 Ill. 238; Loftus v. Riley, 83 Iowa 503, 50 N. W. 17; Hume v. Mullins, 18 Ky. L. 108, 35 S. W. 551; Fisher v. Boynton, 87 Maine 395, 32 Atl. 995; Kribs v. Jones, 44 Md. 396; Kidder v. Flanders, 73 N. H. 345, 61 Atl. 675; Eppens v. Littlejohn, 164 N. Y. 187, 58 N. E. 19, 52 L. R. A. 811; Cameron Coal &c. Co. v. Universal Metal Co., 26 Okla. 615, 110 Pac. 720, 31 L. R. A. (N. S.) 618, and note.

What constitutes a reasonable time usually depends largely upon the circumstances of the particular case and is a question of fact or a mixed question of law and fact for the jury under proper instructions.[17] If the goods are to be delivered at a future time to be designated by the buyer and the buyer fails to fix any time the seller is not in default if he is ready to send and deliver them.[18] But in other cases where the time is not fixed and the place of delivery is not at the buyer's residence or place of business, the seller should notify the buyer of the delivery or his readiness to deliver.[19] So where the time is to be designated by the seller, he should notify the buyer in order to require him to receive on that date.[20] And even where goods are to be delivered free on board ship if by the contract the time or place of delivery is at the seller's option it has been held that he should give notice

(The law implies a reasonable time and this cannot be rebutted by parol evidence of contemporaneous agreement fixing a definite time.) Ellis v. Thompson, 3 Mees. & W. 445; Fish v. Hamilton, 112 Fed. 742, 50 C. C. A. 509.

[17] New Jersey School & Church Furniture Co. v. Board of Education, 58 N. J. L. 646, 35 Atl. 397; Stewart v. Marvel, 101 N. Y. 357, 4 N. E. 743. Compare and see, generally, Burton v. Griffiths, 11 M. & W. 817; American Oak Extract Co. v. Ryan, 104 Ala. 267, 15 So. 807; Dubois v. Spinks, 114 Cal. 289, 46 Pac. 95; Robinson v. Brooks, 40 Fed. 525; Rhoades v. Cotton, 90 Maine 453, 38 Atl. 367; Berthold v. St. Louis Electric Const. Co., 165 Mo 280, 65 S. W. 784; White v. Pease, 15 Utah 170, 49 Pac. 416. It may sometimes, however, be a question of law, as when the facts are undisputed and only one reasonable inference can be drawn. See generally ante, vol. 2, § 1552; also Averill v. Hedge, 12 Conn. 424; Wheeler v. Harrison, 94 Md. 147, 50 Atl. 523; Aymar v. Beers, 7 Cow. (N. Y.) 705, 17 Am. Dec. 538; Wright v. Bank of Metropolis, 110 N. Y. 237, 18 N. E. 79, 1 L. R. A. 289, 6 Am. St. 356. The construction of such terms as "forthwith," "immediately," "promptly" and the like has elsewhere been considered in this work, and it is sufficient to say here that they are to be reasonably construed with reference to the circumstances of the particular case, but indicate that somewhat more promptness or exactness of performance is required than if no such terms were used. See generally, Roberts v. Brett, 11 H. L. Cas. 337; Sofer v. Creighton, 93 Maine 564, 45 Atl. 840, 74 Am. St. 375; Ronmel v. Wingate, 103 Mass. 327; Neldon v. Smith, 36 N. J. L. 148; Victor Safe Co. v. O'Neil, 48 Wash. 176, 93 Pac. 214.

[18] Louisville, N. A. & C. R. Co. v. Diamond State Iron Co., 126 Ill. 294, 18 N. E. 735; Posey v. Scales, 55 Ind. 282; Russell v. Witt, 38 Ind. 9; Barker v. Davis, 47 Nebr. 78, 66 N. W. 11. See also, Dingley v. Oler, 117 U. S. 490, 29 L. ed. 984, 6 Sup. Ct. 850; and Bell v. Hatfield, 121 Ky. 560, 28 Ky. L. 515, 89 S. W. 544, 72 L. R. A. (N. S.) 529.

[19] Henkle v. Smith, 21 Ill. 238; Rogers v. Van Hoesen, 12 Johns. (N. Y.) 221; Bliss Co. v. United States &c. Light Co., 149 N. Y. 300, 43 N. E. 859; Cullum v. Wagstaff, 48 Pa. St. 300.

[20] Parker v. Selden, 69 Conn. 544, 38 Atl. 212; Stanford v. McGill, 6 N. Dak. 536, 72 N. W. 938, 38 L. R. A. 760. See also, Bliss Co. v. United States &c. Light Co., 149 N. Y. 300, 43 N. E. 859.

thereof before the buyer is required to name the ship;[21] but, ordinarily, where the contract is for sale and delivery "free on board ship," or the like, the buyer is required to name the ship before he can claim that the seller is in default for failing to act.[21a]

§ 5044. Delivery where goods are in possession of bailee.—Where the goods at the time of sale are in the possession of a third person such as a bailee, the seller's obligation to deliver is not satisfied unless and until such third person is notified of the sale.[22] And, while this would protect the buyer against third persons, it seems that even more may be required to satisfy the seller's duty to the buyer, namely, that the bailee should assent or acknowledge that he holds the goods on the buyer's behalf.[23] This rule does not, however, apply where the goods are in the custody of a mere servant of the seller, as his possession is that of his employer.[24] Nor does it affect the operation of the issue or transfers of any document of title to goods.[25]

§ 5045. Demand or tender of delivery must be at reasonable hour.—Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour, and what is a reasonable hour is, ordinarily at least, a question of fact. The general

[21] Dwight v. Eckert, 117 Pa. St. 490, 12 Atl. 32.

[21a] Armitage v. Insole, 14 Q. B. 728; Walton v. Black, 5 Houst. (Del.) 149; Pinkham v. Haynes, 103 Maine 112, 68 Atl. 642; Davis v. Columbia Coal Min. Co., 170 Mass. 391, 49 N. E. 629; Hughes v. Knott, 138 N. Car. 105, 50 S. E. 586. See also, Posey v. Scales, 55 Ind. 282; Bell v. Hatfield, 121 Ky. 560, 28 Ky. L. 515, 89 S. W. 544, 72 L. R. A. (N. S.) 529; Harrow Spring Co. v. Whipple Harrow Co., 90 Mich. 147, 51 N. W. 197, 30 Am. St. 421; Hocking v. Hamilton, 158 Pa. St. 107, 27 Atl. 836; Dingley v. Oler, 117 U. S. 490, 29 L. ed. 984, 6 Sup. Ct. 850.

[22] This much is required both as between buyer and seller and as to the buyer's creditors and subsequent purchasers, and protects the buyer as against the latter. Hallgarten v. Oldham, 135 Mass. 1, 46 Am. Rep. 433; Dempsey v. Gardner, 127 Mass. 381, 34 Am. Rep. 389; Buhl Iron Works v. Teuton, 67 Mich. 623, 35 N. W. 804; Freiberg v. Steenbock, 54 Minn. 509, 56 N. W. 175. See also, Hodges v. Hurd, 47 Ill. 363.

[23] Buddle v. Green, 27 L. J. Exch. 33; Edwards v. Meadows, 71 Ala. 42; Barney v. Brown, 2 Vt. 374, 10 Am. Dec. 720. Such is the view taken by those who prepared the English Sales Act, and also by those who prepared the Uniform Sales Act in this country.

[24] Watkins v. Petefish, 49 Ill. App. 80; Trunick v. Smith, 63 Pa. St. 18; Flanagan v. Wood, 33 Vt. 332.

[25] Barber v. Meyerstein, L. R. 4 H. L. 317; Taylor v. Turner, 87 Ill. 296; Forbes v. Chicago & L. R. Co., 133 Mass. 154; Farmers & Mechanics' Nat. Bank v. Logan, 74 N. Y. 568; Gibson v. Stevens, 8 How. (U. S.) 384, 12 L. ed. 1123.

subject has already been considered in another volume, where the authorities are cited.[25a]

§ 5046. Expense of putting goods in deliverable state.—Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.[26] There is a dearth of decisions directly upon this point, but the rule would seem to follow from the duty of the seller to deliver, and it also seems just in principle. It is adopted as the law in the English Sales Act and in the Uniform Sales Act recommended by the American Bar Association and already adopted in ten or more states.

§ 5047. Incomplete delivery — Smaller quantity than agreed.—It is the duty of the seller to deliver the quantity of goods called for by the contract and the buyer is not obliged to accept a smaller quantity than agreed and may reject them on that ground.[27] But if the seller has delivered a portion of the articles agreed to be furnished, and the buyer has accepted, used and had the enjoyment of them, the seller, although he then makes default in the further performance of the contract, may recover for the articles so delivered, subject to recoupment of the damages, if any, by the buyer sustained by reason of such nonperformance.[28] The buyer cannot, however, maintain an action for

[25a] Vol. 3, ch. 44, on Tender. See also, Startup v. Macdonald, 6 Man. & Gr. 593; Berry v. Nall, 54 Ala. 446; Croninger v. Crocker, 62 N. Y. 151; Catlin v. Jones, 48 Ore. 158, 85 Pac. 515.

[26] Cole v. Kerr, 20 Vt. 21.

[27] Rockford, R. I. & St. L. R. Co. v. Lent, 63 Ill. 288; Smith v. Lewis, 40 Ind. 98; Kuhlman v. Wood, 81 Iowa 128, 46 N. W. 738; Salmon v. Boykin, 66 Md. 541, 7 Atl. 701; Churchill v. Holton, 38 Minn. 519; 38 N. W. 611; Bruce v. Pearson, 3 Johns. (N. Y.) 534; Rochester & O. Oil Co. v. Hughey, 56 Pa. St. 322. But compare Hallwood Cash Register Co. v. Lufkin, 179 Mass. 143, 60 N. E. 473 (buyer not bound to accept subsequent tender if he has secured other goods in their place or the like). See also, Sefton v. Minnesota Type Foundry Co., 22 Ore. 49, 29 Pac. 6; Inman, Akers & Inman v. Elk Cotton Mills, 116 Tenn. 141, 92 S. W. 760; Reuter v. Sala, 4 C. P. Div. 239; Waddington v. Oliver, 2 B. & P. N. R. 61; Whitla v. Moore, 164 Pa. St. 451, 30 Atl. 257. See, as to correction of defective tender of goods by subsequent tender in time, Borrowman v. Free, 4 Q. B. D. 500.

[28] Polhemus v. Heiman, 45 Cal. 573; Shimp v. Siedel, 6 Houst. (Del.) 421; Richards v. Shaw, 67 Ill. 222; Byerlee v. Mendel, 39 Iowa 382; Wolf v. Gerr, 43 Iowa 339 (not a sale case, but principle the same); Gage v. Meyers, 59 Mich. 300, 26 N. W. 522; Smith v. Keith, 36 Mo. App. 567; Flanders v. Putney, 58 N. H. 358; Watkins v. Junker (Tex.), 38 S. W. 1129, revd. 90 Tex. 584, 40 S. W. 11; Elliott v. Espenhain, 59 Wis.

breach of the contract in this regard where he himself is in default.[29]

§ 5048. Incomplete delivery—New York doctrine.—In New York a somewhat different view was taken, before the passage of the Sales Act, from that which prevails in most jurisdictions, and the following rulings have been made:[30] Where goods are received and used by the vendee under a contract for the delivery of specified quantities at stated intervals, if the quantity delivered is less than that required by the contract, such breach is a bar to an action by the vendor for the price of the goods delivered. The buyer under such a contract has a right to use the goods delivered, as required in his business, without waiting for the expiration of the time to see whether the vendor will fully perform his contract, and such use is no waiver of his defense in case of the vendor's breach of contract.[31] But while, as a general rule, no action lies on the part of a vendor upon a contract for the sale and delivery of a specified quantity of goods until the whole

272, 18 N. W. 1. (While the question is not discussed it is assumed that the vendor can recover subject to set-off.) See also, Phillips & Colby Construction Co. v. Seymour, 91 U. S. 646, 23 L. ed. 341; Benjamin on Sales, § 690. If the buyer knows at the time of acceptance that the seller is not going to perform the contract in full the buyer should pay for what he retains at the contract rate; but if he has used or disposed of them without such knowledge he ought not to be held liable for more than their fair value, and this distinction is drawn in the Uniform Sale of Goods Act. Champion v. Short, 1 Camp. 53; Shipton v. Casson, 5 B. & C. 378; Oxendale v. Wetherell, 9 B. & C. 386; Hedden v. Roberts, 134 Mass. 38, 45 Am. Rep. 276; Bowker v. Hoyt, 18 Pick. (Mass.) 555; Mitchell v. Scott, 41 Mich. 108, 1 N. W. 968; Moon v. Harder, 38 Mich. 566; Begole v. McKenzie, 26 Mich. 470; McQueen v. Gamble, 33 Mich. 344. If, on the other hand, the delivery is of a quantity less than that sold, it may be refused by the purchaser; and if the contract be for a specified quantity to be delivered in parcels from time to time, the purchaser may return the parcels first received, if the later deliveries be not made, for the contract is not performed by the vendor's delivery of less than the whole quantity sold. But the buyer is bound to pay for any part that he accepts; and after the time for delivery has elapsed he must either return or pay for the part received, and cannot insist on retaining it without payment until the vendor makes delivery of the rest. Brady v. Cassidy, 145 N. Y. 171, 39 N. E. 814.

[29] Harber Bros. Co. v. Moffat Cycle Co., 151 Ill. 84, 37 N. E. 676; McFarlan Carriage Co. v. Connersville Wagon Co. (Ind. App.), 96 N. E. 400.

[30] McMullen v. Hopper, 15 App. Div. (N. Y.) 364, 44 N. Y. S. 63; Nightingale v. Eiseman, 121 N. Y. 288, 24 N. E. 475; Catlin v. Tobias, 26 N. Y. 217, 84 Am. Dec. 183; Champlin v. Rowley, 18 Wend. (N. Y.) 187; Visscher v. Greenbank Alkali Co., 11 Hun (N. Y.) 159.

[31] Catlin v. Tobias, 26 N. Y. 217, 84 Am. Dec. 183.

quantity is delivered, yet, where the whole delivery is to be at one and the same time, and the vendee elects to receive a portion and appropriates the same to his own use, and by his acts evinces that he waives the condition precedent of a complete delivery, the vendor may recover for the portion delivered.[32] In order, however, that acceptance of a part should be a waiver of the residue, there must be a complete delivery and the buyer must, in accepting it, know that the vendor intends no further delivery.[33] And, if the buyer does not waive a complete delivery, he need not return the portion of the goods actually delivered, nor is he liable for their value.[34] But New York has recently adopted the Uniform Sales Act, except with a few changes in some other respects, and that act states the law substantially as it is stated in the last preceding section.[35]

§ 5049. Delivery of excessive quantity.—Where the seller delivers a quantity of goods larger than that contracted for, the buyer, in the absence of any controlling usage, special agreement or course of dealing between the parties,[36] may accept the goods

[32] Avery v. Willson, 81 N. Y. 341, 37 Am. Rep. 503; Flanagan v. Demarest, 26 N. Y. Super. Ct. 173.

[33] Nightingale v. Eiseman, 121 N. Y. 288, 24 N. E. 475.

[34] Levene v. Rabitte, 2 N. Y. S. 389. See Shields v. Pettee, 4 N. Y. Super. Ct. 262, affd. 4 N. Y. 122. See also, Kein v. Tupper, 52 N. Y. 550; Hill v. Heller, 27 Hun (N. Y.) 416; Brown v. Norton, 50 Hun (N. Y.) 248, 19 N. Y. St. 220, 2 N. Y. S. 869; Smith v. Brady, 17 N. Y. 173, 72 Am. Dec. 442; Baker v. Higgins, 21 N. Y. 397. And see the following cases where recovery was refused for a portion of goods actually delivered because of failure to deliver the stipulated quantity: Holden Steam Mill Co. v. Westervelt, 67 Maine 446; Veazie v. Bangor, 51 Maine 509; Wiley v. Athol, 150 Mass. 426, 23 N. E. 311, 6 L. R. A. 342 ("It seems that the performance must be of a substantial part of the contract, and that the acceptance must be under such circumstances as to show that the party accepting knew, or ought to have known, that the contract was not being fully performed."); Haslack v. Mayers, 26 N. J. L. 284; Witherow v. Witherow, 16 Ohio 238. Compare Keyes v. Stones, 5 Mass. 391; Hayward v. Leonard, 7 Pick. (Mass.) 181, 19 Am. Dec. 268; Snow v. Ware, 13 Metc. (Mass.) 42; Gleason v. Smith, 9 Cush. (Mass.) 484, 57 Am. Dec. 62; Bassett v. Sanborn, 9 Cush. (Mass.) 58; Veazie v. Hosmer, 11 Gray (Mass.) 396; Bee Printing Co. v. Hichborn, 4 Allen (Mass.) 63; Cardell v. Bridge, 9 Allen (Mass.) 355; Thompson v. Purcell, 10 Allen (Mass.) 426.

[35] A purchaser's breach of contract to buy malt was held complete, in a recent case, where he stopped delivery and refused to give instructions for delivery of the remainder, although the seller made no actual tender of the undelivered portion. Thomas Gordon Malting Co. v. Bartels Brewing Co. (N. Y.), 100 N. E. 461.

[36] Martz v. Putnam, 117 Ind. 392, 20 N. E. 270; Rommel v. Wingate, 103 Mass. 327; Larkin v. Mitchell & Rowland Lumber Co., 42 Mich. 296, 3 N. W. 904; Downer v. Thompson,

included in the contract and reject the rest, or he may reject the whole.[37] But if the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.[38]

§ 5050. Delivery of goods mixed with others.—The rule is substantially the same as to the right of the buyer to reject where the seller delivers the contract goods mixed with others of a different description not included in the contract. In such a case the buyer may generally accept the goods which are in accordance with the contract and reject the rest,[39] or he may reject them all.[40]

§ 5051. Effect of usage or agreement as controlling preceding rules.—The rules in regard to delivery are sometimes modified by agreement of the parties or by their course of dealing or usage, and this is especially true with reference to the buyer taking the proper quantity from goods of the same kind in bulk at or out of a mixed quantity at the place of delivery.[41] So, a constructive delivery may often be sufficient, as where the key of a building in which the goods are stored is delivered by the seller to the buyer with the intent to surrender possession and the understanding of the parties that it shall operate as a delivery.[42]

2 Hill (N. Y.) 137, revd. 6 Hill (N. Y.) 208; Perry v. Mount Hope Iron Co., 16 R. I. 318, 15 Atl. 87. Compare Shrimpton v. Wormock, 72 Miss. 208, 16 So. 494.

[37] Cunliffe v. Harrison, 6 Exch. 903; Hart v. Mills, 15 M. & W. 85; Norrington v. Wright, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. 12; Barton v. Kane, 17 Wis. 37, 84 Am. Dec. 728; and cases cited in last preceding note.

[38] Cunliffe v. Harrison, 6 Exch. 903; Bedell v. Kowalsky, 99 Cal. 236, 33 Pac. 904.

[39] Cohen v. Pemberton, 53 Conn. 221, 2 Atl. 315, 5 Atl. 682, 55 Am. Rep. 101. See also, Spring v. Slayden-Kirksey Woolen Mills, 106 Ill. App. 579; Rodman v. Guilford, 112 Mass. 405; Schiller v. Blyth &c. Co., 15 Wyo. 304, 88 Pac. 648; and Rubin v. Sturtevant, 80 Fed. 930, 26 C. C. A. 259.

[40] Rylands v. Kreitman, 19 C. B. (N. S.) 351; Dixon v. Fletcher, 3 M. & W. 145; Clark v. Baker, 11 Metc. (Mass.) 186, 45 Am. Dec. 199; Sun Pub. Co. v. Minnesota Type Foundry Co., 22 Ore. 49, 29 Pac. 6; Hoffman v. King, 58 Wis. 314, 17 N. W. 136.

[41] See as to delivery of smaller quantity, Johnston v. Kershaw, L. R. 2 Exch. 82; Ireland v. Livingstone, L. R. 2 Q. B. 99. See also, Iron Cliff Co. v. Buhl, 42 Mich. 86, 3 N. W. 269; Brownfield v. Johnson, 128 Pa. St. 254, 18 Atl. 543, 6 L. R. A. 48; Lockhart v. Bonsall, 77 Pa. St. 53. But compare McHenry v. Bulifant, 207 Pa. St. 15, 56 Atl. 226.

[42] This is held good as against subsequent attaching or execution creditors of the seller. Howe v. Johnson, 117 Cal. 37, 48 Pac. 978; Conly v. Friedman, 6 Colo. App. 160, 40 Pac. 348; Packard v. Dunsmore, 11 Cush. (Mass.) 282; Wilkes v. Ferris, 5 Johns. (N. Y.) 335, 4 Am. Dec. 364; Barr v. Reitz, 53 Pa. St. 256. See also, Atkinson v. Maling, 2 T. R. 462; Hilton v. Tucker, 39 Ch. D. 669; Kellogg Newspaper Co. v. Peterson, 162 Ill. 158, 44 N. E. 411, 53 Am. St.

§ 5052. Rules of construction when quantity is not definitely stated.—It sometimes happens that the exact quantity is not precisely stated, and the question then becomes one of construction. This most often occurs when the statement as to quantity is qualified by the words "about," "more or less," or the like, and the following rules have been laid down for such cases: Where the contract identifies the goods by reference to independent circumstances, such as all the goods deposited in a certain warehouse, or to be shipped in a certain vessel, the mention of an amount accompanied by such qualifying words is regarded as a mere estimate, as to which good faith is all that is required.[43] Where the goods cannot be so identified, the amount named is material and such qualifying words provide only for some deviation within reasonable limits.[44] Where the qualifying words are supplemented by some other stipulation or condition giving them a broader scope, as for instance, so much as the buyer may require, or as the seller may be able to furnish, then the contract is to be governed by such added stipulation or condition in the absence of fraud or intentional deception.[45]

§ 5053. Delivery in instalments.—Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.[46] But there may be an agreement for delivery by instalments, either express or implied.[47] Where there is a con-

300; Crapo v. Kelly, 16 Wall. (U. S.) 610. See note in 28 L. R. A. (N. S.) 214.

[43] Steel Co. v. Tancred, 26 Sc. L. R. 305; Morris v. Wibaux, 159 Ill. 627, 43 N. E. 837; Pembroke Iron Co. v. Parsons, 5 Gray (Mass.) 589; Brawley v. United States, 96 U. S. 168, 24 L. ed. 622, 13 Ct. Cl. (U. S.) 521; Rib River Lumber Co. v. Ogilvie, 113 Wis. 482, 89 N. W. 483.

[44] Brawley v. United States, 96 U. S 168, 24 L. ed. 622, 13 Ct. Cl. (U. S.) 521; Norrington v. Wright, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. 12; Moore v. United States, 196 U. S. 157, 49 L. ed. 428, 40 Ct. Cl. (U. S.) 513, 25 Sup. Ct. 202. See also Chicago v. Galpin, 183 Ill. 399, 55 N. E. 731; Salmon v. Boykin, 66 Md. 541, 7 Atl. 701; Cabot v. Windsor, 1 Allen (Mass.) 546; Gleckler v. Slavens, 5 S. Dak. 364, 59 N. W. 323. See also and compare, Sample v. Pickard, 74 Mich. 416, 42 N. W. 54; Holland v. Rea, 48 Mich. 218, 12 N. W. 167.

[45] Gwillain v. Darnell, 2 C. M. & R. 61; Pembroke Iron Co. v. Parsons, 5 Gray (Mass.) 589; Brawley v. United States, 96 U. S. 168, 24 L. ed. 622, 13 Ct. Cl. (U. S.) 521. See also, Berk v International Explosives Co., 7 Comm. Cas. 20; Thurber v. Ryan, 12 Kans. 453; Bautovich v. Great Southern Lumber Co., 129 La. Ann. 857, 56 So. 1026; Ann. Cas. 1913B, 848 and note; Callmeyer v. Mayor, 83 N. Y. 116.

[46] Reuter v. Sala, 4 C. P. Div. 239; Cleveland Rolling Mill Co. v. Rhodes, 121 U. S. 255, 30 L. ed. 920, 7 Sup. Ct. 882.

[47] Brandt v. Lawrence, 1 Q. B. D. 344; Colonial Ins. Co. v. Adelaide Marine Ins. Co., 12 App. Cas. 128, 138.

tract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it depends in each case on the terms of the contract and the circumstances of the case whether the breach of contract is so material or of such a nature as to justify the injured party in refusing to proceed further and suing for damages as for breach of the entire contract or whether it is a severable breach giving rise to a claim for compensation, but not to a right to repudiate or treat the whole contract as broken.[48] But, prima facie at least, it would seem that if there is a material breach, and especially if the other party would not get substantially what he bargained for, he ought not to be required to perform further, and is entitled, in the absence of a waiver or the like, to treat the entire contract as broken.[49]

[48] Quarton v. American Law Book Co., 143 Iowa 517, 121 N. W. 1009, 32 L. R. A. (N. S.) 1, and note. There is considerable conflict as to whether there must be evinced an apparent intention to abandon and repudiate by the one party before the other can entirely rescind and refuse to perform further, but the better rule would seem to be that if the breach as to one instalment is material it may justify the injured party in refusing to proceed further even though the party in default may have intended to continue and, perhaps, even fully perform as to the remaining instalments. Hoare v. Rennie, 5 H. & N. 19; McDonald v. Kansas City Bolt & Nut Co., 149 Fed. 360, 79 C. C. A. 298, 8 L. R. A. (N. S.) 1110n; Enterprise Mfg. Co. v. Oppenheim, 114 Md. 368, 79 Atl. 1007, 38 L. R. A. (N. S.) 548; Fullam v. Wright &c. Cloth Co., 196 Mass. 474, 82 N. E. 711; Pope v. Porter, 102 N. Y. 366, 7 N. E. 304; King Philip Mills v. Slater, 12 R. I. 82, 34 Am. Rep. 603; Norrington v. Wright, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. 12. Compare National Surety Co. v. Long, 125 Fed. 887, 60 C. C. A. 623, and cases cited. But see Freeth v. Burr, L. R. 9 C. P. 208; Simpson v. Crippin, L. R. 8 Q. B. 14; Cornwall v. Henson, (1900) L. R. 2 Ch. 298; Ellison v. Flat Top Grocery Co., 69 W. Va. 380, 71 S. E. 391, 38 L. R. A. (N. S.) 539, and note. Compare Honck v. Muller, 7 Q. B. D. 92; Herzog v. Purdy, 119 Cal. 99, 51 Pac. 27; West v. Bechtel, 125 Mich. 144, 84 N. W. 69, 51 L. R. A. 791; Welsh v. Michigan Maple Co., 161 Mich. 16, 125 N. W. 692; Otis v. Adams, 56 N. J. L. 38, 27 Atl. 1092; Empire Rubber Mfg. Co. v. Morris, 77 N. J. L. 498, 72 Atl. 1009; Monarch Cycle Mfg. Co. v. Royer Wheel Co., 105 Fed. 324, 44 C. C. A. 523. This general subject, including the question of divisibility of contract, has already been considered in another section of this title as well as in vols. 2 and 3 in chapters on Divisibility of Contracts and Performance. Of course, if the contracts were separate, breach of one would not justify failure to perform another. Arbuthnot v. Streckeisen, 35 L. J. C. P. 305; Hanson v. Wittenberg, 205 Mass. 319, 91 N. E. 383; Hutchens v. Sutherland, 22 Nev. 363, 40 Pac. 409.

[49] See authorities first cited in the last two preceding notes. As to waiver and as to effect of accepting one instalment, see, generally, note to Quarton v. American Law Book

§ 5054. Delivery to carrier for buyer—Risk of deterioration.—As already shown, where the seller is required or authorized to send the goods to the buyer, delivery to a carrier for that purpose is ordinarily deemed a delivery to the buyer;[50] but the seller should make such a contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the circumstances of the case, and if the seller omits to do so and the goods are lost or damaged in course of transit the buyer may decline to treat the delivery to the carrier as a delivery to himself or may hold the seller responsible in damages.[51] But where the seller ships goods ordered from a distant place in a merchantable condition according to the order the buyer must, unless otherwise agreed, take the risk of deterioration necessarily incident to the course of transit.[52]

§ 5055. Acceptance—Buyer not deemed to accept without opportunity to inspect.—Where goods which he has not previously examined are delivered to the buyer, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.[53] Whether the

Co. in 32 L. R. A. (N. S.) 1; notes to J. Case Threshing Machine Co. v. Huber, in 32 L. R. A. (N. S.) 212; Wolfert v. Caledonia Springs Ice Co., 195 N. Y. 118, 88 N. E. 24, 21 L. R. A. (N. S.) 864, and note.

[50] Ante, chapter on Effects of the Contract, Transfer of Property. Especially § 5021. See also, Deutzel's Admr. v. Island Park Assn., 229 Pa. 403, 78 Atl. 935, 33 L. R. A. (N. S.) 54, and note; United States v. Andrews, 207 U. S. 229, 52 L. ed. 185, 28 Sup. Ct. 100. And compare Dutton v. Solomonson, 3 Bos. & Pul. 582; Wheelhouse v. Parr, 141 Mass. 593, 6 N. E. 787.

[51] Clarke v. Hutchins, 14 East 475; Buckman v. Levi, 3 Camp. 414; Ward v. Taylor, 56 Ill. 494; Wilson v. Western Fruit Co., 11 Ind. App. 89, 38 N. E. 827. As to whether there is a duty to insure, see Bartlett v. Jewett, 98 Ind. 206; New York Tartar Co. v. French, 154 Pa. St. 273, 26 Atl. 425.

[52] Bull v. Robinson, 10 Exch. 342; English v. Spokane Commission Co., 57 Fed. 451, 6 C. C. A. 416; Leggat v. Sand's Ale Brew. Co., 60 Ill. 158; Mann v. Evertson, 32 Ind. 355; Lord v. Edwards, 148 Mass. 476, 20 N. E. 161, 2 L. R. A. 519, 12 Am. St. 581. See also, Gates v. Carquinez Packing Co., 78 Cal. 439, 21 Pac. 1; Stafford v. Walter, 67 Ill. 83; McKee v. Wild, 52 Nebr. 9, 71 N. W. 958. Compare, however, Hunter Bros. Milling Co. v. Kramer Bros., 71 Kans. 468, 80 Pac. 963.

[53] Heilbutt v. Hickson, L. R. 7 C. P. 438; Elliott v. Howison, 146 Ala. 568, 40 So. 1018; Shields v. Reibe, 9 Ill. App. 598; Doane v. Dunham, 65 Ill. 512, 79 Ill. 131; Weil v. Stone, 33 Ind. App. 112, 69 N. E. 698, 104 Am. St. 243; Henkel v. Welsh, 41 Mich. 664, 3 N. W. 171; Knoblauch v. Kronschnabel, 18 Gil. (Minn.) 272; McNeal v. Braun, 53 N. J. L. 617, 23 Atl. 687, 26 Am. St. 441; Pierson v. Crooks, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. 831; Sun Pub. Co. v. Minnesota Type Foundry Co.,

title passes without or before inspection depends upon the contract and circumstances already considered.[54] But even where it does ordinarily pass, as where the goods are delivered to a carrier as authorized by the buyer, the rule that the buyer is entitled to make a reasonable examination or inspection still applies.[55]

§ 5056. Place of inspection.—Where goods are bought without previous examination the general rule is that the place of delivery is prima facie the place for examination or inspection;[56] and the same has been held where goods are sold by sample.[57] The contract may, however, provide for some other place of inspection either expressly or by its nature and the circumstances of the case.[58] Thus, if goods are delivered to a carrier to be transported to the buyer as authorized by him the place of inspection is usually at their destination.[59]

§ 5057. Inspection or examination—Reasonable opportunity.—Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.[60] What is a reasonable time depends largely upon

22 Ore. 49, 29 Pac. 6; Eaton v. Blackburn, 52 Ore. 300, 96 Pac. 870, 97 Pac. 539, 20 L. R. A. (N. S.) 53, 132 Am. St. 705; Fogel v. Brubaker, 122 Pa. St. 7, 15 Atl. 692; Charles v. Carter, 96 Tenn. 607, 36 S. W. 396.

[54] See ante, ch. CLVI, on Effects of Contract—Transfer of Property.

[55] Magee v. Billingsley, 3 Ala. 679; Weil v. Stone, 33 Ind. App. 112, 69 N. E. 698, 104 Am. St. 243; McCarty v. Gordon, 16 Kans. 35; Lincoln v. Gallagher, 79 Maine 189, 8 Atl. 883; Alden v. Hart, 161 Mass. 576, 37 N. E. 742; Boothby v. Plaisted, 51 N. H. 436, 12 Am. Rep. 140; Salomon v. King, 63 N. J. L. 39, 42 Atl. 745; Brigham v. Hibbard, 28 Ore. 386, 43 Pac. 383; Wadhams v. Balfour, 32 Ore. 313, 51 Pac. 642; Pope v. Allis, 115 U. S. 363, 29 L. ed. 393, 6 Sup. Ct. 69. See also, Dunham v. H. D. Williams Cooperage Co., 83 Ark. 395, 103 S. W. 386; Allyn v. Burns, 37 Ind. App. 223, 76 N. E. 636; Holmes v. Gregg, 66 N. H. 621, 28 Atl. 17.

[56] Peace River Phosphate Co. v. Grafflin, 58 Fed. 550; Brownlee v. Bolton, 44 Mich. 218, 6 N. W. 657; Cefalu v. Fitzsimmons-Derrig Co., 65 Minn. 480, 67 N. W. 1018; Pease v. Copp, 67 Barb. (N. Y.) 132; Holt v. Pie, 120 Pa. St. 425, 14 Atl. 389.

[57] Perkins v. Bell (1893), 1 Q. B. 193. Compare Weil v. Stone, 33 Ind. App. 112, 69 N. E. 698, 104 Am. St. 243.

[58] Grimoldby v. Wells, L. R. 10 C. P. 391; Molling v. Dean, 18 Times L. 217; Elliott v. Howison, 146 Ala. 568, 40 So. 1018; Holt v. Pie, 120 Pa. St. 425, 14 Atl. 389.

[59] Pierson v. Crooks, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. 831; Holt v. Pie, 120 Pa. St. 425, 14 Atl. 389, and other authorities cited in last note to last preceding section.

[60] Isherwood v. Whitmore, 11 M. & W. 347; Lincoln v. Gallagher, 79

the nature of the property and other circumstances of the particular case,[61] and custom is often important in determining the question.[62] The buyer is required to act with reasonable promptness;[63] but there are cases in which he has been given a week or more, under the particular circumstances, in which to examine and reject the goods, and where the nature of the goods and the question of their conformity with the contract cannot be determined by mere inspection he is entitled to test or even use them so far as may be necessary for that purpose.[64] But here, too, the rule limiting the exercise of the right to reasonable time applies,[65] and the use must not be unreasonable and beyond what is fairly necessary in order to determine the question.[66]

§ 5058. **Waiver of right of inspection.**—The right to inspect may, however, be waived by the buyer either expressly or impliedly. This is especially true as to waiver of the right as constituting a condition precedent to the passing of the property or time of payment. Thus, as already shown, the property or title may pass, conditionally at least, where the goods are delivered to a carrier to be sent to the buyer as he has directed. So, where the contract provides for payment of the price on receiving the documents of title an inspection is not contemplated until the

Maine 189, 8 Atl. 883; Holmes v. Gregg, 66 N. H. 621, 28 Atl. 17; McNeal v. Braun, 53 N. J. L. 617, 23 Atl. 687, 26 Am. St. 441. See also, Avery v. Stewart, 2 Conn. 69, 7 Am. Dec. 240; Allyn v. Burns, 37 Ind. App. 223, 76 N. E. 636; Croninger v. Crocker, 62 N. Y. 151.

[61] Jones v. Bloomgarden, 143 Mich. 326, 106 N. W. 891. See also, Elliott v. Howison, 146 Ala. 568, 40 So. 1018; Armsby Co. v. Shumake, 113 Ga. 1086, 39 S. E. 473; Lenz v. Blake-McFall Co., 44 Ore. 569, 76 Pac. 356.

[62] Doane v. Dunham, 79 Ill. 131. See also, Sanders v. Jameson, 2 C. & K. 557; Enterprise Mfg. Co. v. Oppenheim, 114 Md. 368, 79 Atl. 1007, 38 L. R. A. (N. S.) 548.

[63] Lucy v. Mouflet, 5 H. & N. 229; George D. Sisson Lumber & Shingle Co. v. Haak, 139 Mich. 383, 102 N. W. 946; Doane v. Dunham, 79 Ill. 131. See also, Buckey Traction &c. Co. v. Smith (Iowa), 138 N. W. 817.

[64] Lucy v. Mouflet, 5 H. & N. 229; Philadelphia Whiting Co. v. Detroit White Lead Works, 58 Mich. 29, 24 N. W. 881; Rhind v. Freedley, 74 N. J. L. 138, 64 Atl. 963; Cream City Glass Co. v. Friedlander, 84 Wis. 53, 54 N. W. 28, 21 L. R. A. 135, 36 Am. St. 895 (where buyer used too much and was held to have exercised acts of ownership).

[65] Lasker v. Crane Co., 55 Fed. 449; Gray v. Consolidated Ice Mach. Co., 103 Ga. 115, 29 S. E. 604; Sprout, Waldron & Co. v. Hunter, 30 Ky. L. 380, 98 S. W. 1006.

[66] Nelson v. Overman, 19 Ky. L. 161, 38 S. W. 882; Cream City Glass Co. v. Friedlander, 84 Wis. 53, 54 N. W. 28, 21 L. R. A. 135, 36 Am. St. 895; Zipp Mfg. Co. v. Pastorino, 120 Wis. 176, 97 N. W. 904.

buyer becomes the owner of the document,[67] and the same principle applies where goods are sent by express C. O. D., or the like.[68] So, as will be shown in the next section, the buyer by exercising acts of ownership or retaining the goods an unreasonable time or the like may be deemed to have accepted them no matter whether he has actually inspected them or not.[69]

§ 5059. Acceptance—When buyer is deemed to have accepted.—The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.[70] Thus, where the buyer resells the goods this is inconsistent with ownership in the seller and consistent only with acceptance and ownership on the part of the buyer.[71] So, where the buyer uses them in a manner proper only on the assumption that he is the owner the rule is the same.[72] Retention of the goods longer than reasonable, for inspection or the like, without any intimation of

[67] Polenghi Bros. v. Dried Milk Co., 49 Sol. J. 120. See also, Dudley v. Chicago &c. R. Co., 58 W. Va. 604, 52 S. E. 718, 3 L. R. A. (N. S.) 1135, 112 Am. St. 1027.

[68] Wiltse v. Barnes, 46 Iowa 210; Lawder & Sons Co. v. Albert Mackie Grocery Co., 97 Md. 1, 54 Atl. 634, 62 L. R. A. 795. But see Louisville Lithographic Co. v. Schedler, 23 Ky. L. 465, 63 S. W. 8. See also, Pettit v. Mitchell, 4 M. & Gr. 819, 838, where by printed conditions of sale by auction the goods were to be taken with all faults and errors of description. It is not meant, however, that the buyer may not recover the price paid if the goods do not conform to the contract.

[69] Western Constr. Co. v. Romona &c. Stone Co., 41 Ind. App. 229, 80 N. E. 856; Noble v. Olympia Brewing Co., 64 Wash. 461, 117 Pac. 241, 36 L. R. A. (N. S.) 467, and note.

[70] Saunders v. Topp, 4 Exch. 390; Lyon v. Bertram, 20 How. (U. S.) 149, 15 L. ed. 847; Palmer v. Banfield, 86 Wis. 441, 56 N. W. 1090; Fox v. Wilkinson, 133 Wis. 337, 113 N. W. 669, 14 L. R. A. (N. S.) 1107n. See note in 36 L. R. A. (N. S.) 467.

[71] Chapman v. Morton, 11 M. & W. 534; Wolf v. Dietzsch, 75 Ill. 205; Rock Island Plow Co. v. Meredith, 107 Iowa 498, 78 N. W. 233; Delamater v. Chappell, 48 Md. 244; Warden v. Marshall, 99 Mass. 305; Brown v. Nelson, 66 Vt. 660, 30 Atl. 94; Parker v. Palmer, 4 B. & Ald. 387; Perkins v. Bell, (1893) 1 Q. B. 193.

[72] Harnor v. Groves, 15 C. B. 667; Electric Motor Co. v. Frisbie, 66 Conn. 67, 33 Atl. 604; Carondelet Iron Works v. Moore, 78 Ill. 65; Brown v. Foster, 108 N. Y. 387, 15 N. E. 608; Chambers v. Lancaster, 160 N. Y. 342, 54 N. E. 707; Bascom v. Danville Stove & Mfg. Co., 182 Pa. St. 427, 38 Atl. 510; Cream City Glass Co. v. Friedlander, 84 Wis. 53, 54 N. W. 28, 21 L. R. A. 135, 36 Am. St. 895. See Dodsworth v. Hercules Iron Works, 66 Fed. 483, 13 C. C. A. 552.

rejection, likewise indicates acceptance and ownership.[73] The term "acceptance," as used in this section means assent to become owner of the goods and not necessarily an agreement that they fully conform to the contract and fulfil or meet in all respects the legal obligations of the seller so as to bar an action for damages or the like for breach of warranty. The latter question is one upon which there is some conflict of authority, and it is elsewhere considered in treating of conditions and warranties and remedies of the buyer. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them.[74] The goods then remain at the seller's risk,[75] but it seems that the buyer would be liable as an involuntary bailee for their loss through his gross negligence or failure to take any reasonable steps to care for them.[76] When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods.[77] And if the neglect or refusal of the buyer amounts to a repudiation of the

[73] Heilbutt v. Hickson, L. R. 7 C. P. 438; Treadwell v. Reynolds, 39 Conn. 31; Watkins v. Paine, 57 Ga. 50; Ellis v. Roche, 73 Ill. 280; Hobbs v. Massasoit Whip Co., 158 Mass. 194, 33 N. E. 495; Foster v. Rowley, 110 Mich. 63, 67 N. W. 1077; Gaff v. Homeyer, 59 Mo. 345; Woodward v. Emmons, 61 N. J. L. 281, 39 Atl. 703; Mason v. Smith, 130 N. Y. 474, 29 N. E. 749; Dailey v. Green, 15 Pa. St. 118; McClure v. Jefferson, 85 Wis. 208, 54 N. W. 777. See also, Buckey Traction Ditcher Co. v. Smith (Iowa), 138 N. W. 817; Schwartz v. Church of the Holy Cross, 60 Minn. 183, 62 N. W. 266.

[74] Grimoldy v. Wells, L. R. 10 C. P. 391; Gray v. Consolidated Ice Mach. Co., 103 Ga. 115, 29 S. E. 604; Alden v. Hart, 161 Mass. 576, 37 N. E. 742; McCormick Harvesting Mach. Co. v. Cochran, 64 Mich. 636, 31 N. W. 561; Mulcahy v. Dieudonne (Minn.), 115 N. W. 636; Strauss v. National Parlor Furniture Co., 76 Miss. 343, 24 So. 703; Spaulding v. Hanscom, 67 N. H. 401, 32 Atl. 154; Starr v. Torrey, 22 N. J. L. 190; Rheinstrom v. Steiner, 69 Ohio St. 452, 69 N. E. 745, 100 Am. St. 699.

[75] Doane v. Dunham, 79 Ill. 131.

[76] Dailey v. Green, 15 Pa. St. 118. The buyer under certain circumstances, after so notifying the seller, may be justified in selling the goods on the seller's account. Rubin v. Sturtevant, 80 Fed. 930, 26 C. C. A. 259; Jones v. Bloomgarden, 143 Mich. 326, 106 N. W. 891.

[77] Greaves v. Ashlin, 3 Camp. 426; Dibble v. Corbett, 9 Abb. Pr. (N. Y.) 200, 18 N. Y. Super. Ct. 202.

contract the seller in general has the same rights against the goods and on the contract as in other similar cases when the buyer is in default.[78]

[78] And it is held that the seller, having the right to resell, need not notify the buyer of intention to sell elsewhere. Wallace v. Coons (Ind App.), 95 N. E. 132. See post, §§ 5079, 5080.

CHAPTER CLIX.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

§ 5065. Rights and remedies of unpaid seller—Generally.
5066. Who is an unpaid seller.
5067. Lien of unpaid seller.
5068. Unpaid seller's lien after part delivery.
5069. When lien is lost—Generally.
5070. No lien where goods are in public place or already in possession of buyer.
5071. Waiver of lien.
5072. Right of stoppage in transitu—General rule.
5073. When goods are in course of transit—General rule.
§ 5074. Transit not ended where goods are rejected or seized by buyer's creditors.
5075. When transit is ended.
5076. Broken transit.
5077. Rule where part delivery has been made.
5078. How right of stoppage may be exercised.
5079. Resale by seller.
5080. Manner of resale.
5081. Rescission by unpaid seller.
5082. Effect of buyer's sale of goods subject to lien or right of stoppage—Negotiation of document of title.

§ 5065. Rights and remedies of unpaid seller—Generally.—The unpaid seller of goods, even though the property in the goods has passed to the buyer, may have, in a proper case, (1) a lien on the goods for the price while he is in possession of them; (2) a right to stop the goods in transitu where he has parted with their possession, in case of the buyer's insolvency; (3) a right of resale under certain circumstances. Where he has a right of lien, or has stopped the goods in transitu, it seems that in this country he may generally rescind the transfer and resume the property in the goods if the contract so provides, or if the buyer has been in default in payment of the price for an unreasonable period. So, where the property has not passed to the buyer, such seller has, in addition to his other remedies, a right to withhold delivery similar to and coextensive with his rights of lien and stoppage in transitu which exists where the property has passed.[1]

[1] Professor Benjamin explains and gives the reason for the general doctrine of this section as follows: "Where, under the contract of sale, the property in the goods has not passed to the buyer, the seller's right to retain or resume possession of them is a right incident to the right of ownership. The seller's right to retain possession of the goods for se-

§ 5066. **Who is an unpaid seller.**—The seller is deemed to be an unpaid seller within the rule stated in the last preceding section (1) when the whole of the purchase price has not been paid or tendered;[2] (2) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition has been broken by reason of the dishonor of the instrument, the insolvency of the buyer, or the like.[3] One in the position of such a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price, is in general entitled to these same remedies upon the same principle.[4]

curity, where, under the contract of sale, the general property in the goods has passed to the buyer, or, as the right at this stage of the contract is called, the seller's lien, and his right in case of the insolvency of the buyer, called the right of stoppage in transitu, may be regarded as modified survivals of the right incident to his former absolute property or original ownership. The right of lien succeeds the right of control incident to ownership when the seller parts with the property in the goods, and the right of stoppage in transitu succeeds the right of lien when the seller parts with the possession as well as with the property in the goods. And thus the right of the unpaid seller as against the goods, though diminished from time to time, is not entirely divested (unless waived) until the goods have come into the possession of the buyer." Benj. Princ. of Sales (2d ed.), 170, 171. See also, generally, Bloxam v. Saunders, 4 B. & C. 951; Griffiths v. Perry, 1 El. & El. 680; McElwee v. Metropolitan Lumber Co., 69 Fed. 302, 16 C. C. A. 232; Rappleye v. Racine Seeder Co., 79 Iowa 220, 44 N. W. 363, 7 L. R. A. 139; Tuthill v. Skidmore, 124 N. Y. 148, 26 N. E. 348; Diem v. Koblitz, 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. 531; White v. Welsh, 38 Pa. St. 396; Jeffris v. Fitchburg R. Co., 93 Wis. 250, 67 N. W. 424, 33 L. R. A. 351, 57 Am. St. 919. It would be inequitable to permit goods of one who has not received payment for them, under such circumstances, to be taken by the creditors of the vendee to satisfy their debts, and the right of the unpaid seller against the goods is favored by the courts. Gibson v. Carruthers, 8 M. & W. 321; Kingman v. Denison, 84 Mich. 608, 48 N. W. 26, 11 L. R. A. 347, 22 Am. St. 711; Chicago B. R. Co. v. Painter, 15 Nebr. 394, 19 N. W. 488; Inslee v. Lane, 57 N. H. 454; Farrell v. Richmond &c. R. Co., 102 N. Car. 390, 9 S. E. 302, 3 L. R. A. 647, 11 Am. St. 760.

[2] Hodgson v. Loy, 7 T. R. 440; Ex parte Chalmers, L. R. 8 Ch. App. 289; Owens v. Weedman, 82 Ill. 409; Bradley v. Michael, 1 Ind. 551, Smith (Ind.) 346; Ware River R. Co. v. Vibbard, 114 Mass. 447.

[3] Gunn v. Bolckow, L. R. 10 Ch. 491; McElwee v. Metropolitan Lumber Co. 69 Fed. 302, 16 C. C. A. 232; Peoria & P. U. R. Co. v. Brickley, 114 Ill. 337, 2 N. E. 179; Milliken v. Warren, 57 Maine 46; Arnold v. Delano, 4 Cush. (Mass.) 33, 50 Am. Dec. 754; Weddigen v. Boston Elastic Fabric Co., 100 Mass. 422; Tuthill v. Skidmore, 124 N. Y. 148, 26 N. E. 348; Hodgson v. Barrett, 33 Ohio St. 63, 31 Am. Rep. 527. See also, In re Manuel J. Portuondo Co., 135 Fed. 592.

[4] Morison v. Gray, 2 Bing. 260; Tucker v. Humphrey, 4 Bing. 516; Feise v. Wray, 3 East 93; Kinloch v. Craig, 3 T. R. 119; Ireland v. Livingstone, L. R. 5 H. L. 395; Imperial Bank v. London &c. Docks Co., 5 Ch.

§ 5067. **Lien of unpaid seller.**—As a general rule, unless his lien is waived or otherwise lost, the unpaid seller of goods, who is in possession of them, is entitled to retain possession of them until payment or tender of the price in the following cases, namely: (1) Where the goods have been sold without any stipulation as to credit; (2) where the goods have been sold on credit, but the term of credit has expired; (3) where the buyer becomes insolvent. And the seller may exercise his right of lien in a proper case, notwithstanding that he is in possession of the goods as agent or bailee or custodier for the buyer. This is the law substantially, as stated in both the English and the American Sales Acts, and is a fair condensed statement of the common law upon the subject.[5] As already shown, in the absence of any agreement to the contrary, the seller is entitled to payment at the time of his transfer of possession to the buyer, and if there is no stipulation as to credit the seller, although the property in the goods has passed, has a lien on the goods still in his possession until the price is paid or duly tendered; and so even if credit is given for a certain time, when that time has expired and the price becomes due, without possession having been taken by the buyer, he loses the right to possession before payment, and there is then the same reason for the existence or revival of the lien in favor of the seller still in possession, in such a case, as if no credit had been given.[6] So, where the buyer becomes insolvent the seller is entitled to his lien, no matter whether the goods were sold on credit or

D. 195; Newhall v. Vargas, 13 Maine 93, 103, 29 Am. Dec. 489; Seymour v. Newton, 105 Mass. 272; Muller v. Pondir, 55 N. Y. 325, 14 Am. Rep. 259. See also, Jenkins v. Usborne, 7 M. & Gr. 678, 698 (buyer who has resold); Gossler v. Schepeler, 5 Daly (N. Y.) 476 (one who has paid for the buyer and taken assignment of bill of lading as security).

[5] Bloxam v. Saunders, 4 B. & C. 951; McElwee v. Metropolitan Lumber Co., 69 Fed. 302, 16 C. C. A. 232; Willis v. Glenwood Cotton Mills, 200 Fed. 301; Owens v. Weedman, 82 Ill. 409; Perrine v. Barnard, 142 Ind. 448, 41 N. E. 820; Arnold v. Delano, 4 Cush. (Mass.) 33, 50 Am. Dec. 754.

[6] Bunney v. Poyntz, 4 B. & Ad. 568; McElwee v. Metropolitan Lumber Co., 69 Fed. 302, 16 C. C. A. 232; Leahy v. Lobdell, 80 Fed. 665, 26 C. C. A. 75; Robinson v. Morgan, 65 Vt. 37, 25 Atl. 899. See also, Valpy v. Oakeley, 16 Q. B. 941; Wade v. Moffett, 21 Ill. 110, 74 Am. Dec. 79. But the very meaning of the term "credit" implies that the seller who agrees to give it agrees to turn the goods over to the buyer without receiving immediate pay, and if the buyer takes possession while credit is given the seller loses his lien. Spartali v. Benecke, 10 C. B. 212; Leonard v. Davis, 1 Black (U. S.) 476, 17 L. ed. 222; Abraham v. Karger, 100 Wis. 387, 76 N. W. 330.

not.[7] It makes no difference that the seller is holding the goods as bailee for the buyer.[8]

§ 5068. Unpaid seller's lien after part delivery.—Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.[9] This lien or right of retention as against such remainder, as shown by the cases cited in support of the general rule above stated, is not limited to a proportionate part of the purchase price, but may be asserted against such remainder for all of the purchase price due and unpaid.

§ 5069. When lien is lost—Generally.—The unpaid seller of goods loses his lien or right of retention thereon in these instances: (1) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods, or, in other words, the property or right of possession; (2) when the buyer or his agent lawfully obtains possession of the goods; (3) by waiver thereof.[10] But he does not lose his lien by merely obtaining a

[7] Bloxam v. Morley, 4 B. & C. 951; Griffiths v. Perry, 1 E. & E. 680; Thompson v. Baltimore & Ohio R. Co., 28 Md. 396; Lennox v. Murphy, 171 Mass. 370, 50 N. E. 644; Crummey v. Raudenbush, 55 Minn. 426, 56 N. W. 1113; Pardee v. Kanady, 100 N. Y. 121, 2 N. E. 885; Wanamaker v. Yerkes, 70 Pa. St. 443; Arnold v. Carpenter, 16 R. I. 560, 18 Atl. 174, 5 L. R. A. 357; Bohn Mfg. Co. v. Hynes, 83 Wis. 388, 53 N. W. 684.

[8] Townley v. Crump, 4 A. & E. 58; Grice v. Richardson, L. R. 3 App. Cas. 319; Perrine v. Barnard, 142 Ind. 448, 41 N. E. 820; Conrad v. Fisher, 37 Mo. App. 352, 8 L. R. A. 147; White v. Welsh, 38 Pa. St. 396. Indeed, as shown in the above cases and as is clearly apparent, in all such cases, where the seller's lien is in question, as the property has passed, the seller necessarily holds the goods practically as the buyer's bailee.

[9] Dixon v. Yates, 5 B. & Ad. 313; Miles v. Gorton, 2 Cr. & M. 504; Ex parte Chalmers, L. R. 8 Ch. App. 289; Haskell v. Rice, 11 Gray (Mass.) 240; McFarland v. Wheeler, 26 Wend. (N. Y.) 467. See also, Holland's Assignee v. Cincinnati Desiccating Co., 97 Ky. 454, 17 Ky. L. 316, 30 S. W. 972. But part delivery may amount to a symbolical delivery of the whole, and a waiver of the right of retention as to the remainder, if such clearly appears to be the intention of the parties. See Kemp v. Falk, 7 A. C. 573, 586. And compare McElwee v. Metropolitan Lumber Co., 69 Fed. 302, 16 C. C. A. 232; Parks v. Hall, 2 Pick. (Mass.) 206.

[10] Williston on Sales, § 510; Dutton v. Solomonson, 3 Bos. & P. 582; Holland's Assignee v. Cincinnati Desiccating Co., 97 Ky. 454, 17 Ky. L. 316, 30 S. W. 972; Douglas v. Shumway, 13 Gray (Mass.) 498; Schmertz v. Dwyer, 53 Pa. St. 335.

judgment for the purchase price.[11] Even where he has lost his lien by reason of parting with possession to a carrier, as bailee or agent of the buyer, he may still have in its place the right of stoppage in transitu where the buyer is insolvent.[12] If the buyer wrongfully gets possession, furtively or otherwise, without the seller's assent, the general rule does not apply and the lien of the seller is not thereby destroyed.[13] If the agreement between the parties contemplates immediate payment on delivery, and the goods are merely "handed over" with the expectation of contemporaneous payment, or merely to examine, this does not amount to possession of the buyer with such assent of the seller as to destroy the lien and prevent the seller from retaking them;[14] but the seller should promptly take steps to reclaim the goods or resume possession in order to prevent his being deemed to acquiesce and assent to surrender of the lien.[15]

§ 5070. No lien where goods are in public place or already in possession of buyer.—If goods, when sold, are at a place equally accessible to buyer and seller, and neither has actual possession, it would seem that the right of the seller to a lien on them would depend, in the absence of anything to the contrary, upon the question of title on the theory that in such a case the

[11] Houlditch v. Desanges, 2 Stark. 337; Scriviner v. Great Northern R. Co., 19 W. R. 388. See also, Wade v. Moffett, 21 Ill. 110, 74 Am. Dec. 79; Kirkwood v. Hoxie, 95 Mich. 62, 54 N. W. 720, 35 Am. St. 549. As between the parties, it may be agreed that the seller shall retain a lien (apparently in the nature of a mortgage) even after delivery. Dodsley v. Varley, 12 A. & E. 632; Dewitt v. Prescott, 51 Mich. 298, 16 N. W. 656; Gregory v. Morris, 96 U. S. 619, 24 L. ed. 740.

[12] Dutton v. Solomonson, 3 Bos. & P. 582; Bolton v. Lancashire &c. Co., L. R. 1 C. P. 431; Schmertz v. Dwyer, 53 Pa. St. 335.

[13] Bush v. Bender, 113 Pa. St. 94, 4 Atl. 213. See also, Fawcett v. Osborn, 32 Ill. 411, 83 Am. Dec. 278; Woolsey v. Axton, 192 Pa. St. 526, 43 Atl. 1029; McGill v. Chilhowee Lumber Co., 111 Tenn. 552, 82 S. W. 210. And see where consent is obtained by fraud, Ames v. Moir, 130 Ill. 582, 22 N. E. 535, affd. 138 U. S. 306, 34 L. ed. 951, 11 Sup. Ct. 311; McFarland v. Wheeler, 26 Wend. (N. Y.) 467.

[14] Canadian Bank of Commerce v. McCrea, 106 Ill. 281; Ames v. Moir, 130 Ill. 582, 22 N. E. 535, affd. 138 U. S. 306, 34 L. ed. 951, 11 Sup. Ct. 311; Leven v. Smith, 1 Denio (N. Y.) 571. See also, Starnes v. Roberts, 128 Ga. 718, 58 S. E. 348; Lamb v. Utley, 146 Mich. 654, 110 N. W. 50 (in absence of express agreement law implies cash on delivery, and if immediate payment is demanded and refused the seller may sue buyer for conversion).

[15] Leatherbury v. Connor, 54 N. J. L. 172, 23 Atl. 684, 33 Am. St. 672; Bowen v. Burk, 13 Pa. St. 146. See generally, Willis v. Glenwood Cotton Mills, 200 Fed. 301.

possession follows the title, and if the title has passed to the buyer the legal possession would be in him, and the seller would have no lien.[16] So if the goods are already in the possession of the buyer when sold, and property is passed, the seller has no lien.[17]

§ 5071. Waiver of lien.—The unpaid seller may lose his lien or right thereto by waiver, either express or implied. Thus, the seller may enter into a special agreement utterly inconsistent with the existence or continuance of the lien.[18] Giving credit operates as a waiver of the lien or suspension of it, at least for the time during which credit is given.[19] So, the assent by the seller to a resale to a third person operates as an estoppel or waiver of his lien,[20] and other acts or conduct of the seller may have a like effect.[21] But it seems that taking security for the price, where there is nothing to indicate an agreement to rely solely upon such security, does not waive the unpaid seller's lien,[22] and that the mistaken assertion of a greater right or refusal to deliver on some other ground, not inconsistent with the lien, does not necessarily have that effect in the absence of some element of equitable estoppel,[23] although refusal to deliver or surrender property upon some ground or right inconsistent with a lien has often been held to operate as a waiver.[24]

[16] Tansley v. Turner, 2 Bing. N. C. 151.

[17] Harman v. Anderson, 2 Camp. 243; Dodsley v. Varley, 12 A. & E. 632; Cooper v. Bell, 3 H. & C. 722.

[18] In re Leith's Estate, L. R. 1 P. C. 296; Douglas v. Shumway, 13 Gray (Mass.) 498; Pickett v. Bullock, 52 N. H. 354. See also, Gregory v. Morris, 96 U. S. 619, 24 L. ed. 740; Dewitt v. Prescott, 51 Mich. 298, 16 N. W. 656.

[19] Spartali v. Benecke, 10 C. B. 212; Leonard v. Davis, 1 Black (U. S.) 476, 17 L. ed. 222. However, as already shown, it may revive on default where the buyer still has possession after the term of credit has expired.

[20] Pearson v. Dawson, E. B. & E. 448; Knights v. Wiffen, L. R. 5 Q. B. 660; Voorhis v. Olmstead, 66 N. Y. 113.

[21] Legg v. Willard, 17 Pick. (Mass.) 140, 28 Am. Dec. 282; People's Bank v. Frick Co., 13 Okla. 179, 73 Pac. 949.

[22] Angus v. McLachan, 23 Ch. D. 330; Kimball v. Corta, 76 Vt. 289, 56 Atl. 1009, 104 Am. St. 937. And compare Ward v. Yarnelle, 173 Ind. 535, 91 N. E. 7. But see Horncastle v. Farran, 3 B. & Ald. 497, 5 E. C. L. 356; Chambers v. Davidson, L. R. 1 P. C. 296, 4 Moore P. C. (N. S.) 158; Westinghouse Electric Mfg. Co. v. Citizens' St. R. Co., 24 Ky. L. 334, 68 S. W. 463; Dummer v. Smedley, 110 Mich. 466, 68 N. W. 260, 38 L. R. A. 490.

[23] Crummey v. Raudenbush, 55 Minn. 426, 56 N. W. 1113. See also, Folsom v. Barrett, 180 Mass. 439, 62 N. E. 723, 91 Am. St. 320; Bierce v. Hutchins, 205 U. S. 340, 51 L. ed. 828, 27 Sup. Ct. 524.

[24] Boardman v. Sill, 1 Camp. 410, note; Dirks v. Richards, 4 Man. & G. 574; Hanna v. Phelps, 7 Ind. 21, 63 Am. Dec. 410, and note.

§ 5072. Right of stoppage in transitu—General rule.—When the buyer becomes insolvent, or is found after the sale to have been insolvent at the time of the sale, and is still insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is, he may resume possession of them, in a proper case, while they are in course of transit, and may retain them until payment or tender of the purchase price.[25] He may, indeed, resell them in a proper case, and, it seems, rescind the sale.[26] Insolvency of the buyer is of prime importance, and a necessary condition to the right or its exercise,[27] but as shown in the general statement of the rule already given, and by the authorities cited in its support, such insolvency may exist either after the sale or at the time of the sale, provided in the latter case it was unknown to the seller. Another essential condition, as the term itself indicates, is that the goods

[25] 4 Elliott R. R. (2d ed.), §§ 1539-1543a; Gibson v. Carruthers, 8 M. & W. 321; Snee v. Prescott, 1 Atk. 245; Burghall's Assignees v. Howard, 1 H. Bl. 366, note; Loeb v. Peters, 63 Ala. 243, 35 Am. Rep. 17; Bayonne Knife Co. v. Umbenhauer, 107 Ala. 496, 18 So. 175, 54 Am. St. 114; Branan v. Atlanta &c. R. Co., 108 Ga. 70, 33 S. E. 836, 75 Am. St. 26; O'Brien v. Norris, 16 Md. 122, 77 Am. Dec. 284; Fenkhausen v. Fellows, 20 Nev. 312, 21 Pac. 886, 4 L. R. A. 732; Harris v. Pratt, 17 N. Y. 249; Farrell v. Richmond &c. R. Co., 102 N. Car. 390, 9 S. E. 302, 3 L. R. A. 647, 11 Am. St. 760; Benedict v. Schaettle, 12 Ohio St. 515; Diem v. Koblitz, 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. 531. But this right, as hereinafter shown, is subject to some exceptions or limitations, as in case of assent or estoppel, where there is in effect a delivery to a subpurchaser from the buyer, and in case of the lawful transfer of a document of title, such as a bill of lading, at least where it is negotiable in the strict sense. The retaking of possession of goods by a carrier after delivery to the purchaser, for nonpayment of freight, does not inure to the benefit of the seller as a stoppage in transitu. In re Dancy Hardware &c. Co., 198 Fed. 336. In Willis v. Glenwood Cotton Mills, 200 Fed. 301, stoppage in transitu is defined or described as a seller's right to a lien for the price anterior to delivery, which he may enforce by seizing the goods in the possession of a carrier.

[26] See post, §§ 5079–5081. The Constantia, 6 Rob. Adm. 321; Bayonne Knife Co. v. Umbenhauer, 107 Ala. 496, 18 So. 175, 54 Am. St. 114, and note; Gustine v. Phillips, 38 Mich. 674; Smith Co. v. Louisville &c. R. Co., 145 Mo. App. 394, 122 S. W. 342; Carder v. Atchison &c. R. Co. (Mo. App.), 153 S. W. 517; Chandler v. Fulton, 10 Tex. 2, 60 Am. Dec. 188; St. Jose Indians, 1 Wheat. (U. S.) 208, 212, 4 L. ed. 73; note in 29 Am. Dec. 386.

[27] As to what is meant by insolvency in this connection, see Diem v. Koblitz, 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. 531; Bloomingdale v. Memphis &c. Co., 6 Lea (Tenn.) 616; Jeffris v. Fitchburg R. Co., 93 Wis. 250, 67 N. W. 424, 33 L. R. A. 351, 57 Am. St. 919. And as to proof of it as a question of fact, see Kingman v. Denison, 84 Mich. 608, 48 N. W. 26, 11 L. R. A. 347, 22 Am. St. 711; Walsh v. Blakely, 6 Mont. 194, 9 Pac. 809; Hays v. Mouille, 14 Pa. St. 48.

should still be in transit.[28] This term has rather a broad meaning in this connection, and the subject will be considered in the next section.

§ 5073. When goods are in course of transit—General rule.—Goods are deemed to be in course of transit from the time they are delivered to the carrier, or other bailee, for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee.[29] Thus, when the goods are still in the hands of the carrier as such for purposes of the transit it is held that even though the carrier may be the buyer's agent to accept delivery so far as to pass the property in the goods they are still in transit within the rule.[30] And this is true even though the goods may have arrived at the station or port of destination and may have been placed by the carrier in his own or another's warehouse.[31]

§ 5074. Transit not ended where goods are rejected or seized by buyer's creditors.—If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of

[28] Gibson v. Carruthers, 8 M. & W. 321; Lickbarrow v. Mason, 2 T. R. 63; O'Neal v. Day, 53 Mo. App. 139; Hall v. Dimond, 63 N. H. 565, 3 Atl. 423; Walsh v. Blakely, 6 Mont. 194, 9 Pac. 809.

[29] Branan v. Atlanta &c. R. Co., 108 Ga. 70, 33 S. E. 836, 75 Am. St. 26, (citing 4 Elliott R. R. [2d ed.], §§ 1539, 1543); Rogers v. Schneider, 13 Ind. App. 23, 41 N. E. 71; Lewis v. Sharvey, 58 Minn. 464, 59 N. W. 1096; More, Reynolds & Co. v. Lott, 13 Nev. 376; Calahan v. Babcock, 21 Ohio St. 281, 8 Am. Rep. 63; Jenks v. Fulmer, 160 Pa. St. 527, 28 Atl. 841; Jeffris v. Fitchburg R. Co., 93 Wis. 250, 67 N. W. 424, 33 L. R. A. 351, 57 Am. St. 919. Whitehead v. Anderson, 9 M. & W. 518; Ex parte Rosevear China Clay Co., 11 Ch. Div. 560.

[30] Bethell v. Clark, L. R. 20 Q. B. D. 615; Lyons v. Hoffnung, 15 App. Cas. 391; Johnson v. Eveleth, 93 Maine 306, 45 Atl. 35, 48 L. R. A. 50.

[31] Clapp v. Peck, 55 Iowa 270, 7 N. W. 587; O'Neil v. Garrett, 6 Iowa 480; Symns v. Schotten, 35 Kans. 310, 10 Pac. 828; Covell v. Hitchcock, 23 Wend. (N. Y.) 611; More v. Lott, 13 Nev. 376; Calahan v. Babcock, 21 Ohio St. 281, 8 Am. Rep. 63; Jeffris v. Fitchburg R. Co., 93 Wis. 250, 67 N. W. 424, 33 L. R. A. 351, 57 Am. St. 919. And see opinion of Brett, L. J., in Kendall v. Marshall, 11 Q. B. D. on p. 356. Compare also, Ex parte Barrow, 6 Ch. Div. 783; Seymour v. Newton, 105 Mass. 272; Inslee v. Lane, 57 N. H. 454; Wheeling & L. E. R. Co. v. Koontz, 61 Ohio St. 551, 56 N. E. 471, 76 Am. St. 435; Harris v. Tenney, 85 Tex. 254, 20 S. W. 82, 34 Am. St. 796. See also, Jacobs & Garrett v. Bentley, 86 Ark. 186, 110 S. W. 594, 126 Am. St. 1086; Brewer Lumber Co. v. Boston &c. R. Co., 179 Mass. 228, 60 N. E. 548, 54 L. R. A. 435, 88 Am. St. 375. Payment of freight does not conclusively show that transit is ended. Coventry v. Gladstone, L. R. 6 Eq. 44; Reynolds v. Boston &c. R. Co., 43 N. H. 580.

them, the transit is not deemed to be at an end,[32] even though the seller has refused to receive them back.[33] So, the right of stoppage in transitu is not defeated by seizure of the property, before delivery to the buyer, by attachment or the like at the suit of the buyer's creditors.[34]

§ 5075. **When transit is ended.**—If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is ended.[35] So, if, after arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee for the buyer, or his agent, the transit is at an end;[36] and it makes no difference that a further destination may have been indicated by the buyer.[37] The transit is also deemed to be at an end where the carrier, or other bailee, wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf.[38]

[32] Mason v. Wilson, 43 Ark. 172; Greve v. Dunham, 60 Iowa 108, 14 N. W. 130; Tufts v. Sylvester, 79 Maine 213, 9 Atl. 357, 1 Am. St. 303; Grout v. Hill, 4 Gray (Mass.) 361; Morris v. Shryock, 50 Miss. 590; Jenks v. Fulmer, 160 Pa. St. 527, 28 Atl. 841.

[33] Bolton v. Lancashire &c. R. Co., L. R. 1 C. P. 431.

[34] Bayonne Knife Co. v. Umbenhauer, 107 Ala. 496, 18 So. 175, 54 Am. St. 114, and note; Mason v. Wilson, 43 Ark. 172; Blackman v. Pierce, 23 Cal. 508; Buckley v. Furniss, 15 Wend. (N. Y.) 137; Frame v. Oregon Liquor Co., 48 Ore. 272, 85 Pac. 1009; Harris v. Tenney, 85 Tex. 254, 20 S. W. 82, 34 Am. St. 796. See 4 Elliott R. R. (2d ed.), § 1539a, and other cases there cited. So, the right of stoppage in transitu is held superior to that of a trustee in bankruptcy in In re M. Burke & Co., 140 Fed. 971.

[35] Whitehead v. Anderson, 9 M. & W. 518 (intimating that this is true even though the goods are taken from the carrier's possession without consent of the carrier); London & N. W. R. Co. v. Bartlett, 7 H. & N. 400; Kendall v. Marshall, 11 Q. B. D. 356; Secomb v. Nutt, 14 B. Mon. (Ky.) 324; Eaton v. Cook, 32 Vt. 58. The carrier generally has the right to regard the consignee as owner and deliver the goods at another place as directed by him. Cork Distilleries Co. v. Great Southern R. Co., L. R. 7 H. L. 269; The Pennsylvania Co. v. Holderman, 69 Ind. 18.

[36] Foster v. Frampton, 6 B. & C. 107; Langstaff v. Stix, 64 Miss. 171, 1 So. 97, 60 Am. Rep. 49; Hall v. Dimond, 63 N. H. 565, 3 Atl. 423; Williams v. Hodges, 113 N. Car. 36, 18 S. E. 83. And the carrier is not allowed to enlarge the seller's right by wrongfully refusing to deliver or attorn in this way. Bird v. Brown, 4 Exch. 786.

[37] And this seems to be true even though such attornment or change in the character of the bailee's possession is at an intermediate point and not at the final destination. Whitehead v. Anderson, 9 M. & W. 518.

[38] Bird v. Brown, 4 Exch. 786.

§ 5076. **Broken transit.**—It is often difficult to determine what is the appointed destination where goods arrive at a designated place to be transported elsewhere and what is the effect of the action of the party in charge at such intermediate place in giving them a further destination. The answer depends largely upon the intention of the parties to the sale and the authority of the party receiving them at the intermediate point. The best statement of the general test in such cases seems to be as follows: "When an intermediate delivery occurs, before the goods reach their ultimate destination, if the party to whom they are delivered has authority to receive them, and gives to them a new destination not originally intended, the transitu is at an end. They have reached the ultimate destination intended by both buyer and seller. But if the middleman be a mere agent to transmit the goods in accordance with original directions, the vendor's right continues. The rule may be stated as follows: If in the hands of the middleman they require new orders to put them again in motion, and give them another substantive destination—if without such new orders they must continue stationary—then the delivery is complete and the lien of the vendor has expired."[39]

§ 5077. **Rule where part delivery has been made.**—Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.[40] Whether such circumstances exist in a particular case would seem to be, largely at least, a question of fact.

[39] Cabeen v. Campbell, 30 Pa. St. 254. See also, Bethell v. Clark, 20 Q. B. D. 615; Dixon v. Baldwan, 5 East 175; Coates v. Railton, 60 B. & C. 422; Lyons v. Hoffnung, 15 A. C. 391; Kendal v. Marshall, 11 Q. B. D. 356; Ex parte Rosevear China Clay Co., 11 Ch. D. 560; Valpy v. Gibson, 4 C. B. 837; Aguirre v. Parmelee, 22 Conn. 473; Johnson v. Eveleth, 93 Maine 306, 45 Atl. 35, 48 L. R. A. 50; Brooke Iron Co. v. O'Brien, 135 Mass. 442; Mohr v. Boston & A. R. Co., 106 Mass. 67; Frame v. Oregon Liquor Co., 48 Ore. 272, 85 Pac. 1009; Diehl v. McCormick, 143 Pa. St. 584, 22 Atl. 1033; Guilford v. Smith, 30 Vt. 49.

[40] Kemp v. Falk, 7 A. C. 573; Bolton v. Lancashire & Yorkshire R. Co., L. R. 1 C. P. 431; Ex parte Cooper, 11 Ch. D. 68; Johnson v. Eveleth, 93 Maine 306, 45 Atl. 35, 48 L. R. A. 50; Buckley v. Furniss, 17 Wend. (N. Y.) 504; Jeffris v. Fitchburg R. Co., 93 Wis. 250, 67 N. W. 424, 33 L. R. A. 351, 57 Am. St. 919.

§ 5078. **How right of stoppage may be exercised.**—The unpaid seller may exercise his right of stoppage in transitu either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodier in whose possession the goods are.[41] Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may prevent a delivery to the buyer.[42] When notice of stoppage in transitu is given by the seller to the carrier, or other bailee or custodier in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such redelivery must be borne by the seller.[43] Payment or tender may have to be made of accrued charges for freight or storage;[44] and the American Sales Act provides that if a negotiable document of title has been issued by the carrier or bailee he is not bound or even justified in delivering the goods to the seller without its surrender for cancelation.[45]

§ 5079. **Resale by seller.**—Where the goods are of a perishable nature,[46] or where the seller expressly reserves the right

[41] Durgy Cement &c. Co. v. O'Brien, 123 Mass. 12 (stoppage on behalf of seller by unauthorized person held effectual if ratified before end of transit); Reynolds v. Boston & M. R. Co., 43 N. H. 580; Poole v. Houston & T. C. R. Co., 58 Tex. 134; Chandler v. Fulton, 10 Tex. 2, 60 Am. Dec. 188. See Snee v. Prescott, 1 Atk. 248; Whitehead v. Anderson, 9 M. & W. 518.

[42] Whitehead v. Anderson, 9 M. & W. 518. See also, Litt v. Cowley, 7 Taunt. 169; Ex parte Watson, 5 Ch. D. 35; Poole v. Houston & T. C. R. Co., 58 Tex. 134. Notice to the buyer himself is not sufficient. Rucker v. Donovan, 13 Kans. 251, 19 Am. Rep. 84; Mottram v. Heyer, 5 Denio (N. Y.) 629. No particular form of notice is required. Jones v. Earl, 37 Cal. 630, 99 Am. Dec. 338; Rucker v. Donovan, 13 Kans. 251, 19 Am. Rep. 84; Allen v. Maine Cent. R. Co., 79 Maine 327, 9 Atl. 895, 1 Am. St. 310; Reynolds v. Boston & M. R. Co., 43 N. H. 580. See also, Clementson v. Grand Trunk R. Co., 42 U. C. Q. B. 263.

[43] The Tigress, 32 L. J. Adm. 97; Pontifex v. Midland R., 3 Q. B. Div. 23; Jones v. Earl, 37 Cal. 630, 99 Am. Dec. 338; Bloomingdale v. Memphis &c. R. Co., 6 Lea (Tenn.) 616. See also, The E. H. Pray, 27 Fed. 474; The Vidette, 34 Fed. 396.

[44] Pennsylvania Steel Co. v. Georgia Railroad & Banking Co., 94 Ga. 636, 21 S. E. 577; Potts v. New York &c. R. Co., 131 Mass. 455, 41 Am. Rep. 247; Hays v. Mouille, 14 Pa. St. 48; Pennsylvania R. Co. v. American Oil Works, 126 Pa. St. 485, 17 Atl. 671, 12 Am. St. 885.

[45] American Uniform Sales Act, § 59. See also, Newhall v. Central Pac. R. Co., 51 Cal. 345, 21 Am. Rep. 713.

[46] MacLean v. Dunn, 4 Bing. 722; Camp v. Hamlin, 55 Ga. 259; Ull-

of resale in case the buyer should make default,[47] or where the buyer has been in default in the payment of the price an unreasonable time (at least if the seller has given notice to the buyer of intention to resell), the unpaid seller who has a right of lien thereon as such or has stopped the goods in transitu may resell them[48] and is not liable thereafter to the original buyer upon the contract, nor for any profits made by such resale,[49] but may recover from the original buyer damages for loss caused by such buyer's breach of contract.[50] The English law has been somewhat uncertain on this subject where the goods are not perishable and there is no express provision for resale, and the rule as above stated is not perhaps fully in accord with the English decisions.[51] Upon the question of notice of intention to resell there is also some conflict in this country, but the weight of authority is said to be that notice of an intention to resell is not absolutely necessary, and this is the rule stated in the American Sales Act.[52] All the authorities practically agree that, no mat-

mann v. Kent, 60 Ill. 271; Clore v. Robinson, 100 Ky. 402, 18 Ky. L. 851, 38 S. W. 687; Grist v. Williams, 111 N. Car. 53, 15 S. E. 889, 32 Am. St. 782; Sands v. Taylor, 5 Johns. (N. Y.) 395, 4 Am. Dec. 374. See also, Descalzi v. William S. Sweet & Son, 30 R. I. 320, 75 Atl. 308, 27 L. R. A. (N. S.) 932n, 136 Am. St. 961.

[47] Lamond v. Davall, 9 Q. B. 1030.

[48] North Georgia Milling Co. v. Henderson Elevator Co., 130 Ga. 113, 60 S. E. 258, 24 L. R. A. (N. S.) 235n; Ridgley v. Mooney, 16 Ind. App. 362, 45 N. E. 348; Van Brocklen v. Smeallie, 140 N. Y. 70, 35 N. E. 415; Tuthill v. Skidmore, 124 N. Y. 148, 26 N. E. 348, and cases there cited; Arnold v. Carpenter, 16 R. I. 560, 18 Atl. 174, 5 L. R. A. 357; Pratt v. S. Freeman & Sons Mfg. Co., 115 Wis. 648, 92 N. W. 368.

[49] Warren v. Buckminster, 24 N. H. 336; Bridgford v. Crocker, 60 N. Y. 627.

[50] Slaughter v. Marlow, 3 Ariz. 429, 31 Pac. 547 (expenses of sale included); Darby v. Hall, 3 Pennew. (Del.) 25, 50 Atl. 64; White Walnut Coal Co. v. Crescent Coal & Mining Co. (Ill.), 98 N. E. 669; Roebling Sons' Co. v. Lock-Stitch Fence Co., 130 Ill. 660, 22 N. E. 518; Ingram v. Wackernagel, 83 Iowa 82, 48 N. W. 998; Putnam v. Glidden, 159 Mass. 47, 34 N. E. 81, 38 Am. St. 394; Sands v. Taylor, 5 Johns. (N. Y.) 395, 4 Am. Dec. 374; Dustan v. McAndrew, 44 N. Y. 72; Moore v. Potter, 155 N. Y. 481, 50 N. E. 271, 63 Am. St. 692; Diem v. Koblitz, 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. 531; Phelps v. Hubbard, 51 Vt. 489; Neis v. O'Brien, 12 Wash. 358, 41 Pac. 59, 50 Am. St. 894; Gehl v. Milwaukee Produce Co., 105 Wis. 573, 81 N. W. 666 (but not commission for seller's own services).

[51] Benj. Sales (5th Eng. ed.) 949.

[52] Willston on Sales, § 548; Uniform Sales Act, § 60. Professor Willston cites the following authorities as holding notice of intention unnecessary: Davis Sulphur Ore Co. v. Atlanta Guano Co., 109 Ga. 607, 34 S. E. 1011; Ullmann v. Kent, 60 Ill. 271; Wrigley v. Cornelius, 162 Ill. 92, 44 N. E. 406; Redmond v. Smock, 28 Ind. 365; Ridgley v. Mooney, 16 Ind. App. 362, 45 N. E. 348; Dill v. Mumford, 19 Ind. App. 609, 49 N. E. 861; Nelson v. Hirsch & Sons Iron & Rail Co., 102 Mo. App. 498, 77 S. W. 590; Van Brocklen v. Smeallie, 140

ter whether notice of intention to resell is always required or not, there is no absolute legal requirement that notice of the time and place of resale should be given.[53] It is certainly safer and better, however, to give notice of intention to resell when feasible, and also notice of the time and place, since it may be important on the questions of good faith and amount of damages and also upon the question as to whether the buyer had been in default an unreasonable time before the resale.[54]

§ 5080. **Manner of resale.**—The time and manner of resale depend somewhat upon the nature of the goods and the circumstances of the particular case. Good faith must be observed and the sale should be made within a reasonable time and so as to produce the fair value of the goods;[55] but the seller is not bound to sell at the contract place of delivery nor within the contract time.[56] A private sale may be sufficient, though it is

N. Y. 70, 35 N. E. 415; Woldert v. Arledge, 4 Tex. Civ. App. 692, 23 S. W. 1052; Rosenbaums v. Weeden, 18 Grat. (Va.) 785, 98 Am. Dec. 737; Pratt v. S. Freeman & Sons Mfg. Co., 115 Wis. 648, 92 N. W. 368. But some of these decisions, such as the Georgia case and those from Indiana, seem to be contra, and one or two of the others do not seem to support his statement. Compare, however, Wallace v. Coons (Ind. App.), 95 N. E. 132; West v. Cunningham, 9 Port. (Ala.) 104, 33 Am. Dec. 300; Atwood v. Lucas, 53 Maine 508, 89 Am. Dec. 713. The following decisions are cited by Prof. Willston as requiring notice of intention: Magnes v. Sioux City Nursery & Seed Co., 14 Colo App. 219, 59 Pac. 879; Clore v. Robinson, 100 Ky. 402, 18 Ky. L. 851, 38 S. W. 687; Mann v. National Linseed Oil Co., 87 Hun (N. Y.) 558, 68 N. Y. St. 488, 34 N. Y. S. 481; Waples v. Overaker, 77 Tex. 7, 13 S. W. 527, 19 Am. St. 727. But these cases are not all clearly to that effect. On the contrary, the first and last leave it undecided whether notice is ever necessary and hold that it was not necessary under the particular circumstances. Compare, however, Hickock v. Hoyt, 33 Conn. 553; Brady v. Isler, 9 Lea (Tenn.) 356; Winslow v. Harriman Iron Co. (Tenn.), 42 S. W. 698; Leonard v. Portier, 4 Willson Civ. Cas. Ct. App. (Tex.), § 55, 15 S. W. 414; Long v. Preston, 2 M. & P. 262, 17 E. C. L. 205.

[53] Holland v. Rea, 48 Mich. 218, 12 N. W. 167; Pollen v. Le Roy, 30 N. Y. 549; Gaskell v. Morris, 7 Watts & S. (Pa.) 32; Rosenbaums v. Weeden, 18 Grat. (Va.) 785, 98 Am. Dec. 737; American Hide &c. Co. v. Chalkley, 101 Va. 458, 44 S. E. 705.

[54] See Mendel v. Miller, 126 Ga. 834, 56 S. E. 88, 7 L. R. A. (N. S.) 1184; Dill v. Mumford, 19 Ind. App. 609, 49 N. E. 861; Ackerman v. Rubens, 167 N. Y. 405, 60 N. E. 750, 53 L. R. A. 867, 82 Am. St. 728; Pratt v. S. Freeman & Sons Mfg. Co., 115 Wis. 648, 92 N. W. 368.

[55] Alden Speare's Sons Co. v. Hubinger, 129 Fed. 538, 64 C. C. A. 68; Morris v. Wibaux, 159 Ill. 627, 43 N. E. 837; Saladin v. Mitchell, 45 Ill. 79; Smith v. Pettee, 70 N. Y. 13; Lewis v. Greider, 51 N. Y. 231; Brooke v. Laurens Mill Co., 78 S. Car. 200, 58 S. E. 806, 125 Am. St. 780; Clews v. Jamieson, 182 U. S. 461, 45 L. ed. 1183, 21 Sup. Ct. 845.

[56] North Georgia Milling Co. v. Henderson Elevator Co., 130 Ga. 113, 60 S. E. 258, 24 L. R. A. (N. S.) 235n; White Walnut Co. v. Crescent Coal &c. Co. (Ill.), 98 N. E. 669.

safer to make the sale by outcry to the highest bidder.[57] In such case the seller himself may become the purchaser if everything is fair.[58]

§ 5081. **Rescission by unpaid seller.**—The American Sales Act contains the following statement of the law as to rescission by an unpaid seller: "An unpaid seller having a right of lien or having stopped the goods in transitu, may rescind the transfer of title and resume the property in the goods, where he expressly reserved the right to do so in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale. The transfer of title shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer or by some other overt act an intention to rescind. It is not necessary that such overt act should be communicated to the buyer, but the giving or failure to give notice to the buyer of the intention to rescind shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the right of rescission was asserted." This is not supported by the English authorities, but, on the contrary, carries the doctrine of rescission by the seller further than the English law permits. It is believed, however, to be a fair statement of the rule that generally obtains in this country.[59] The American Uniform Sales Act further provides that where goods have not been delivered to the buyer, and the buyer has repudiated the contract, or sale, or has manifested his inability to perform his obligations thereunder, or has com-

[57] Ackerman v. Rubens, 167 N. Y. 405, 60 N. E. 750, 53 L. R. A. 867, 82 Am. St. 728.

[58] Moore v. Potter, 155 N. Y. 481, 50 N. E. 271, 63 Am. St. 692; Strickland v. McCulloch, 8 N. S. Wales 324. See also, Judd Linseed &c. Oil Co. v. Kearney, 14 La. Ann. 352. But compare Strauss v. Labsap, 59 Mo. App. 260.

[59] Stafsky v. Southern R. Co., 143 Ala. 272, 39 So. 132; Magnes v. Sioux City Seed Co., 14 Colo. App. 219, 225, 59 Pac. 879; Barr v. Logan, 5 Har. (Del.) 52; Hayes v. Nashville, 80 Fed. 641, 26 C. C. A. 59; Habeler v. Rogers, 131 Fed. 43, 65 C. C. A. 281; Bagley v. Findlay, 82 Ill. 524; Putnam v. Glidden, 159 Mass. 47, 34 N. E. 81, 38 Am. St. 394; Dustan v. McAndrews, 44 N. Y. 72. But compare Page v. Cowasjee Eduljee, L. R. 1 P. C. 127; Martindale v. Smith, 1 Q. B. 389.

mitted a material breach thereof, the seller may totally rescind the contract or sale by giving notice of his election so to do to the buyer.[60] This probably carries the doctrine of rescission further in this connection than the English law permits,[61] but it seems to be supported by a number of decisions in this country.[62] This is undoubtedly true where there has been a clear repudiation of the entire contract by the purchaser.[63] But it is held in a recent case that there can be no anticipatory breach of a contract by one party without the consent of the other and that the repudiation by the buyer without the acquiescence of the seller did not put an end to the contract; that the title had passed to the buyer by delivery to the carrier designated and that the seller could recover the contract-price under the Sales Act, although it was said that if he had received them back he could not recover the price without having notified the buyer that the goods were held by the seller as the buyer's bailee.[64] If the contract is not

[60] Uniform Sales Act, § 65.

[61] Ehrensperger v. Anderson, 3 Ex. 148. See also, Monarch Cycle Mfg. Co. v. Royer Wheel Co., 105 Fed. 324, 44 C. C. A. 523; West v. Bechtel, 125 Mich. 144, 84 N. W. 69, 51 L. R. A. 791, reviewing English and other cases.

[62] Porter v. Arrowhead Reservoir Co., 100 Cal. 500, 35 Pac. 146 (Default in payment of a contract for work is a breach justifying a rescission and action of quantum meruit by the contractor.); San Francisco Bridge Co. v. Dunbarton Land &c. Co., 119 Cal. 272, 51 Pac. 335 (contract for work); Campbell Printing Press &c. Co. v. Marsh, 20 Colo. 22, 36 Pac. 799; King v. Faist, 161 Mass. 449, 37 N. E. 456; Ballou v. Billings, 136 Mass. 307; Reybold v. Voorhees, 30 Pa. St. 116; Meeker v. Johnson, 5 Wash. 718, 32 Pac. 772, 34 Pac. 148. See also, Cresswell Ranch &c. Co. v. Martindale, 63 Fed. 84, 11 C. C. A. 33; Loudenback Fertilizer Co. v. Tennessee Phosphate Co., 121 Fed. 298, 58 C. C. A. 220, 61 L. R. A. 402; Johnson Forge Co. v. Leonard, 3 Pennew. (Del.) 342, 51 Atl. 305, 57 L. R. A. 225, 94 Am. St. 86. "There are also cases of sales providing for consecutive deliveries, where, after a portion of the goods have been delivered, the purchaser renounces the contract and refuses to accept further deliveries, in which the seller is permitted to regard the contract as at an end and to recover on a quantum valebat for the goods delivered and accepted." Bates-Street Shirt Co. v. Place (N. H.), 84 Atl. 47, 50, citing Tyson v. Doe, 15 Vt. 571; Bartholomew v. Warwick, 15 C. B. (N. S.) 711.

[63] See authorities cited in last preceding note; also, Bartholomew v. Markwick, 15 C. B. (N. S.) 711; Rayfield v. Van Meter, 120 Cal. 416, 52 Pac. 666; Johnson Forge Co. v. Leonard, 3 Pennew. (Del.) 342, 51 Atl. 305, 157 L. R. A. 225, 94 Am. St. 86; Monarch Cycle Mfg. Co. v. Royer Wheel Co., 105 Fed. 324, 44 C. C. A. 523; King v. Faist, 161 Mass. 449, 37 N. E. 456; West v. Bechtel 125 Mich. 144, 84 N. W. 69, 51 L. R. A. 791; Heiser v. Mears, 120 N. Car. 443, 27 S. E. 117; J. K. Armsby Co. v. Grays Harbor &c. Co. (Ore.), 123 Pac. 32; Ault v. Dustin, 100 Tenn. 366, 45 S. W. 981; The Schooner Treasurer, 1 Sprague (U. S.) 473.

[64] Home Pattern Co. v. W. W. Mertz Co. (Conn.), 86 Atl. 19.

divisible and a part of the goods has been delivered, but the seller is not entitled to sue on the contract because it has not been complied with, yet if this is because the buyer has repudiated it, the seller may recover the value of what he has delivered.[65] But, as elsewhere shown, where the goods are sold on credit, it is generally held that the seller cannot so recover before the term of credit has expired.

§ 5082. Effect of buyer's sale of goods subject to lien or right of stoppage—Negotiation of document of title.—The unpaid seller's right of lien or stoppage in transitu is not, in general, affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto;[66] and it would seem that the assent must be such as, under the circumstances, amounts to an attornment or delivery to the sub-buyer,[67] or to an estoppel.[68] But where a document of title has been issued for the goods, such, for instance, as a bill of lading, the seller's lien or right of stoppage in transitu may be defeated or rendered subject to the right of a bona fide purchaser of the document for value, at least, if it is a negotiable document. The law in England, and in some jurisdictions in this country, seems to make no distinction between negotiable and non-negotiable documents of title but regards either when indorsed as a symbolical delivery. And the rule is stated as follows in the English Sale of Goods Act: "Where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfer the document

[65] Mavor v. Pyne, 3 Bing. 285; Bartholomew v. Markwick, 15 C. B. (N. S.) 711; Thompson v. Gaffey, 52 Nebr. 317, 72 N. W. 314; Person v. Stoll, 72 App. Div. (N. Y.) 141, 76 N. Y. S. 324, affd. 174 N. Y. 548, 67 N. E. 1089; Wellston Coal Co. v. Franklin Paper Co., 57 Ohio St. 182, 48 N. E. 888. Compare also, Lake Shore &c. R. Co. v. Richards, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33; Purcell Co. v. Sage, 200 Ill. 242, 65 N. E. 723.

[66] Dixon v. Yates, 5 B. & Ad. 313; Farmiloe v. Bain, 1 C. P. D. 445; McElwee v. Metropolitan Lumber Co., 69 Fed. 302, 16 C. C. A. 232; Milliken v. Warren, 57 Maine 46; Keeler v. Goodwin, 111 Mass. 490; Anderson v. Read, 106 N. Y. 333, 13 N. E. 292. See also, Craven v. Ryder, 6 Taunt. 433; Ellis v. Hunt, 3 T. R. 464; Pattison v. Culton, 33 Ind. 240, 5 Am. Rep. 199; Seymour v. Newton, 105 Mass. 272; United States Engine Co. v. Oliver, 16 Nebr. 612, 614.

[67] Stoveld v. Hughes, 14 East 308; Pearson v. Dawson, E. B. & E. 448.

[68] Woodley v. Coventry, 2 H. & C. 164; Knight v. Wiffen, L. R. 5 Q. B. 660; Robinson v. Morgan, 65 Vt. 37, 25 Atl. 899.

to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage in transitu is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transitu can only be exercised subject to the rights of the transferee."[69] But the provision on the subject in the American Uniform Sales Act, § 62, is as follows: "If, however, a negotiable document of title has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the right of any purchaser for value in good faith to whom such document has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier or other bailee who issued such document, of the seller's claim to a lien or right of stoppage in transitu."[70]

[69] In re Westzinthus, 5 B. & Ad. 817; Spalding v. Ruding, 6 Beav. 376; Kemp v. Falk, 7 App. Cas. 573; Chandler v. Fulton, 10 Tex. 2, 60 Am. Dec. 188.

[70] See as to seller's right to rescind generally for failure to pay for instalment as delivered, Quarton v. American Law Book Co., 143 Iowa 517, 121 N. W. 1009, 32 L. R. A. (N. S.) 1, and note.

CHAPTER CLX.

ACTIONS FOR BREACH—REMEDIES OF SELLER ON THE CONTRACT.

§ 5090. Generally — Affirming or rescinding—Election of remedies.
5091. Seller's action for price where title has passed.
5092. Recovery of price where title has not passed.
5093. Seller's action for price where it is payable on a day certain.
§ 5094. Action for nonacceptance.
5095. Measure of damages in action for nonacceptance.
5096. Rule where buyer repudiates contract and notifies seller to go no further—Anticipatory breach.

§ 5090. Generally—Affirming or rescinding—Election of remedies.—In considering the rights of the unpaid seller against the goods, it was indicated that either party to a sale or contract of sale might have more than one remedy open to him, and, incidentally, it was shown that the seller might rescind in a proper case, or might seek his remedy against the buyer on the contract even where he had no remedy against the goods. But he may have to elect and cannot both affirm the sale and deny it.[1] He has a right, of course, to rescind for fraud or the like where he acts in time and is not estopped, just as a party to a contract has in other cases.[2] And a purchase of goods by one who at the time knew he was not able to pay for them and intended not to

[1] Stuart v. Hayden, 72 Fed. 402, 18 C. C. A. 618, affd. in 169 U. S. 1, 42 L. ed. 639, 1204, 18 Sup. Ct. 274; O'Donald v. Constant, 82 Ind. 212; Bach v. Tuch, 126 N. Y. 53, 26 N. E. 1019; James Music Co. v. Bridge, 134 Wis. 510, 114 N. W. 1108. See also, Clough v. London &c. R. Co., L. R. 7 Exch. 26; Pike's Peak Paint Co. v. Masury, 19 Colo. App. 286, 74 Pac. 796; Kearney Mill & Elevator Co. v. Union Pac. R. Co., 97 Iowa 719, 66 N. W. 1059, 59 Am. St. 434; Byrd v. Rautman, 85 Md. 414, 36 Atl. 1099; Bullock v. Ueberroth, 121 Mich. 293, 80 N. W. 39; Joslin v. Cowee, 52 N. Y. 90; Powers v. Benedict, 88 N. Y. 605. See also, Boyd v. Second Hand Supply Co., (Ariz.) 123 Pac. 619. But compare Cohoon v. Fisher, 146 Ind. 583, 44 N. E. 664, 45 N. E. 787, 36 L. R. A. 193; Woonsocket Rubber Co. v. Loewenberg, 17 Wash. 29, 48 Pac. 785, 61 Am. St. 902 (delay or assuming validity of transaction will not prevent rescission where fraud not then discovered).

[2] Merritt v. Robinson, 35 Ark. 483; Judd v. Weber, 55 Conn. 267, 11 Atl. 40; Stevenson v. Marble, 84 Fed. 23;

do so is such fraud as entitles the seller to avoid the sale.[3] Or, he may have an action for damages for deceit in a proper case.[4] But, for the reason that the law upon this subject has no peculiar application to sales, it is not here considered in detail. The subject of this chapter is that of the remedies of the seller on the contract rather than that of his remedy where he rescinds or seeks to avoid the contract for fraud, duress, mistake or the like. The effect of fraud, duress or mistake has already been sufficiently treated in another volume of this work. It may be well to add, however, in concluding this general outline of the seller's remedies against the seller, that, in many jurisdictions, the seller, even in the comparatively limited class of cases where goods contracted for are tendered by him and the buyer refuses to take them, ordinarily has the choice of any one of three remedies. (1) He may store or retain the property for the buyer and sue him for the entire purchase-price; (2) he may sell the property, acting as agent of the buyer for this purpose, and recover the difference between the contract-price and the price thus obtained; or (3) he may keep the property as his own and recover the difference between the market-price or value at the time and place of delivery and the contract-price.[5]

Hacker v. Munroe, 176 Ill. 384, 52 N. E 12; Nichols v. Michael, 23 N. Y. 264, 80 Am. Dec. 259; Bliss v. Sickles, 142 N. Y. 647, 36 N. E. 1064; Crossen v. Murphy, 31 Ore. 114, 49 Pac. 858; Schultheis v. Sellers, 223 Pa. St. 513, 72 Atl. 887, 22 L. R. A. (N. S.) 1210; Gainesville Nat. Bank v. Bamberger, 77 Tex. 48, 13 S. W. 959, 19 Am. St. 738; Turner v. Ward, 154 U. S. 618, 23 L. ed. 391, 14 Sup. Ct. 1179; Woonsocket Rubber Co. v. Loewenberg, 17 Wash. 29, 48 Pac. 785, 61 Am. St. 902; Hart v. Moulton, 104 Wis. 349, 80 N. W. 599, 76 Am. St. 881. See, as to election of remedies, note to Union Cent. Life Ins. Co. v. Schidler (130 Ind. 214, 29 N. E. 1071) in 15 L. R. A. 89.

[3] Patton v. Campbell, 70 Ill. 72; Farwell v. Hanchett, 120 Ill. 573, 11 N. E. 875; Peninsular Stove Co. v. Ellis, 20 Ind. App. 491, 51 N. E. 105; Reid v. Cowduroy, 79 Iowa 169, 44 N. W. 351, 18 Am. St. 359, and note; Skinner v. Michigan Hoop Co., 119 Mich. 467, 78 N. W. 547, 75 Am. St. 413; Talcott v. Henderson, 31 Ohio St. 162, 27 Am. Rep. 501, and extended note. See also, Jaffrey v. Brown, 29 Fed. 476; Fechheimer v. Baum, 37 Fed. 167, 2 L. R. A. 153, and note.

[4] Andrews v. Jackson, 168 Mass. 266, 47 N. E. 412, 37 L. R. A. 402, 60 Am. St. 390. See also, Binghampton Trust Co. v. Auten, 68 Ark. 294, 57 S. W. 936, 82 Am. St. 295 (right of defrauded purchaser to elect to rescind or sue for damages for fraud); Cottrill v. Crum, 100 Mo. 397, 13 S. W. 753, 18 Am. St. 549, and note; Elliott v. Brady, 192 N. Y. 221, 85 N. E. 69, 18 L. R. A. 600n, 127 Am. St. 898.

[5] J. George Leyner Engineering Works Co. v. Mohawk Consol. Leasing Co., 193 Fed. 745; Kinkead v. Lynch, 132 Fed. 692; White Walnut Coal Co. v. Crescent Coal &c. Co., 162 Ill. App. 353, affd. in 254 Ill. 368, 98 N. E. 669; Dustan v. McAn-

§ 5091. Seller's action for price where title has passed.—Where the property in the goods has passed to the buyer and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against the buyer for the price of the goods.[6] This is self-evident, and is universally conceded. But where the goods are sold on unconditional credit the seller cannot, ordinarily at least, maintain an action for the price before the time of credit has expired.[7] Yet where by the contract payment of the whole or part of the price is deferred, and the buyer is to give a note or the like for the deferred payment, and fails to do so, the seller may maintain an action for breach of the contract before the expiration of the time of credit.[8]

drew, 44 N. Y. 72; Mason v. Decker, 72 N. Y. 595, 28 Am. Rep. 190; Moore v. Potter, 155 N. Y. 481, 50 N. E. 271, 63 Am. St. 692. See also, Bagley v. Findlay, 82 Ill. 524; Shawham v. Van Nest, 25 Ohio St. 490, 18 Am. Rep. 313. And compare, generally, Georgia Agr. Works v. Price (Ga. App.), 74 S. E. 718; Sims v. Bolton, 138 Ga. 576, 74 S. E. 770 (must notify purchaser of intent to resell). See also, Boyd v. Second Hand Supply Co. (Ariz.), 123 Pac. 619 (when seller may treat contract as broken and recover damages or treat it as existing and recover price, or treat it as rescinded and recover goods); Whittington v. Stanton (Fla.), 58 So. 489; Faulk v. Richardson (Fla.), 57 So. 666; Ridden v. Lynch, 133 N. Y. S. 468. The right to store or retain the property for the vendee and sue him for the entire price is held not to exist where the contract gives the buyer the right to select from different kinds of goods therein specified, and no selection has been made. Albany Mill Supply Co. v. United Roofing &c. Co. (Ga. App.), 77 S. E. 829.

[6] Scott v. England, 2 Dowl. & L. 520; Olcese v. Mobile Fruit & Trading Co., 211 Ill. 539, 71 N. E. 1084; Armstrong v. Turner, 49 Md. 589; Mitchell v. Le Clair, 165 Mass. 308, 43 N. E. 117; Meagher v. Cowing, 149 Mich. 416, 112 N. W. 1074; Wood v. Michaud, 63 Minn. 478, 65 N. W. 963; Hayden v. Demets, 53 N. Y. 426. This is also stated or impliedly conceded in the authorities cited in the notes to the next following section.

[7] Tatum v. Ackerman, 148 Cal. 357, 83 Pac. 151, 113 Am. St. 276, 3 L. R. A. (N. S.) 908, and notes; Hunt v. Markle, 12 Ind. App. 335, 40 N. E. 151; Dellone v. Hull, 47 Md. 112; Bates-Street Shirt Co. v. Place (N. H.), 84 Atl. 47 (criticising Inman Mfg. Co. v. American Cereal Co., 124 Iowa 737, 100 N. W. 860, as overlooking the distinction between an action for nonacceptance and one for the agreed price); Keller v. Strasburger, 90 N. Y. 379; Tucker v. Billing, 3 Utah 82, 5 Pac. 554. But see in case of fraud, etc., Wilson v. Foree, 6 Johns. (N. Y.) 110, 5 Am. Dec. 195; Heilbronn v. Herzog, 165 N. Y. 98, 58 N. E. 759; Jaffray v. Wolf, 4 Okla. 303, 47 Pac. 496; Jones v. Brown, 167 Pa. St. 395, 31 Atl. 647.

[8] Paul v. Dodd, 2 C. B. 800; Mussen v. Price, 4 East 147; Carnahan v. Hughes, 108 Ind. 225, 9 N. E. 79; Barron v. Mullin, 21 Minn. 374; Hanna v. Mills, 21 Wend. (N. Y.) 90; Nichols v. Scranton Steel Co., 137 N. Y. 471, 33 N. E. 561; Stephenson v. Repp, 47 Ohio St. 551, 25 N. E. 803, 10 L. R. A. 620; Girard v. Taggart, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327; Foster v. Adams, 60 Vt. 392, 15 Atl. 169, 6 Am. St. 120.

§ 5092. **Recovery of price where title has not passed.**—It seems that in England, and in a number of jurisdictions in this country, an action for the price cannot be maintained unless the property has passed. The weight of authority is probably to this effect.[9] This seems to be logically correct and it would appear to be an anomaly and at variance with strict legal principles to permit the seller to force title upon the buyer by merely electing to do so. But where the buyer is in default in wrongfully refusing to take title when properly offered to him there is much reason in justice for permitting the seller to recover the purchase-price, and this rule has been adopted in many jurisdictions, especially where the goods are of a peculiar kind not readily salable in the market.[10] In a very recent case goods were delivered to a carrier and the bill of lading duly forwarded so as to pass title to the buyer who refused to receive them. It was held that this did not revest title in the seller, and that he should be allowed to recover the contract-price under the Sales Act, but it was said that if he had received them back he could not recover the con-

[9] Atkinson v. Bell, 8 B. & C. 277; Deere Plow Co. v. Gorman, 9 Kans. App. 675, 59 Pac. 177; Moody v. Brown, 34 Maine 107, 56 Am. Dec. 640; Greenleaf v. Gallagher, 93 Maine 549, 45 Atl. 829, 74 Am. St. 371; Tufts v. Bennett, 163 Mass. 398, 40 N. E. 172; McCormick Harvesting Mach. Co. v. Balfany, 78 Minn. 370, 81 N. W. 10, 79 Am. St. 393; Backes v. Schlick, 82 Nebr. 289, 117 N. W. 707; Unexcelled Fire Works Co. v. Polites, 130 Pa. St. 536, 18 Atl. 1058, 17 Am. St. 788; Puritan Coke Co. v. Clark, 204 Pa. 556, 54 Atl. 350; Tufts v. Lawrence, 77 Tex. 526, 14 S. W. 165; Rider v. Kelley, 32 Vt. 268, 76 Am. Dec. 176; American Hide & Leather Co. v. Chalkley, 101 Va. 458, 4 S. E. 705; Acme Food Co. v. Older, 64 W. Va. 255, 61 S. E. 235, 17 L. R. A. (N. S.) 807, and note. See also, Morris v. Cohn, 55 Ark. 401, 17 S. W. 342, 18 S. W. 384; Grier v. Simpson, 8 Houst. (Del.) 7, 31 Atl. 587; Singer Mfg. Co. v. Cheney, 21 Ky. L. 550, 51 S. W. 813; Dohnan v. Studebaker, 52 Ind. 286; Pittsburgh, C. & St. L. R. Co. v. Heck, 50 Ind. 303, 19 Am. Rep. 713; Hamilton v. Finnegan, 117 Iowa 623, 91 N. W. 1039; Fairbanks, Morse & Co. v. Heltsley, 135 Ky. 397, 122 S. W. 198, 26 L. R. A. (N. S.) 248; Frederick v. Willoughby, 136 Mo. App. 244, 116 S. W. 1109; Massman v. Steiger, 79 N. J. L. 442, 75 Atl. 746; Dowagiac Mfg. Co. v. Mahon, 13 N. Dak. 516, 101 N. W. 903. See to effect that seller may maintain trover as for conversion where the sale is for cash on delivery and the buyer uses the property and fails to pay, Allen Lumber Co. v. Higuera (Vt.), 85 Atl. 979.

[10] Magnes v. Sioux City Nursery & Seed Co., 14 Colo. App. 219, 59 Pac. 879; Bond v. Bourk (Colo.), 129 Pac. 223; Kinkhead v. Lynch, 132 Fed. 692; Habeler v. Rogers, 131 Fed. 43, 65 C. C. A. 281; Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869; Rastetter v. Reynolds, 160 Ind. 133, 66 N. E. 612; Moline Scale Co. v. Beed, 52 Iowa 307, 3 N. W. 96, 35 Am. Rep. 272; McCormick Harvesting Mach. Co. v. Markert, 107 Iowa 340, 78 N. W. 33; Black River Lumber Co. v. Warner, 93 Mo. 374, 6 S. W. 210; Bement v. Smith, 15 Wend. (N. Y.) 493 (probably put on wrong ground); Dustan v. McAndrew, 44 N. Y. 72;

tract-price without notice to the buyer that such seller held them as the buyer's bailee.[11]

§ 5093. Seller's action for price where it is payable on a day certain.—Where the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.[12] But there may be cases where it would be unjust to apply this rule because the seller has repudiated the contract or it is clear that he cannot or will not perform when the time comes for performance on his part.[13]

§ 5094. Action for nonacceptance.—Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for nonacceptance.[14] In many jurisdictions this is usually the sole remedy in such a case where the seller is prevented by the buyer

Ackerman v. Rubens, 167 N. Y. 405, 60 N. E. 750, 53 L. R. A. 867, 82 Am. St. 728; Atkinson v. Truesdell, 127 N. Y. 230, 27 N. E. 844; Rhodes v. Mooney, 43 Ohio St. 421, 4 N. E. 233; Haynes v. Brown, 18 Okla. 389, 89 Pac. 1124; Smith v. Wheeler, 7 Ore. 49, 33 Am. Rep. 698; Pratt v. S. Freeman & Sons Mfg. Co., 115 Wis. 648, 92 N. W. 368. See also, Darby v. Hall, 3 Pennew. (Del.) 25, 50 Atl. 64; Rounsaville v. Leonard Mfg. Co., 127 Ga. 735, 56 S. E. 1030 (under statute); Bell v. Offutt, 10 Bush (Ky.) 632; Ballentine v. Robinson, 46 Pa. St. 177. But the seller must have delivered the property or done such acts as would have vested the title in the vendee if he had consented to accept, or, in other words, everything required of the vendor to pass the title must have been done. Shipp v. Atkinson, 8 Ind. App. 505, 36 N. E. 375; Dwiggins v. Clark, 94 Ind. 49, 48 Am. Rep. 140; Pate v. Ralston (Iowa), 139 N. W. 906.

[11] Home Pattern Co. v. W. W. Mertz Co. (Conn.), 86 Atl. 19.

[12] Dunlop v. Grote, 2 C. & K. 158; Burnley v. Tufts, 66 Miss. 48, 5 So. 627, 14 Am. St. 540. See also, White v. Solomon, 164 Mass. 516, 42 N. E. 104, 30 L. R. A. 537; Krebs Hop Co. v. Livesley, 51 Ore. 527, 92 Pac. 1084. And compare Morris v. Cohn, 55 Ark. 401, 17 S. W. 342, 18 S. W. 384; Smith v. Aldrich, 180 Mass. 367, 62 N. E. 381; Haynes v. Temple, 198 Mass. 372, 84 N. E. 467.

[13] Willston Sales, §§ 560, 576-578; Gray v. Smith, 83 Fed. 824, 28 C. C. A. 168; Gerli v. Poidebard Silk Mfg. Co., 57 N. J. L. 432, 31 Atl. 401, 30 L. R. A. 61, 51 Am. St. 611.

[14] Atkinson v. Bell, 3 Barn. & Cr. 277; Skeele Coal Co. v. Arnold, 200 Fed. 393; Trinidad Asphalt &c. Co. v. Buckstaff &c. Co., 86 Nebr. 623, 126 N. W. 293, 136 Am. St. 710; Bates-Street Shirt Co. v. Place (N. H.), 84 Atl. 47; Dillon v. Anderson, 43 N. Y. 231; Ganson v. Madigan, 15 Wis. 158. See also, Jebeles & Colias Confectionery Co. v. Stephenson (Ala. App.), 60 So. 437.

from performing an executory contract.[15] In a recent case the seller, on refusal of the buyer to receive the goods shipped, directed an agent to sell them for the best price obtainable and the agent sold them to the buyer at less than the contract-price. It was held that the seller was not estopped thereby but could recover damages for the buyer's breach.[16]

§ 5095. Measure of damages in action for nonacceptance. —The measure of damages in an action by the seller for nonacceptance is the loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.[17] Where there is an available market for the goods in question the measure of damages is prima facie, or in the absence of special circumstances showing greater damage, to be ascertained by the difference between the contract-price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.[18] If there is no available market at the place, evidence of the market value at the nearest or controlling

[15] See, generally, Allen v. Jarvis, 20 Conn. 38; Brand v. Henderson, 107 Ill. 141; Thorn v. Danzinger, 50 Ill. App. 306; McCormick Harvesting Mach. Co. v. Cusack, 116 Mich. 647, 74 N. W. 1005; Thick v. Detroit &c. R. Co., 137 Mich. 708, 101 N. W. 64, 109 Am. St. 694; McCormick Harvesting Mach. Co. v. Balfang, 78 Minn. 370, 81 N. W. 10, 79 Am. St. 393; Trinidad Asphalt &c. Co. v. Buckstaff &c. Co., 86 Nebr. 623, 126 N. W. 293, 136 Am. St. 710; Unexcelled Fire Works v. Polites, 130 Pa. St. 536, 18 Atl. 1058, 17 Am. St. 788; Huguenot Mills v. George F. Jempson & Co., 68 S. Car. 363, 47 S. E. 687, 102 Am. St. 673. See, however, the last two preceding sections, and ante, § 5081, Rescission by unpaid seller.

[16] New Blue Grass Canning Co. v. Dougan (Ky.), 152 S. W. 566.

[17] Tahoe Ice Co. v. Union Ice Co., 109 Cal. 242, 41 Pac. 1020; Hassell Iron Works v. Cohen, 36 Colo. 353, 85 Pac. 89; Yellow Poplar Lumber Co. v. Chapman, 74 Fed. 444, 20 C. C. A. 503; Ridgley v. Mooney, 16 Ind. App. 362, 45 N. E. 348; Houghton v. Furbush, 185 Mass. 252, 70 N. E. 49; Kellogg v. Frohlich, 139 Mich. 612, 102 N. W. 1057; Funke v. Allen, 54 Nebr. 407, 74 N. W. 832, 69 Am. St. 716; Jones v. Jennings Bros. & Co., 168 Pa. St. 493, 32 Atl. 51; Chicago v. Greer, 9 Wall. (U. S.) 726, 19 L. ed. 769; United States v. Behan, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. 81, 19 Ct. Cl. (U. S.) 710.

[18] Barron v. Arnaud, 8 Q. B. 595; Hopkinsville Mill Co. v. Gwin (Ala.), 60 So. 270 (holding the measure of damages such difference at the time the buyer declined to accept even though he had an option as to date of delivery); Hassell Iron Works v. Cohen, 36 Colo. 353, 85 Pac. 89; Fell v. Muller, 78 Ind. 507; Ridgley v. Mooney, 16 Ind. App. 362, 45 N. E. 348; Osgood v. Bander, 75 Iowa 550, 39 N. W. 887, 1 L. R. A. 655; Tufts v. Bennett, 163 Mass. 398, 40 N. E. 172; Brownlee v. Bolton, 44 Mich. 218, 6 N. W. 657; Cahen v. Platt, 69 N. Y. 348, 25 Am. Rep. 203; Huguenot Mills v. George F. Jempson & Co., 68 S. Car. 363, 47 S. E. 687, 102 Am. St. 673; Scott Lumber Co. v. Hafner-Lothman Mfg. Co., 91 Wis. 667, 65 N. W. 513; Newark City Ice

market is usually admissible as tending to show the real value at the time and place in question.[19] And if there is no market value from which the question can be determined, it does not necessarily follow that the goods are worthless. The seller is still entitled to the amount of damage, if any, that he is shown to have sustained by the breach.[20]

§ 5096. **Rule where buyer repudiates contract and notifies seller to go no further—Anticipatory breach.**—It is provided in substance in the American Uniform Sales Act that if, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfil his obligations under the contract, the buyer repudiates the contract, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing toward carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand; but the profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages.[21] This is not in accord with the English law, but

Co. v. Fisher, 76 Fed. 427, 22 C. C. A. 261 (less expense which seller was saved by such refusal to accept); and authorities cited in last preceding note. See also, Skeele Coal Co. v. Arnold, 200 Fed. 393. "In an action for the price, the damages are the price agreed. In an action for nonacceptance, which proceeds upon the theory that the title has not passed, the damages are the difference between that price and the value of the goods, the title to which remains in the vendor. When the goods are worthless in the hands of the seller, the damages may equal the price agreed." Bates-Street Shirt Co. v. Place (N. H.), 84 Atl. 47, 50, citing Gordon v. Norris, 49 N. H. 376; Rand v. White Mountains Railroad, 40 N. H. 79. On the other hand, substantial damages are not ordinarily recoverable for nonacceptance where the goods are worth the contract-price in open market. Yellow Poplar &c. Lumber Co. v. Chapman, 74 Fed. 444, 20 C. C. A. 503; Foos v. Sabin, 84 Ill. 564; Tufts v. Bennett, 163 Mass. 398, 40 N. E. 172; Furniture Co. v. Board of Education, 58 N. J. L. 646, 35 Atl. 397; Gibbons v. United States, 8 Wall. (U. S.) 269, 19 L. ed. 453, 7 Ct. Cl. (U. S.) 105.

[19] Dwiggins v. Clark, 94 Ind. 49, 48 Am. Rep. 140; Ingram v. Wackernagel, 83 Iowa 82, 48 N. W. 998; Cahen v. Platt, 69 N. Y. 348, 25 Am. Rep. 203; Bump v. Cooper, 20 Ore. 527, 26 Pac. 848; McCormick & Co. v. Hamilton, Wood & Co., 23 Grat. (Va.) 561. See also, 1 Elliott Ev., § 182, 2 Elliott Ev., § 1302. But the expense of transportation may have to be taken into account. Barry v. Cavanagh, 127 Mass. 394.

[20] Dunkirk Colliery Co. v. Lever, 9 Ch. Div. 20. See, as to proof in such cases, 1 Elliott Ev., § 182.

[21] Uniform Sales Act, § 64. But see, where buyer was held to have waived his notice of repudiation or countermand by afterward taking part of the goods, Trinidad Asphalt Co. v. Buckstaff &c. Co., 86 Nebr. 623, 126 N. W. 293, 136 Am. St. 710. Compare, however, Bates-Street Shirt

it is the general doctrine in this country that where a contract is executory one party has a right to stop performance on the other side under such circumstances without subjecting himself to greater damage than will compensate the other party for being stopped at that stage.[22] The weight of authority is to the effect that in case of such repudiation the seller may treat it as a legal prevention and immediately maintain an action for damages without further completing or tendering the goods.[23] Some courts,

Co. v. Place (N. H.), 84 Atl. 47. In Cullen &c. Co. v. Turley (Ind. App.), 97 N. E. 946, a purchaser who failed to make payments, as agreed, on monthly shipments was held guilty of such a breach of contract as entitled the seller to refuse additional instalments until he received payment for what he had already furnished and to recover the reasonable value of the same, less damages from failure of full performance.

[22] Trinidad Asphalt &c. Co. v. Buckstaff &c. Co., 86 Nebr. 623, 126 N. W. 293, 136 Am. St. 710; Backes v. Schlick, 82 Nebr. 289, 117 N. W. 707; Clark v. Marsiglia, 1 Denio (N. Y.) 317, 43 Am. Dec. 670; Dillon v. Anderson, 43 N. Y. 231; Heiser v. Mears, 120 N. Car. 443, 27 S. E. 117; Davis v. Bronson, 2 N. Dak. 300, 50 N. W. 836, 16 L. R. A. 655, 33 Am. St. 783; Tufts v. Lawrence, 77 Tex. 526, 14 S. W. 165; Tufts v. Weinfeld, 88 Wis. 647, 60 N. W. 992; Richards v. Manitowoc & N. Traction Co., 140 Wis. 85, 121 N. W. 937, 133 Am. St. 1063. But in Frost v. Knight, L. R. 7 Ex. 111, 112, it is said: "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own: he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." See also, Southern Cotton Oil Co. v. Heflin, 99 Fed. 339, 39 C. C. A. 546; Roebling's Sons Co. v. Lock-Stitch Fence Co., 130 Ill. 660, 22 N. E. 518; Martin v. Meles, 179 Mass. 114, 118, 60 N. E. 397; Roehm v. Horst, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. 780.

[23] Roehm v. Horst, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. 780 (reviewing Hochster v. De La Tour, 2 El. & Bl. 678; Cort v. Ambergate &c. R. Co., 17 Q. B. 127, and other English cases as well as some of the American cases to the same effect); Hale v. Trout, 35 Cal. 229; Gaberino v. Roberts, 109 Cal. 125, 41 Pac. 857; Northrop v. Mercantile Trust Deposit Co., 119 Fed. 969; Skeele Coal Co. v. Arnold, 200 Fed. 393; Thomson v. Kyle, 39 Fla. 582, 23 So. 12, 63 Am. St. 193; Fox v. Kitton, 19 Ill. 519; McPherson v. Walker, 40 Ill. 371; McCormick v. Basal, 46 Iowa 235; Hosmer v. Wilson, 7 Mich. 294, 74 Am. Dec. 716; Nichols v. Scranton Steel Co., 137 N. Y. 471, 33 N. E. 561; Hocking v. Hamilton, 158 Pa. St. 107, 27 Atl. 836; Davis v. Grand Rapids School-Furniture Co., 41 W. Va. 717, 24 S. E. 630. See also, Braithwaite v. Foreign Hardwood Co. (1905), 2 K. B. 543; Lake Shore & M. S. Ry. Co. v. Richards, 152 Ill. 59, 38 N. E. 773, 30

however, have held otherwise, and consider that an anticipatory breach or anticipated injury is no ground of legal recovery.[24]

L. R. A. 33; Kadish v. Young, 108 Ill. 170, 43 Am. Rep. 548; Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275; Lee v. Dow, 71 N. H. 326, 51 Atl. 1072; Vickers v. Electrozone Commercial Co., 67 N. J. L. 665, 52 Atl. 467; Windmuller v. Pope, 107 N. Y. 674, 14 N. E. 436, 1 Silvernail Ct. App. (N. Y.) 550; Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. 914. In the case first cited it is said in regard to the measure of damages, where this rule prevails: "Plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself. If a vendor is to manufacture goods, and during the process of manufacture the contract is repudiated, he is not bound to complete the manufacture, and estimate his damages by the difference between the market price and the contract price, but the measure of damages is the difference between the contract price and the cost of performance. Hinckley v. Pittsburgh Bessemer Steel Co., 121 U. S. 264, 30 L. ed. 967, 7 Sup. Ct. 875."

[24] South Gardiner Lumber Co. v. Bradstreet, 97 Maine 165, 53 Atl. 1110; Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384 (a leading case on this side); Carstens v. McDonald, 38 Nebr. 858, 861, 57 N. W. 757; Stanford v. McGill, 6 N. Dak. 536, 72 N. W. 938, 38 L. R. A. 760. See also, Phillpots v. Evans, 5 Mees. & W. 475; Warden v. Hinds, 163 Fed. 201, 90 C. C. A. 449; Pittman v. Pittman, 110 Ky. 306, 22 Ky. L. 1751, 61 S. W. 461; Porter v. American Legion of Honor, 183 Mass. 326, 67 N. E. 238; Markowitz v. Greenwall Theatrical Circuit Co. (Tex. Civ. App.), 75 S. W. 74, 317, revd. 97 Tex. 479, 79 S. W. 1069, 65 L. R. A. 302.

CHAPTER CLXI.

REMEDIES OF THE BUYER ON THE CONTRACT.

§ 5105. Where property has passed—Action for conversion or nondelivery.
5106. Where title has not passed—Action for failing to deliver.
5107. Measure of damages.
5108. Measure of damages—Difference between contract-price and market-value.
5109. Specific performance.
5110. Buyer's remedies for breach of warranty.
5111. Agreement for specific remedy.
§ 5112. Measure of damages for breach of warranty.
5113. Measure of damages for breach of warranty of quality.
5114. Rescission by buyer—Placing seller in statu quo.
5115. Buyer's damages on rescission—Recovery of purchase-price paid.
5116. Interest and special damages.
5117. Special damages.

§ 5105. Where property has passed—Action for conversion or nondelivery.—Where the property in the goods has passed to the buyer the buyer may maintain an action against the seller who has wrongfully neglected or refused to deliver them or against him or any other person who has wrongfully converted them.[1] This action may be in tort for the conversion or detention or it may be in replevin in a proper case to recover the specific goods, or it may be for breach of the seller's contractual duty or obligation to deliver, depending largely upon the circumstances of the particular case, which may be such as to permit the election of any one of these remedies.[2] But the rules for the

[1] Chinery v. Viall, 5 H. & N. 288; Clarke v. Hutchins, 14 East 475; Wilson v. Western Fruit Co., 11 Ind. App. 89, 38 N. E. 827; Kennedy v. Whitwell, 4 Pick. (Mass.) 466; Philbrook v. Eaton, 134 Mass. 398; Koon v. Brinkerhoff, 39 Hun (N. Y.) 130.

[2] As to trover or replevin against the seller, see Elgin v. Barker (Ark.), 153 S. W. 598; Rhea v. Riner, 21 Ill. 526; Bradley v. Michael, 1 Ind. 552, 1 Smith (Ind.) 346; Kennedy v. Whitwell, 4 Pick. (Mass.) 466; Abraham v. Karger, 100 Wis. 387, 76 N. W. 330. As to replevin against third party, see Tandler v. Saunders, 56 Mich. 142, 22 N. W. 271; Brewster v. Baxter, 2 Wash. Ter. 135, 3 Pac. 844. See also, generally, Shriner v. Meyer, 171 Ala. 112, 55 So. 156, Ann. Cas. 1913A. 1103 (trover); Schenck v. Sithoff, 75 Ind. 485.

protection of the unpaid seller and for the protection of innocent purchasers from a seller in possession, heretofore stated, may qualify or limit the right or remedy of the buyer in particular cases. The measure of damages for the seller's failure to deliver where the title has passed is prima facie the market value at the time and place where delivery should have been made, and such damages may usually be recovered where the price has been paid,[3] or, if the price has not been paid, the buyer may be excused from paying it and that amount deducted from the buyer's recovery. The subject of the measure of the buyer's damages, however, will be considered in a subsequent section.

§ 5106. Where title has not passed—Action for failing to deliver.—Where the property has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for nondelivery.[4] This is, in general, the buyer's only remedy on the contract where the property in the goods has not passed to him.[5]

§ 5107. Measure of damages.—The measure of damages in general is the loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract,[6] or such as may reasonably be presumed to have been contemplated by the

[3] Deere v. Lewis, 51 Ill. 254; Winside State Bank v. Lound, 52 Nebr. 469, 72 N. W. 486; Hill v. Smith, 32 Vt. 433; Kennedy v. Whitwell, 4 Pick. (Mass.) 466. See also, Berbarry v. Lombacher (N. Car.), 77 S. E. 412. But see where the value fluctuates, Galigher v. Jones, 129 U. S. 193, 32 L. ed. 658, 9 Sup. Ct. 335, and cases cited.

[4] Luke v. Batts (Ga. App.), 76 S. E. 165. See cases cited in following note and in note to section on Measure of Damages, also Wolf v. Willitts, 35 Ill. 88; Daggy v. Cox, 19 Ind. 142; Parker v. Pettit, 43 N. J. L. 512; Woolner v. Hill, 93 N. Y. 576; Pakas v. Hollingshead, 184 N. Y. 211, 77 N. E. 40, 3 L. R. A. (N. S.) 1042, 112 Am. St. 601.

[5] Low v. Freeman, 12 Ill. 467; Haverstick v. Fergus, 71 Ill. 105; Lester v. East, 49 Ind. 588; Morgan v. East, 126 Ind. 42, 25 N. E. 867, 9 L. R. A. 558; Graves v. Damrow, 28 Nebr. 271, 44 N. W. 234. See also, Mead v. Johnson, 54 Conn. 317, 7 Atl. 718; Tingle v. Kelly, 29 Ky. L. 24, 92 S. W. 303; Boutell v. Warne, 62 Mo. 350; Kerr v. Henderson, 62 N. J. L. 724, 42 Atl. 1073.

[6] Portman v. Middleton, 4 C. B. (N. S.) 322; Cory v. Iron Cliff Works Co., L. R. 3 Q. B. 181; Strawn v. Cogswell, 28 Ill. 457; Liggett Spring & Axle Co. v. Michigan Buggy Co., 106 Mich. 445, 64 N. W. 466; Rochester Lantern Co. v. Stiles & Parker Press Co., 135 N. Y. 209, 31 N. E. 1018; Willock v. Crescent Oil Co., 184 Pa. St. 245, 39 Atl. 77; Howard v. Stillwell & Bierce Mfg. Co., 139 U. S. 199, 35 L. ed. 147, 11 Sup. Ct. 500. See ante, vol. 3, § 2129.

parties when the contract was made.[7] Special damages may be recovered in a proper case, but that subject will be considered in another section.[8]

§ 5108. Measure of damages—Difference between contract-price and market-value.—Where there is an available market the measure of damages, ordinarily and in the absence of special circumstances, is the difference between the contract-price and the market or current price of the goods at the time or times when they ought to have been delivered,[9] or, if no time was fixed, then at the time of refusal to deliver.[10] This contemplates a fair market,[11] and if no market exists at the place the value at the nearest available market plus the cost of transportation is generally taken in its place.[12]

[7] Jordan v. Patterson, 67 Conn. 473, 35 Atl. 521. See Smeed v. Ford, 1 El. & El. 602; Richardson v. Chynoweth, 26 Wis. 656. See ante, vol. 3, § 2129.

[8] See post, § 5116; also ante, §§ 2129, 2134–2136.

[9] Barrow v. Arnaud, 8 Q. B. 595; Coffin v. State, 144 Ind. 578, 43 N. E. 654, 55 Am. St. 188; Ladoga Canning Co. v. Corydon Canning Co. (Ind. App.), 98 N. E. 849 (on the date of the default at the place of delivery); Chandler Grain &c. Co. v. Shea (Mass.), 100 N. E. 663; Austrian &c. Co. v. Springer, 94 Mich. 343, 54 N. W. 50, 34 Am. St. 350; Theiss v. Weiss, 166 Pa. St. 9, 31 Atl. 63, 45 Am. St. 638; Trigg v. Clay, 88 Va. 330, 13 S. E. 434, 29 Am. St. 723, and note. In Craig &c. Co. v. Pierson Lumber Co. (Ala.), 60 So. 838, the rule is stated to be that the measure of such damages is such difference at the time and place of delivery agreed on (with interest), but an instruction that it is such difference "at the time of the breach of the contract" was held correct as so stating the rule in effect.

[10] Shaw v. Holland, 15 M. & W. 136; Williams v. Woods, 16 Md. 220; Chadwick v. Butler, 28 Mich. 349; McKnight v. Dunlop, 5 N. Y. 537, 55 Am. Dec. 370; Guice & Mercer v. Crenshaw, 60 Tex. 344.

[11] Kountz v. Kirkpatrick, 72 Pa. St. 376, 13 Am. Rep. 687; Grand Tower Co. v. Phillips, 23 Wall. (U. S.) 471, 23 L. ed. 71.

[12] Marshall v. Clark, 78 Conn. 9, 60 Atl. 741, 112 Am. St. 84; Capen v. De Steiger Glass Co., 105 Ill. 185; Vickery v. McCormack, 117 Ind. 594, 20 N. E. 495; Furlong v. Polleys, 30 Maine 491, 50 Am. Dec. 635; National Coal Tar Co. v. Malden & Melrose Gaslight Co., 189 Mass. 234, 75 N. E. 625; Rice v. Manley, 66 N. Y. 82, 23 Am. Rep. 30; Cahen v. Platt, 69 N. Y. 348, 25 Am. Rep. 203; Nottingham Coal & Ice Co. v. Preas, 102 Va. 820, 47 S. E. 823; Grand Tower Co. v. Phillips, 23 Wall. (U. S.) 471, 23 L. ed. 71. As stated in a recent case, applying the rule to a contract for sale of grain, the measure of damages for breach by the seller of a contract for sale of grain to be delivered at a certain place is the difference between the contract-price and the market-price of the same quality of grain at the place of delivery at the time of breach, if there was a market-price at such time and place, and, if there is no such market, the difference between the contract-price and what it cost the buyer to procure the grain delivered there from the most accessible market, where the buyer purchased the same in a reasonable and diligent manner. Gaunt v. Ralston Purina Co., 198 Fed. 60. Where the goods have no determinable mar-

contract on the part of the seller to deliver specific or ascertained goods, a court of equity, or one having the jurisdiction and powers of a court of equity, may, in a proper case, on the application of the buyer, decree specific performance of the contract, without giving the seller the option of retaining the goods on payment of damages. This course is usually followed where damages would not be an adequate remedy, as, for instance, where the property is a work of art,[13] or consists of family pictures and furniture, or other heirlooms,[14] or valuable documents,[15] or other articles which the seller alone can supply.[16] So, contracts for the sale of shares of corporate stock may generally be specifically enforced if they cannot otherwise be obtained, but not if they can be readily obtained in the market.

§ 5110. **Buyer's remedies for breach of warranty.**—Where there is a breach of warranty by the seller the buyer may accept or keep the goods and set up against the seller the breach of warranty in diminution or extinction of the price,[17] or he may main-

ket-value the question is more difficult and the court determines the value as best it can by considering the cost of similar goods or such as would equally serve the purpose, or the like. Hinde v. Liddell, L. R. 10 Q. B. 265; Bell v. Reynolds, 78 Ala. 511, 56 Am. Rep. 52; Wilmoth v. Hamilton, 127 Fed. 48, 61 C. C. A. 584; Consolidated Coal Co. v. Smelting Co., 53 Ill. App. 565; Kavanaugh Mfg. Co. v. Rosen, 132 Mich. 44, 92 N. W. 788, 102 Am. Rep. 378.

[13] Lowther v. Lowther, 13 Ves. 95; Falcke v. Gray, 4 Drew. 651. See also, McGowin v. Remington, 12 Pa. St. 56, 51 Am. Dec. 584.

[14] Pusey v. Pusey, 1 Vern. 273; Onondaga Nation v. Thacher, 53 App. Div. (N. Y.) 561, 65 N. Y. S. 1014, affd. 169 N. Y. 584, 62 N. E. 1098.

[15] Williams v. Carpenter, 14 Colo. 477, 24 Pac. 558; Pattison v. Skillman, 34 N. J. Eq. 344 (title papers); Dock v. Dock, 180 Pa. St. 14, 36 Atl. 411, 57 Am. St. 617 (letters).

[16] Buxton v. Cooper, 3 Atk. 383; Equitable Gaslight Co. v. Baltimore Coal Tar &c. Co., 63 Md. 285; Gloucester Isinglass & Glue Co. v. Russia Cement Co., 154 Mass. 92, 27 N. E. 1005, 12 L. R. A. 563, 26 Am. St. 214; Patents: Cogent v. Gibson, 33 Beav. 557; Hull v. Pitrat, 45 Fed. 94; Whitney v. Burr, 115 Ill. 289, 3 N. E. 434; Adams v. Messinger, 147 Mass. 185, 17 N. E. 491, 9 Am. St. 679; Spears v. Willis, 151 N. Y. 443, 45 N. E. 849; Valley Iron Works Mfg. Co. v. Goodrich, 103 Wis. 436, 78 N. W. 1096; Copyrights: Sweet v. Cater, 11 Sim. 572.

[17] Mondel v. Steel, 8 M. & W. 858; Street v. Blay, 2 B. & Ad. 456; Poulton v. Lattimore, 9 B. & C. 259; Lyon v. Bertram, 20 How. (U. S.) 149, 15 L. ed. 847. See also, Polhemus v. Heiman, 45 Cal. 573; Welch v. Hoyt, 24 Ill. 117; Underwood v. Wolf, 131 Ill. 425, 23 N. E. 598, 19 Am. St. 40; Dill v. O'Ferrell, 45 Ind. 268; A. D. Baker Co. v. Cornelius, 47 Ind. App. 1, 93 N. E. 678 (but holding that as a defense it is complete only when the damages from the breach are equal to the cost of the article warranted or the article is of no value whatever); Harrington v. Stratton, 22 Pick.

tain an action against the seller for the breach of warranty.[18] And under the American Uniform Sales Act, and in a number of jurisdictions even where it is not or was not in force, it has been held that he may elect to rescind therefor.[19] But he should act promptly if he elects to rescind,[20] and he cannot both rescind and maintain an action on the contract for damages, but is bound by his election.[21] Many courts, indeed, deny the right of rescission

(Mass.) 510; Judd v. Dennison, 10 Wend. (N. Y.) 512; Pease Oil Co. v. Monroe County Oil Co., 138 N. Y. S. 177; Dayton v. Hooglund, 39 Ohio St. 671; Falconer v. Smith, 18 Pa. St. 130, 55 Am. Dec. 611; Huntington v. Lombard, 22 Wash. 202, 60 Pac. 414. But see where goods were resold by buyer, Jewell Belting Co. v. Hamilton Rubber Mfg. Co. (Ill.), 100 N. E. 920. In Bloom v. Reisman, 135 N. Y. S. 547, the seller's breach of warranty is held the subject of a counterclaim and not a defense to an action for the price.

[18] Mondel v. Steel, 8 M. & W. 858; Davis v. Hedges, L. R. 6 Q. B. 687; A. D. Baker Co. v. Cornelius, 47 Ind. App. 1, 93 N. E. 678; Gilmore v. Williams, 162 Mass. 351, 38 N. E. 976; Frohreich v. Gammon, 28 Minn. 476, 11 N. W. 88; American Warehouse Co. v. Ray (Tex. Civ. App.), 150 S. W. 763; St. Anthony &c. Elevator Co. v. Dawson, 20 N. Dak. 18, 126 N. W. 1013, Ann. Cas. 1912B, 1337. And see cases cited under § 5112. It is useless to cite additional cases on this well-settled proposition.

[19] Thompson v. Harvey, 86 Ala. 519, 5 So. 825; Hodge v. Tufts, 115 Ala. 366, 22 So. 422; Baer v. Mobile Cooperage &c. Co., 159 Ala. 419, 49 So. 92; Collins v. Tigner, 5 Pennew. (Del.) 345, 60 Atl. 978; Rogers v. Hanson, 35 Iowa 283; Timken Carriage Co. v. Smith, 123 Iowa 554, 99 N. W. 183; Gale Sulky Harrow Mfg. Co. v. Stark, 45 Kans. 606, 26 Pac. 8, 23 Am. St. 739; Mitchell v. Emmons, 104 Maine 76, 71 Atl. 321; Borden v. Fine (Mass.), 98 N. E. 1073 (under statute of 1908, on breach of implied warranty, where goods do not conform to sample, buyer may rescind or retain goods and recover damages). Franklin v. Long, 7 Gill & J. (Md.) 407; Columbian Iron Works &c. Co. v. Douglas, 84 Md. 44, 34 Atl. 1118, 33 L. R. A. 103, 57 Am. St. 362; Bryant v. Isburgh, 13 Gray (Mass.) 607, 611, 74 Am. Dec. 655; Smith v. Hale, 158 Mass. 178, 33 N. E. 493, 35 Am. St. 485. Smith v. Means (Mo. App.), 155 S. W. 454. See also, Millikin v. Skillings, 89 Maine 180, 36 Atl. 77; Branson v. Turner, 77 Mo. 489; Punteney-Mitchell Mfg. Co. v. T. G. Northwall Co., 66 Nebr. 5, 91 N. W. 863; Canham v. Plano Mfg. Co., 3 N. Dak. 229, 55 N. W. 583; Crooks v. Eldridge &c. Co., 64 Ohio St. 195, 60 N. E. 203 (rule recognized); Boothby v. Scales, 27 Wis. 626, 636; Parry Mfg. Co. v. Tobin, 106 Wis. 282, 82 N. W. 154; Kohl v. Bradley, Clark & Co., 130 Wis. 301, 110 N. W. 265. See where contract provides for return of goods on breach of warranty, J. I. Case Threshing Mach. Co. v. Huber, 160 Mich. 92, 125 N. W. 66, 32 L. R. A. (N. S.) 212, and note.

[20] Upton Mfg. Co. v. Huiske, 69 Iowa 557, 29 N. W. 621; Higson v. Hughes (Wash.), 130 Pac. 478; Spencer v. Osberg (Wis.), 140 N. W. 66. But a buyer who notified the seller of the fraud of the seller's agent within 18 days after discovering it and offered to return all the machines bought was held not guilty of laches in White Sewing Machine Co. v. Bullock (N. Car.), 76 S. E. 634. See also, Thompson v. Rhodenhamel (Wash.), 127 Pac. 572.

[21] Abraham Bros. v. Browder, 114 Ala. 287, 21 So. 818; Brooks v. Romano, 149 Ala. 300, 42 So. 819; Shaw v. Water Supply &c. Co. (Colo. App.), 128 Pac. 480; Heagney v. J. I. Case Threshing Mach. Co., 4 Nebr. (unof.) 745, 96 N. W. 175, affd. on rehearing, 4 Nebr. (unof.) 753, 99 N. W. 260; Mundt v. Simpkins, 81 Nebr. 1, 115 N. W. 325, 129 Am. St.

of an executed contract, where there is no fraud or agreement to that effect, for breach of warranty, as it involves the transfer of title back to the seller without mutual consent and because a warranty is usually in the nature of a collateral obligation.[22] It is generally agreed, however, as already shown, that an executory contract of sale may be rescinded in a proper case.

§ 5111. **Agreement for specific remedy.**—The parties may agree upon a specific remedy, not unlawful, and they may thus limit the remedy to that specified.[23] But a provision in the contract giving the right to pursue a certain course or a certain remedy, such, for instance, as the right to return the property, is not

670; Houser & Haines Co. v. McKay, 53 Wash. 337, 101 Pac. 894, 27 L. R. A. (N. S.) 925n; Thompson v. Rhodenhamel (Wash.), 127 Pac. 572. See also, Gilmore v. Williams, 162 Mass. 351, 38 N. E. 976; Berman v. Henry N. Clark Co., 194 Mass. 248, 80 N. E. 480. But compare Mondel v. Steel, 8 M. & W. 858; Punteney-Mitchell Mfg. Co. v. T. G. Northwall Co., 66 Nebr. 5, 91 N. W. 863 (distinguishing between an action for breach of warranty and an action on the contract).

[22] Street v. Blay, 2 B. & Ad. 456; Dawson v. Collis, 10 C. B. 523; Thornton v. Wynn, 12 Wheat. (U. S.) 183, 6 L. ed. 595. See also, Gay Oil Co. v. Roach, 93 Ark. 454, 125 S. W. 122, 27 L. R. A. (N. S.) 914, 137 Am. St. 95 (distinguishing warranty from condition precedent for failure of which purchaser is entitled to reject); Worcester Mfg. Co. v. Waterbury Brass Co., 73 Conn. 554, 48 Atl. 422 (but Connecticut has since adopted the Sales Act); Hutchinson Lumber Co. v. Dickerman, 127 Ga. 328, 56 S. E. 491; Crabtree v. Kile, 21 Ill. 180 (but see Sparling v. Marks, 86 Ill. 125); Marsh v. Low, 55 Ind. 271; Wulschner v. Ward, 115 Ind. 219, 17 N. E. 273; A. D. Baker Co. v. Cornelius, 47 Ind. App. 1, 93 N. E. 678 (stating this to be the general rule, but holding it inapplicable where there is a provision for return of the property if it does not comply with the warranty); Nave v. Powell (Ind. App.), 96 N. E. 395; Lightburn v. Cooper, 1 Dana (Ky.) 273 (but see Ruby Carriage Co. v. Kremer, 26 Ky. L. 274, 81 S. W. 251); H. W. Williams Transp. Line v. Darius Cole Transp. Co., 129 Mich. 209, 88 N. W. 473, 56 L. R. A. 939; Lynch v. Curfman, 65 Minn. 170, 68 N. W. 5; Mulcahy v. Dieudonne, 103 Minn. 352, 115 N. W. 636; Voorhees v. Earl, 2 Hill (N. Y.) 288, 38 Am. Dec. 588; Muller v. Eno, 14 N. Y. 597; Fairbank Canning Co. v. Metzger, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. 753; Kase v. John, 10 Watts (Pa.) 107, 36 Am. Dec. 148; Kauffman Milling Co. v. Stuckey, 40 S. Car. 110, 18 S. E. 218 (but see Walker &c. Co. v. Ayer, 80 S. Car. 292, 61 S. E. 557); Hull v. Caldwell, 3 S. Dak. 451, 54 N. W. 100; Wright v. Davenport, 44 Tex. 164; Fetzer v. Haralson (Tex. Civ. App.), 147 S. W. 290; Hoadley v. House, 32 Vt. 179, 76 Am. Dec. 167; Hulet v. Achey, 39 Wash. 91, 80 Pac. 1105. See note in 27 L. R. A. (N. S.) 919, 920. "Under the law of this state," says the Supreme Court of South Carolina, in First Nat. Bank v. Badham, 86 S. Car. 170, 68 S. E. 536, 138 Am. St. 1043, "there can be no rescission of an executed sale for breach of warranty, except (1) where this right is given in the contract of purchase; (2) where the seller is guilty of fraud; (3) where there has been an entire failure of consideration." See also, Hafer v. Cole (Ala.), 57 So. 757.

[23] Nave v. Powell (Ind. App.), 96 N. E. 395; McCormick Harvesting Mach. Co. v. Brower, 94 Iowa 144,

exclusive of the ordinary remedies unless such fairly appears to have been the intention.[24]

§ 5112. Measure of damages for breach of warranty.—The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.[25] This is the ordinary rule as to general damages. But there may be a recovery in a proper case for special as well as general damages, and such damages as may fairly be supposed to have been within the contemplation of the parties as a probable result of the breach are included.[26] The rule for the measurement of damages for breach of warranty of quality is more specifically stated in the next section. Where seed of a certain variety was bought and the seller delivered mixed seed it was held that the buyer was entitled to recover not only the difference between the value of the seed delivered and that contracted for, but also the difference between the value of the crops produced by the seed delivered and the value of the crops which would have been produced from the seed contracted for.[27] Where defective machines or the like are delivered and are not what the contract calls for, the measure of damages has been held to be what it would cost to remedy the defect or supply the deficiency.[28] The measure of damages for warranty of title is

62 N. W. 700; Tyler v. Augusta, 88 Maine 504, 34 Atl. 406; Wasatch Orchard Co. v. Morgan Can. Co., 32 Utah 229, 89 Pac. 1009, 12 L. R. A. (N. S.) 540n.

[24] Eyers v. Haddem, 70 Fed. 648; Nave v. Powell (Ind. App.), 96 N. E. 395. See also, Shupe v. Collender, 56 Conn. 489, 15 Atl. 405, 1 L. R. A. 339; Elwood v. McDill, 105 Iowa 437, 75 N. W. 340, and other cases cited in the cases already referred to.

[25] Randall v. Raper, El. Bl. & El. 84; Randall v Newson, 2 Q. B. Div. 102; Phelan v. Andrews, 52 Ill. 486; McCormick v. Vanatta, 43 Iowa 389; Peak v. Frost, 162 Mass. 298, 38 N. E. 518; Aultman v. Stout, 15 Nebr. 586, 19 N. W. 464; Passinger v. Thorburn, 34 N. Y. 634, 90 Am. Dec. 753; Dushane v. Benedict, 120 U. S. 630, 30 L. ed. 810, 7 Sup. Ct. 696, and authorities cited in notes to subsequent sections.

[26] Vol. 3, ch. on Damages, § 2129, and post, § 5116. See also, Frohreich v. Gammon, 28 Minn. 476, 11 N. W. 88; Burr v. Redhead &c. Co., 52 Nebr. 617, 72 N. W. 1058; Punteney-Mitchell Mfg. Co. v. T. G. Northwall Co., 66 Nebr. 5, 91 N. W. 863; Dushane v. Benedict, 120 U. S. 630, 30 L. ed. 816, 7 Sup. Ct. 696.

[27] White v. Miller, 71 N. Y. 118, 27 Am. Rep. 13, 78 N. Y. 393, 34 Am. Rep. 544; American Warehouse Co. v. Ray (Tex. Civ. App), 150 S. W. 763. See also, Wolcott v. Mount, 36 N. J. L. 262, 13 Am. Rep. 438, affd. 38 N. J. L. 496, 20 Am. Rep. 425.

[28] Central Trust Co. v. Arctic Ice Mach. Mfg. Co., 77 Md. 202, 26 Atl. 493; Cassidy v. Le Fevre, 45 N. Y. 562; Brown v. Foster, 51 Pa. St. 165; Marsh v. McPherson, 105 U. S.

held in a number of cases to be the value of the goods.[29] But some courts deny more than nominal damages until there has been an eviction, or, in other words, while the buyer still retains undisturbed possession,[30] and others hold that even then the buyer can recover only the price or purchase-money paid and interest or such expenses as he may properly have incurred in defending his title.[31]

§ 5113. Measure of damages for breach of warranty of quality.—In the case of breach of warranty of quality such loss is prima facie, or, in other words, in the absence of special circumstances, the difference between the value of the goods (usually at the time of delivery) and the value they would have had if they had answered to the warranty.[32] This will usually

709, 26 L. ed. 1139; Butler v. Boston & S. Steamship Co., 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. 612; Williams v. Thrall, 101 Wis. 337, 76 N. W. 599.

[29] Rowland's Admr. v. Shelton, 25 Ala. 217; Marlatt v. Clary, 20 Ark. 251; Dabovich v. Emeric, 12 Cal. 171; Grose v. Hennessey, 13 Allen (Mass.) 389; Brown v. Pierce, 97 Mass. 46, 93 Am. Dec. 97 (but see Hartley v. Rotman, 200 Mass. 372, 862 N. E. 903); Hendrickson v. Back, 74 Minn. 90, 76 N. W. 1019; Hoffman v. Chamberlain, 40 N. J. Eq. 663, 5 Atl. 150, 53 Am. Rep. 783 (but the price will prima facie fix the value); Brown v. Woods, 3 Coldw. (Tenn.) 182.

[30] Patrick v. Swinney, 5 Bush (Ky.) 421; Burt v. Dewey, 40 N. Y. 283, 100 Am. Dec. 482; O'Brien v. Jones, 91 N. Y. 193. Indeed, as elsewhere shown, many courts hold that no right of action accrues so long as the buyer has undisturbed possession.

[31] Moorehead v. Davis, 92 Ind. 303; Ellis v. Gosney's Heirs, 7 J. J. Marsh. (Ky.) 109; Noel v. Wheatly, 30 Miss. 181; Armstrong v. Percy, 5 Wend. (N. Y.) 535; Goss v. Dyrant, 31 Tex. 186; Duecker v. Goeres, 104 Wis. 29, 80 N. W. 91. See also, Morgan v. Hendrie, 34 Colo. 25, 81 Pac. 700, 7 Am. & Eng. Ann. Cas. 935, and note. When the buyer has been compelled, after litigation, to pay an incumbrance on the goods, he has been allowed to recover the amount of the incumbrance and costs, including reasonable attorney's fees (although there is some difference of opinion as to this). St. Anthony &c. Elevator Co. v. Dawson, 20 N. Dak. 18, 126 N. W. 1013, Ann. Cas. 1912B 1337; Balte v. Bedemiller, 37 Ore. 27, 60 Pac. 601, 82 Am. St. 734. See also, Harding v. Larkin, 41 Ill. 413; Ryerson v. Chapman, 66 Maine 557; Allis v. Nininger, 25 Minn. 525. Contra, Reggio v. Braggiotti, 7 Cush. (Mass.) 166; Clark v. Mumford, 62 Tex. 531.

[32] Shaw v. Water &c. Co. (Colo. App.), 128 Pac. 480 (but also holding that a stipulation in a warranty that the seller would refund all money paid if the article did not comply with the warranty limited the seller's liability to repayment of the price); Florence v. Pattillo, 105 Ga. 577, 32 S. E. 642; Moore Furniture Co. v. W. & J. Sloane, 166 Ill. 457, 46 N. E. 1128; Elwood Planing-Mill Co. v. Harting, 21 Ind. App. 408, 52 N. E. 621; Alpha Checkrower Co. v. Bradley, 105 Iowa 537, 75 N. W. 369; Central Trust Co. v. Arctic Ice Mach. Mfg. Co., 77 Md. 202, 26 Atl. 493; Ponce v. Smith, 84 Maine 266, 24 Atl. 854; Noble v. Fagnaut, 162 Mass. 275, 38 N. E. 507; Maxted v. Fowler, 94 Mich. 106, 53 N. W. 921; Miamisburg Twine & Cordage Co. v. Wohlhuter, 71 Minn. 484, 74 N. W. 175; Sherrill v. Coad

put the buyer in a position as good as he would have been in if the warranty had been fulfilled, and, on the other hand, if he got the goods at a low price he is entitled to the benefit of his bargain.[33] So the rule is not changed by the fact that the buyer has resold the goods for even a higher price than he paid for them.[34] But there are cases in which the application of the general rule stated will not make good the proximate loss and in which the buyer may be entitled to special or consequential damages, as distinguished, however, from remote or speculative damages.[35]

§ 5114. Rescission by buyer—Placing seller in statu quo.—The general rule is well settled that a buyer seeking to rescind must place the seller in statu quo.[36] If the goods have been injured or destroyed or so used by him that he cannot place the seller in statu quo, he cannot rescind.[37] His remedy, it is said,

(Nebr.), 138 N. W. 567; Hooper v. Story, 155 N. Y. 171, 49 N. E. 773. See also, McDonald v. Kansas City Bolt Co., 149 Fed. 360, 79 C. C. A. 298, 8 L. R. A. (N. S.) 1110; Western Twine Co. v. Wright, 11 S. Dak. 521, 78 N. W. 942, 44 L. R. A. 438; Case Plow Works v. Niles &c. Co., 90 Wis. 590, 63 N. W. 1013.

[33] Scranton v. Mechanics' Trading Co., 37 Conn. 130; Wallace v. Wren, 32 Ill. 146; Cothers v. Keever, 4 Pa. St. 168. See also, McCabe v. Desnoyers, 20 S. Dak. 581, 108 N. W. 341; Loisseau v. Gates (S. Dak.), 140 N. W. 258. But see Jewell Belting Co. v. Hamilton Rubber Mfg. Co. (Ill.), 100 N. E. 920.

[34] Woody v. Bennett, 88 Cal. 241, 26 Pac. 117; Street v. Chapman, 29 Ind. 142; Lane v. Lantz, 27 Md. 211; Minneapolis Harvester Works v. Bonnaille, 29 Minn. 373, 13 N. W. 149; Cary v. Gruman, 4 Hill (N. Y.) 625, 40 Am. Dec. 299; Seigworth v. Leffel, 76 Pa. St. 476; Houghton v. Carpenter, 40 Vt. 588; Aultman & Taylor Co. v. Hetherington, 42 Wis. 622.

[35] See post, § 5116 on Interest and special damages; also, Black v. Elliot, 1 F. & F. 595; Hodge v. Tufts, 115 Ala. 366, 22 So. 422; Poland v. Miller, 95 Ind. 387, 48 Am. Rep. 730; Sinker v. Kidder, 123 Ind. 582, 24 N. E. 341; Joy v. Bitzer, 77 Iowa 73, 41 N. W. 575, 3 L. R. A. 184; Whitehead &c. Mach. Co. v. Ryder, 139 Mass. 366, 31 N. E. 736; Boston Woven Hose Co. v. Kendall, 178 Mass. 232, 59 N. E. 657, 51 L. R. A. 781, 86 Am. St. 478; Long v. Pruyn, 128 Mich. 57, 87 N. W. 88, 92 Am. St. 443; Kester v. Miller, 119 N. Car. 475, 26 S. E. 115; Coyle v. Baum, 3 Okla. 695, 41 Pac. 389; Loisseau v. Gates (S. Dak.), 140 N. W. 258 (necessary expense of caring for stallion during breeding season included); Sedro Veneer Co. v. Kwapil, 62 Wash. 385, 113 Pac. 1100; Aultman Co. v. McDonough, 110 Wis. 263, 85 N. W. 980.

[36] Continental Jewelry Co. v. Pugh, 168 Ala. 295, 53 So. 324, Ann. Cas. 1912A 657, and note; Maynard v. Render, 95 Ga. 652, 23 S. E. 194; Parson's Band Cutter & Self-Feeder Co. v. Mallinger, 122 Iowa 703, 98 N. W. 580. See Chandler v. Tompson, 30 Fed. 38; and cases cited in next following note; also vol. 3, § 2434 et seq. But compare National Cable &c. Co. v. Filbert (S. Dak.), 140 N. W. 741.

[37] Aultman &c. Co. v. Mead, 109 Ky. 583, 60 S. W. 294, 123 Am. St. 193; Kifer v. Nuttall, 1 Rob. (La.) 46; Milliken v. Skillings, 89 Maine 180, 36 Atl. 77; Libby v. Haley, 91 Maine 331, 39 Atl. 1004; Robinson v. Siple, 129 Mo. 208, 31 S. W. 788; McKnight v. Nichols, 147 Pa. St.

is for an abatement of the price, by way of recoupment, or by separate action.[37a] Where delivery has been made and the property in the goods has passed it is evident that a return of the goods is necessary, or at least an offer to return and not a mere notice to the seller to the effect that the buyer desires to rescind.[38] But the rule requiring complete restoration and placing of the seller in statu quo by the purchaser does not apply so as to prevent the latter from rescinding where such restoration is rendered impossible by the fraud or wrongful act of the former,[39] and the restoration of a worthless article or portion thereof is not required.[40] It is frequently said the rescission must be in toto and this no doubt fairly expresses the general rule, at least, where the contract is indivisible, for the purchaser cannot rescind the contract and yet retain part of the consideration, or, in other words, at the same time both rescind and affirm the same contract.[41] But

158, 23 Atl. 399. See Curtis v. Hannay, 3 Esp. 82. See also, O'Donnell & Duer Bavarian Brew. Co. v. Farrar, 163 Ill. 471, 45 N. E. 283; Cherry v. Cox, 1 Ind. Ter. 578, 45 S. W. 122; T. Wilce Co. v. Kelly Shingle Co., 130 Mich. 319, 89 N. W. 957; Clark v. American Developing &c. Co., 28 Mont. 468, 72 Pac. 978; Jewell v. McIntyre, 172 N. Y. 638, 65 N. E. 1118; A. Landreth Co. v. Schevenal, 102 Tenn. 486, 52 S. W. 148; Anvil Min. Co. v. Humble, 153 U. S. 540, 38 L. ed. 814, 14 Sup. Ct. 876. There may be an exception to this rule, however, where the destruction or injury is caused by the very defect covered by the warranty, and in such cases it has been held sufficient to return the article as so injured. Lawley & Son Corp. v. Park, 138 Fed. 31, 70 C. C. A. 399; Smith v. Hale, 158 Mass 178, 33 N. E. 493, 35 Am. St. 485. Compare also, Rosenthal v. Rambo, 165 Ind. 584, 76 N. E. 404, 3 L. R. A. (N. S.) 678; Payne v. Hiram Lindsey Co. (Wash.), 128 Pac. 678. And see the exception where the article is worthless, hereinafter stated.

[37a] Continental Jewelry Co. v. Pugh, 168 Ala. 295, 53 So. 324, Ann. Cas. 1912A 657; Eagan v. Johnson, 82 Ala. 233, 2 So 302.

[38] Milliken v. Skillings, 89 Maine 180, 36 Atl. 77; Mundt v. Simpkins, 81 Nebr. 1, 115 N. W. 325, 129 Am. St. 670. See also, German Sav. Inst. v. De La Vergne Refrigerating Mach. Co., 70 Fed. 146, 17 C. C. A. 34; Houghton Implement Co. v. Vavrosky, 15 N. Dak. 308, 109 N. W. 1024. See as to what is necessary where contract provides for return of property on breach of warranty, note in 32 L. R. A. (N. S.) 212.

[39] Creveling v. Banta, 138 Iowa 47, 115 N. W. 598; Masson v. Bovet, 1 Denio (N. Y.) 69, 43 Am. Dec. 651; Hammond v. Pennock, 61 N. Y. 145; Leland v. Tweto, 19 N. Dak. 551, 125 N. W. 1032. See also, Central Life Assur. Soc. v. Mulford, 45 Colo. 240, 100 Pac. 423; O'Shea v. Vaughn, 201 Mass. 412, 87 N. E. 616.

[40] Pettus v. Roberts, 6 Ala. 811; Dill v. O'Ferrell, 45 Ind. 268; Merchants' & Mechanics' Sav. Bank v. Fraze, 9 Ind. App. 161, 36 N. E. 378, 53 Am. St. 341; Smith v. Means (Mo. App.), 155 S. W. 454; Crenshaw v. Looker, 185 Mo. 375, 388, 84 S. W. 855; Isaacs v. Wanamaker, 71 Misc. (N. Y.) 55, 127 N. Y. S. 346; Babcock v. Case, 61 Pa. St. 427, 100 Am. Dec. 654; Seley v. Parker (Tex. Civ. App.), 45 S. W. 1026. See also as to waiver, Downing v. Dearborn, 77 Maine 457, 1 Atl. 407.

[41] Continental Jewelry Co. v. Pugh, 168 Ala. 295, 53 So. 324, Ann. Cas.

it would seem that there may be cases in which, where the contract is so far severable and divisible that one portion is independent of all others so that the acceptance and enjoyment thereof and payment therefor does not interfere with a complete restoration of the status quo of the others, there may be a partial rescission.[42]

§ 5115. Buyer's damages on rescission—Recovery of purchase-price paid.—Where the buyer is allowed to rescind for breach of warranty, upon a return of the property, or, in a proper case, upon offer to return, he is ordinarily entitled to recover the amount of the purchase-price he has paid thereon.[43] If he has paid the freight on the property he is entitled to recover the amount so paid, in addition to the purchase-money paid,[44] and in some cases he has been allowed interest on the purchase-money paid, from the time he returned or tendered back the property to the seller.[45] Logically, and upon principle, it would seem that he

1912A 657, and note; Pikes Peak Paint Co. v. Masury, 19 Colo. App. 286, 74 Pac. 796; Buchenan v. Horney, 12 Ill. 336; Perley v. Balch, 23 Pick. (Mass.) 283, 34 Am. Dec. 56; Morse v. Brackett, 98 Mass. 205; Mauss-Bruning Shoe Mfg. Co. v. Prince, 51 W. Va. 510, 41 S. E. 907; Seattle Nat. Bank v. Powles, 33 Wash. 21, 73 Pac. 887; Harding, Whitman & Co. v. York Knitting Mills, 142 Fed. 228. See also, American Sales Book Co. v. Pope & Co. (Ala.), 61 So. 45.

[42] Weil v. Stone, 33 Ind. App. 112, 69 N. E. 698, 104 Am. St. 243. See also, note in Ann. Cas. 1912A 663; Bunch v. Weil, 72 Ark. 343, 80 S. W. 582, 65 L. R. A. 80; Higham v. Harris, 108 Ind. 246, 8 N. E. 255; Mansfield v. Trigg, 113 Mass. 350; Sigerson v. Harker, 15 Mo. 101; J. M. Russell Co. v. Lilienthal, 36 Ore. 105, 58 Pac. 890; Norrington v. Wright, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. 12.

[43] Rogers v. Hanson, 35 Iowa 283; Jack v. Des Moines &c. R. Co., 53 Iowa 399, 5 N. W. 537; Wilkinson v. Ferree, 24 Pa. St. 190; Houser & Haines Mfg. Co. v. McKay, 53 Wash. 337, 101 Pac. 894, 27 L. R. A. (N. S.) 925n (but freight properly paid is regarded as part of the purchase-price); Parry Mfg. Co. v. Tobin, 106 Wis. 268, 82 N. W. 154; Kohl v. Bradley, 130 Wis. 301, 110 N. W. 265. See also, Caswell v. Coare, 1 Taunt. 566; Sloan v. Wolf Co., 124 Fed. 196, 59 C. C. A. 612; Chambers v. Harper, 83 Ga. 382, 9 S. E. 717; Franklin v. Long, 7 Gill & J. (Md.) 407; D. M. Osborne & Co. v. Walther, 12 Okla. 20, 69 Pac. 953. The term "purchase-money" as here used is held to include the actual consideration paid, no matter whether in money, property or otherwise. Taylor v. Allen, 131 Ga. 416, 62 S. E. 291. The buyer may also recover payments made by him on the purchase-price where there has been a rescission by mutual consent. Fruits v. Pearson, 25 Ind. App. 235, 57 N. E. 158.

[44] Virginia-Carolina Lumber Co. v. Eisinger, 29 App. D. C. 531; Pennebaker Bros. v. Bell City Mfg. Co., 130 Ky. 592, 113 S. W. 829; Evenson v. Keystone Mfg. Co., 83 Minn. 164, 86 N. W. 8; Houser & Haines Mfg. Co. v. McKay, 53 Wash. 337, 101 Pac. 894, 27 L. R. A. (N. S.) 925n; Kohl v. Bradley Co., 130 Wis. 301, 110 N. W. 265.

[45] Donovan v. Mooney, 5 La. 57;

cannot recover damages, upon the contract, for breach of warranty where he rescinds on account of such breach;[46] but it is said in a recent case that "the measure of damages upon rescission (of a contract of sale for nonconformance with a warranty) is the recovery of money paid, plus all damages sustained by reason of the failure of the article to comply with the representation,"[47] and, under special circumstances, special damages have been allowed in some cases.[48] But, even though there may be cases in which such special damages can be properly allowed, it does not necessarily follow that a buyer can rescind and at the same time recover damages that are not incident to the rescission but are for breach of warranty. The case is different from that of an action for breach of contract where the buyer refuses to receive and rejects the goods tendered on the ground that they do not comply with the contract and may therefore recover not only what he has paid but also damages for the breach by the seller of his contract.[49] The buyer, of course, may also rescind for fraud or the

Philadelphia Whiting Co. v. Detroit White Lead Works, 58 Mich. 29, 24 N. W. 881.

[46] Abraham Bros. v. Browder, 114 Ala. 287, 21 So. 318; Brooks v. Romano, 149 Ala. 301, 42 So. 819; Enterprise Soap Works v. Sayers, 51 Mo. App. 310; Mundt v. Simpkins, 81 Nebr. 1, 115 N. W. 325, 129 Am. St. 670; McCarthy v. Ellers, 107 App. Div. (N. Y.) 219, 94 N. Y. S. 1109; Houser & Haines Mfg. Co. v. McKay, 53 Wash. 337, 101 Pac. 894, 27 L. R. A. (N. S.) 925n; Smeesters v. Schroeders, 123 Wis. 116, 101 N. W. 363.

[47] Shaw v. Water Supply &c. Co. (Colo. App.), 128 Pac. 480, 483.

[48] Berkey v. Lefebure, 125 Iowa 76, 99 N. W. 710; Harvey v. Kendall, 2 La. Ann. 748; Kester v. Miller, 119 N. Car. 475, 26 S. E. 115; Optenberg v. Skelton, 109 Wis. 241, 85 N. W. 356. But this can not well be on the theory that such recovery can be based on the rescinded contract and warranty therein, and in several cases where damages were allowed for reasonable expenses incurred in taking care of the property or inspecting and testing it, the courts indicated that the recovery was not based on the contract and breach of warranty. Phares v. Jaynes Lumber Co., 118 Mo. App. 546, 94 S. W. 585; Hunt County Oil Co. v. Scott, 28 Tex. Civ. App. 213, 67 S. W. 451. See also, Kimball & Austin Mfg. Co. v. Vroman, 35 Mich. 310, 24 Am. Rep. 558. So, while it is held that where the buyer rescinds or repudiates on account of fraud special damages may be recovered in a proper case (McRae v. Lonsby, 130 Fed. 17, 64 C. C. A. 385; Atlanta &c. R. Co. v. Hodnett, 29 Ga. 461; Lenox v. Fuller, 39 Mich. 268); it is also held that this is not on the theory that they are for breach of the contract. American Food Co. v. G. W. Elliott, 151 N. Car. 393, 66 S. E. 451. See also, Atlanta &c. R. Co. v. Hodnett, 29 Ga. 461; Hunt County Oil Co. v. Scott, 28 Tex. Civ. App. 213, 67 S. W. 451.

[49] Punteney-Mitchell Mfg. Co. v. T. G. Northwall Co., 66 Nebr. 5, 91 N. W. 863; Tompkins v. Lamb, 121 App. Div. (N. Y.) 366, 106 N. Y. S. 6, affd. 195 N. Y. 518, 88 N. E. 1133. See also, Azemar v. Casella, L. R. 2 C. P. 431; Munford v. Kevil, 109 Ky. 246, 58 S. W. 703.

like[50] and may recover the price or portion of the price paid by him, in a proper case, where there has been a failure of consideration,[51] but these phases of the subject are sufficiently treated elsewhere.[52]

§ 5116. Interest and special damages.—As already indicated, there are cases in which a seller[53] or buyer may recover for loss of profits or other special or consequential damages, and interest is likewise recoverable in some instances. The rules hereinbefore stated as to the measure of damages are not intended to preclude the recovery of such damages in a proper case, and there is nothing peculiar in the law of sales upon the subject. It is often difficult, however, to determine when such damages are proximate and when too remote and there is some difference of opinion in regard to certain phases of the subject. It may be well, therefore, to refer to some of the illustrative cases. But, first, it may be said here that in some jurisdictions, where the

[50] Murray v. Mann, 2 Ex. 538; Whitworth v. Thomas, 83 Ala. 308, 3 So. 781, 3 Am. St. 725; Sparling v. Marks, 86 Ill. 125; A. D. Baker Co. v. Smedley (Ind. App.), 100 N. E. 307; Perley v. Balch, 23 Pick. (Mass.) 283, 34 Am. Dec. 56; Tiffany v. Times Square Automobile Co. (Mo. App.), 154 S. W. 865; White Sewing Machine Co. v. Bullock (N. Car.), 76 S. E. 634; Nelson v. Martin, 105 Pa. St. 229; Smith v. Columbus Buggy Co. (Utah), 123 Pac. 580; Matterson v. Holt, 45 Vt. 336; Wilson v. Carpenter's Admr., 91 Va. 183, 21 S. E. 243, 50 Am. St. 824, and note. See also, J. I. Case Threshing Mach. Co. v. McKay (N. Car.), 77 S. E. 848.

[51] Logan v. Le Mesurier, 6 Moore P. C. 116; Young v. Cole, 3 Bing. N. Cas. 724; Eicholz v. Bannister, 17 C. B. (N. S.) 708; Biggerstaff v. Rowatt's Wharf, (1896) 2 Ch. 93; Stone v. Waite, 88 Ala. 599, 7 So. 117; Dalton v. Bentley, 15 Ill. 420; Young &c. Mfg. Co. v. Wakefield, 121 Mass. 91; Raphael v. Reinstein, 154 Mass. 178, 28 N. E. 141; Wood v. Sheldon, 42 N. J. L. 421, 36 Am. Rep. 523; Joyce v. Adams, 8 N. Y. 291; Flandrow v. Hammond, 148 N. Y. 129, 42 N. E. 511; Cleveland v. Sterrett, 70 Pac. St. 204; Nash v. Towne, 5 Wall. (U. S.) 689, 18 L. ed. 527; Meyer v. Richards, 163 U. S. 385, 41 L. ed. 199, 16 Sup. Ct. 1148. See also, Kitchen v. Wilcox, 21 Ky. L. 1823, 56 S. W. 514; Kauffman Milling Co. v. Stuckey, 37 S. Car. 7, 16 S. E. 192; Shores Lumber Co. v. Claney, 102 Wis. 235, 78 N. W. 451. As to partial failure of consideration, see Devaux v. Conolly, 8 C. B. 640; Devine v. Edwards, 87 Ill 177, 101 Ill. 138; Hill v. Rewee, 11 Metc. (Mass.) 268; Acme Harvesting Mach. Co. v. Gasperson (Mo. App.), 153 S. W. 1069; Wheadon v. Olds, 20 Wend. (N. Y.) 174.

[52] Vol. 1, chaps. 4, 5, 6, 7, 9, and vol. 3, ch. 53.

[53] Gardner v. Deeds & Hirsig, 116 Tenn. 128, 92 S. W. 518, 4 L. R. A. (N. S.) 740, and note. See as to seller's right to recover for loss of profit where vendee refuses to take articles manufactured or to be manufactured for him, and as to measure of damages generally in such cases, Ridgeway Dynamo &c. Co. v. Penna. Cement Co., 221 Pa. St. 160, 70 Atl. 557, 18 L. R. A. (N. S.) 613, and note.

seller has failed to deliver, it is held that in order to put the buyer in as good a position as if the contract had been performed he is entitled not only to the difference between the contract-price and the market-value but also to interest thereon from the time of the breach;[54] and where the contract-price was paid by the buyer before the seller's default the buyer is entitled to interest upon the whole market-value of the goods from the time of such default.[55] For breach of the buyer's obligation to pay money interest is generally regarded as sufficient compensation and no special damages can be recovered.[56]

§ 5117. **Special damages.**—It is evident that the seller can seldom, if ever, suffer any special damages, but the buyer often suffers special or consequential damages by the seller's breach of contract, and where they are not too remote or merely speculative the buyer may recover such damages. Thus, where goods are bought for a special purpose known to the seller, the buyer may recover special damages proximately caused by the breach.[57] So, special damages are often recoverable for delay in delivery.[58] And, in a recent case, where a breeder of cattle sold four

[54] Penn v. Smith, 104 Ala. 445, 18 So. 38; Bunch v. Potts, 57 Ark. 257, 21 S. W. 437; Driggers v. Bell, 94 Ill. 223; Ingram v. Wackernagel, 83 Iowa 82, 48 N. W. 998; Gray v. Hall, 29 Kans. 704; Thomas v. Wells, 140 Mass. 517, 5 N. E. 485; Minneapolis Harvester Works v. Bonnaillie, 29 Minn. 373, 13 N. W. 149; Dana v. Fiedler, 12 N. Y. 40, 62 Am. Dec. 130. But see, Harvey v. Myer, 9 Ind. 391. And the same rule has been applied in favor of the seller where buyer wrongfully refuses to accept. Murray v. Doud, 167 Ill. 368, 47 N. E. 717, 59 Am. St. 297; Gray v. Central R. Co., 157 N. Y. 483, 52 N. E. 555.

[55] Rose's Exrs. v. Bozeman, 41 Ala. 678; Smith v. Dunlap, 12 Ill. 184; Kountz v. Kirkpatrick, 72 Pa. St. 376, 13 Am. Rep. 687.

[56] Sutherland Damages (3d ed.), §§ 76-78, 328, 329. See also, ante, vol. 3, § 2207.

[57] Bell v. Reynolds, 78 Ala. 511, 56 Am. Rep. 52; Robinson v. Hyer, 35 Fla. 544, 17 So. 745; Thorne v. McVeagh, 75 Ill. 81; Ford v. Illinois Refrigerating Const. Co., 40 Ill. App. 222; Stewart v. Power, 12 Kans. 596; Jones v. George, 61 Tex. 345, 48 Am. Rep. 280; Hammer v. Schoenfelder, 47 Wis. 455, 2 N. W. 1129. See Hydraulic Engineering Co. v. McHaffie, 4 Q. B. D. 670; Grebert-Borgnis v. Nugent, 15 Q. B. D. 85; Jordan v. Patterson, 67 Conn. 473, 35 Atl. 521. Loss of profits where goods are bought to fulfill contract for resale already made, Trego v. Arave, 20 Idaho 38, 116 Pac. 119, 35 L. R. A. (N. S.) 1021n; Liggett Spring & Axle Co. v. Michigan Buggy Co., 106 Mich. 445, 64 N. W. 466.

[58] Smeed v. Foord, 1 El. & El. 602; Ramsey v. Tully, 12 Ill. App. 463; Halstead Lumber Co. v. Sulton, 46 Kans. 192, 26 Pac. 444; Merrimack Mfg. Co. v. Quintard, 107 Mass. 127; Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718. See also, Carson-Muse Lumber Co. v. Fairbanks &c. Co., 151 Ky. 404, 152 S. W. 256.

bull calves, knowing they were purchased for exportation and sale in Japan, and agreed to furnish certificates of registration, it was held that he was liable for the loss sustained by the buyer because of the failure to furnish such certificates, that an award of damages equal to the difference in value of the cattle delivered without registration papers and their value if registered was proper and that the buyer was under no obligation to attempt to procure such certificate himself where the seller alone had the necessary information.[59] So, in another recent case, where the defendant, knowing that the plaintiff was buying timber to manufacture into hubs to sell, contracted to sell the plaintiff timber therefor, the plaintiff, being unable to obtain such lumber elsewhere, was held entitled to recover his loss of profits caused by the plaintiff's breach of the contract and not merely the difference between the contract-price and the market-value.[60]

Such damages are often recoverable on breach of warranty. Thus, where seeds are bought with a warranty of quality, the loss or diminution in the value of the crop is recoverable as part of the damages caused by the breach of such warranty.[61] So, on breach of warranty of an appliance or goods bought for a certain purpose, special damages proximately caused thereby are recoverable.[62] Sellers of feed for cattle, where

[59] Yamaoka v. Kloeber (Wash.), 129 Pac. 387. See also, Miller v. Mosely (Tex. Civ. App.), 91 S. W. 648.

[60] Martin v. Bunker-Culler Lumber Co. (Mo. App.), 151 S. W. 984.

[61] Crutcher v. Elliott, 13 Ky. L. (abstract) 592; White v. Miller, 71 N. Y. 118, 27 Am. Rep. 13; Landreth v. Wyckoff, 67 App. Div. (N. Y.) 145, 73 N. Y. S. 388; Reiger v. Worth Co., 127 N. Car. 230, 37 S. E. 217, 52 L. R. A. 362, 80 Am. St. 798; American Warehouse Co. v. Ray (Tex. Civ. App.), 150 S. W. 763. But see Butler v. Moore, 68 Ga. 780, 45 Am. Rep. 508; Hurley & Son v. Buchi, 10 Lea (Tenn.) 346. To same effect are Moody v. Peirano (Cal.), 84 Pac. 783, and Edgar v. Joseph Breck & Sons Corp., 172 Mass. 581, 52 N. E. 1083. See, generally, note in 37 L. R. A. (N. S.) 79-89. So, where there is a breach of warranty in the sale of trees, the buyer has been held entitled to recover the difference in value of the land with such trees as were warranted and its value with the inferior trees, or without them if they did not grow. Shearer v. Park Nursery Co., 103 Cal. 415, 37 Pac. 412, 42 Am. St. 125; Long v. Pruyn, 128 Mich. 57, 87 N. W. 88, 92 Am. St. 443.

[62] Snow v. Schomacker Mfg. Co., 69 Ala. 111, 44 Am. Rep. 509; Bagley v. Cleveland Rolling Mill, 21 Fed. 159; Phelan v. Andrews, 52 Ill. 486; Sinker v. Kidder, 123 Ind. 528, 24 N. E. 341; Thoms v. Dingley, 70 Maine 100, 35 Am. Rep. 310; Tower v. Pauly, 67 Mo. App. 632; Milburn v. Belloni, 39 N. Y. 53, 100 Am. Dec. 403; Beeman v. Banta, 118 N. Y. 538, 22 N. E. 887, 16 Am. St. 779; Swain v. Schieffelin, 134 N. Y. 471, 31 N. E. 1025, 18 L. R. A. 385; Russell v. Corning Mfg. Co., 49 App. Div. (N.

such feed contains a substance which poisons the buyer's cattle, have often been held liable therefor.[63] And if one sells an animal with a warranty of its soundness, knowing that it has an infectious disease and that the buyer would probably place the animal with other animals, the seller is liable for damages resulting from a communication of such disease by such animal to the buyer's other animals.[64] There is some conflict among the authorities as to the recovery of damages where personal injury results from a defect in the warranted article, especially where the injury is to a third person and the buyer has been compelled to pay damages therefor. The weight of authority seems to sustain such a recovery when the damages are the natural result or such as might reasonably have been contemplated, as where the defect is of such a nature that it is likely to cause such an injury.[65] But there are decisions to the contrary.[66]

Y.) 610, 63 N. Y. S. 640; New York & Colorado Mining Syndicate Co. v. Fraser, 130 U. S. 611, 32 L. ed. 1031, 9 Sup. Ct. 665. See also, Poland v. Miller, 95 Ind. 387, 48 Am. Rep. 730; Tatro v. Brower, 118 Mich. 615, 77 N. W. 274. But compare Fuller v. Curtis, 100 Ind. 237, 50 Am. Rep. 786. Profits which buyer would make on contract made by him for resale where the goods are bought for that purpose, disclosed to vendor, have often been held recoverable. Trego v. Arave, 20 Idaho 38, 116 Pac. 119, 35 L. R. A. (N. S.) 1021n; Bluegrass Cordage Co. v. Luthy, 98 Ky. 583, 17 Ky. L. 1126, 33 S. W. 835; Wakeman v. Wheeler &c. Mfg. Co., 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676

[63] Wilson v. Dunville, 4 L. R. Ir. 249, 6 L. R. Ir. 210; French v. Vining, 102 Mass. 132, 3 Am. Rep. 440; Coyle v. Baum, 3 Okla. 695, 41 Pac. 389.

[64] Smith v. Green, 1 C. P. D. 92; Black v. Elliot, 1 F. & F. 595; Snowden v. Waterman, 105 Ga. 384, 31 S. E. 110; Joy v. Bitzer, 77 Iowa 73, 41 N. W. 575, 3 L. R. A. 184; McKee v. Jones, 67 Miss. 405, 7 So. 348; Stranahan v. Coit, 55 Ohio St. 398, 45 N. E. 634, 4 L. R. A. 506; Packard v. Slack, 32 Vt. 9. See also, Bradley v. Rea, 14 Allen (Mass.) 20; Marsh v. Webber, 16 Gil. (Minn.) 375; Dushane v. Benedict, 120 U. S. 630, 30 L. ed. 810, 7 Sup. Ct. 696.

[65] Mowbray v. Merryweather, (1895) 2 Q. B. 640; Vogan v. Oulton, 81 L. T. (N. S.) 435; Tyler v. Moody, 111 Ky. 191, 23 Ky. L. 584, 63 S. W. 433, 54 L. R. A. 417, 98 Am. St. 406; Boston Woven Hose &c. Co. v. Kendall, 178 Mass. 232, 59 N. E. 657, 51 L. R. A. 781, 86 Am. St. 478.

[66] Jones v. Ross, 98 Ala. 448, 13 So. 319; Rode v. Arney, 115 Ill. App. 629; Birdsinger v. McCormick Harvesting Mach. Co., 183 N. Y. 487, 76 N. E. 611, 3 L. R. A. (N. S.) 1047. Compare also, Herring v. Skaggs, 62 Ala. 180, 34 Am. Rep. 4; Schurmeier v. English, 46 Minn. 306, 48 N. W. 1112.

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